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'DISABILITY AND REASONABLE ACCOMMODATION'

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SECTION 2: OUTLINE OF MAIN ARGUMENT

The aim of this lecture is to consider the place of disability rights within Directive 2000/78/EC and to illustrate that development of disability rights more generally by reference to the UK experience of implementing the Disability Discrimination Act 1995 (DDA). The paper seeks, in particular, to establish the link between the concept of 'reasonable accommodation', the new 'equality paradigm' that such rights represent, and human rights.

The history of disabled people in the western liberal democracies since the Second World War is one of movement from being regarded as objects of pity and potential beneficiaries of welfare to being seen as bearers of rights whose denial should be a cause of indignation.

The association of the disability movement in the USA with the civil rights movement in the 1960s and 1970s led in due course to the Americans with Disabilities Act 1990. At the same time, the established medical model of disability gave way to a new social model, which saw disability as a social construct, the result of a failure on the part of society to accommodate individual impairment.

It was not until 1995 that the DDA was passed in the UK. The DDA was significantly different from the well-established UK race and gender legislation. In particular, it was not equal treatment legislation at all but instead imported from the USA the notion of reasonable accommodation or reasonable adjustment, thereby establishing the need for employers and

service providers to treat disabled people differently in order to achieve substantive equality (see for example *Archibald v Fife Council* [2004] UKHL 32).

The notion of reasonable adjustment meant that disability rights were from the outset articulated in a positive accent. That positive accent was reinforced by the introduction in 2006 of the new disability equality duty, in emulation of the race equality duty, which had been in force since 2000. The new duty effectively turned disability rights on their head, shifting the focus of attention from victims to those with obligations, and from remedial cure to prevention. At the same time, the further development of the DDA led to the extension of rights for disabled people beyond employment, services and education to encompass housing, transport and the exercise of public functions.

It was these developments over a decade or longer that justified the claim that disability rights represented a new paradigm in equality law. This is a new paradigm, however, that sits very comfortably with the development of a positive approach to social rights within the jurisprudence of the ECHR and since 2000 within domestic UK human rights law too (see for example *Botta v Italy* [1998] 26 EHRR 241; *A and B, X and Y v East Sussex CC* (No. 2) [2003] EWHC 167). That emerging jurisprudence might be seen as a manifestation of the so-called third wave of human rights, which puts a premium upon the value of participation, over and above the values of liberty and solidarity associated with the first and second waves of the Enlightenment and post-World War II periods.

This manifestation is in turn consistent with the new thinking on equality that finds expression in the UK government's Equalities Review of 2007 and the forthcoming Equality Bill, which give precedence to the sort of 'capability theory' of equality developed by Amartya Sen and Martha Nussbaum as a challenge to the dominant social-contract models associated with John Rawls.

These various strands can to a large extent be seen to come together in the first UN Human Rights Convention of the 21st century, which is the Convention on the Rights of Persons with Disabilities. Here the human rights values of autonomy, solidarity and participation combine to produce a powerful new human rights paradigm that can serve as a blueprint for the future achievement of substantive equality for disabled people.

SECTION 3: SOME KEY MATERIALS

A. COUNCIL DIRECTIVE 2000/78/EC

Article 1

Purpose

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.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

- (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any other person or organisation 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

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 disability policy of the Member State concerned.

Recital 17

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 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.

Recital 20

Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks, or the provision of training or integration resources.

Recital 21

To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

B. UK DISABILITY DISCRIMINATION ACT 1995 (AS AMENDED)

3A Meaning of 'discrimination'

(1) For the purposes of this Part, a person discriminates against a disabled person if -

- (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person

(3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).

(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

(6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with duty.

4A Employers: duty to make adjustments

(1) Where -

- (a) a provision, criterion or practice applied by or on behalf of an employer, or
- (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

(2) In subsection (1), 'the disabled person concerned' means -

- (a) in the case of a provision, criterion or practice for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment;
- (b) in any other case, a disabled person who is -
 - (i) an applicant for the employment concerned, or
 - (ii) an employee of the employer concerned.

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know -

- (a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment;
- (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).

18B Reasonable adjustments: supplementary

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -

- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed
- (b) the extent to which it is practicable for him to take the step
- (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities
- (d) the extent of his financial and other resources
- (e) the availability to him of financial or other assistance with respect to taking the step
- (f) the nature of his activities and the size of his undertaking
- (g) where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household, or (ii) disturb any person residing there

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments -

- (a) making adjustments to premises
- (b) allocating some of the disabled person's duties to another person
- (c) transferring him to fill an existing vacancy
- (d) altering his hours of working or training
- (e) assigning him to a different place of work or training
- (f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment
- (g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person)
- (h) acquiring or modifying equipment
- (i) modifying instructions or reference manuals
- (j) modifying procedures for testing or assessment
- (k) providing a reader or interpreter
- (l) providing supervision or other support

C. GB DISABILITY RIGHTS COMMISSION CODE OF PRACTICE (EMPLOYMENT AND OCCUPATION, AND TRADE ORGANISATIONS AND QUALIFICATIONS BODIES) 2004

Some key headings

- Understanding the social dimensions of disability
- Recognising the diverse nature of disability
- Avoiding making assumptions
- Finding out about disabled people's needs
- Seeking expert advice
- Planning ahead
- Implementing anti-discrimination policies and practices
- Auditing policies and procedures
- Monitoring
- Ensuring good practice in recruitment: attracting disabled applicants; promoting a positive image; use of the Disability Symbol
- Resolving disputes

D. UK DISABILITY DISCRIMINATION ACT 2005

3 Duties of Public authorities

In the 1995 Act, after section 49 there is inserted -

Part 5A

PUBLIC AUTHORITIES

49A General duty

Every public authority shall in carrying out its functions have due regard to -

- (a) the need to eliminate discrimination that is unlawful under this Act;
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
- (c) the need to promote equality of opportunity between disabled persons and other persons;
- (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;
- (e) the need to promote positive attitudes towards disabled persons; and
- (f) the need to encourage participation by disabled persons in public life.

E. UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES

Article 27

States party will:

- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remunerations for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances'

F. ARCHIBALD v FIFE COUNCIL [2004] UK HL 32

[In the cases of the SDA and RRA] men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question for us is when that obligation arises and how far it goes.

G. LONDON BOROUGH OF LEWISHAM v MALCOLM [2008] UK HL 43

Lord Bingham

9. It seems to me...that the task of the court is to ascertain the real reason for the treatment, the reason which operates on the mind of the alleged discriminator. This may not be the reason given, and may not be the only reason, but the test is an objective one. Here it seems to me inescapable that Lewisham, as a social landlord with a limited stock of housing and a heavy demand from those on its waiting list, acted as it did because it was not prepared to allow tenancies to continue where the tenant was not living in the premises demised. That I think was the real reason for the treatment...'

11. I would accept that, but for his mental illness, Mr Malcolm would probably not have behaved so irresponsibly as to sublet his flat and moved elsewhere. He had, after all, worked in Lewisham's housing department for

a time, and must have been well aware of the ground rules. But Lewisham's reason for seeking possession – that Mr Malcolm had sublet the flat and gone to live elsewhere – was pure housing management decision which had nothing whatever to do with his mental disability. With some hesitation I would resolve this issue against Mr Malcolm.

13. The problem of identifying the correct comparator is one which Mummery LJ examined with care and in detail in *Clark v Novacold*. The problem can be re-stated on the facts of the present case, assuming (contrary to the conclusion I have expressed [above]) that Lewisham's treatment of Mr Malcolm was for a reason which related to Mr Malcolm's disability. Are 'the others' with whose treatment the treatment of Mr Malcolm is to be compared (a) persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere, or (b) tenants of Lewisham flats who have not sublet or gone to live elsewhere, or (c) some other comparator group, and if so what?

14. As I understand the judgment in *Clark v Novacold*, the correct comparison is said to be with group (b). But that I think is difficult to accept...

15. A more natural comparison, as it seems to me is with group (a). On this analysis the comparison would fall to be made on the bases rejected in *Clark v Novacold*: with a person who had a dog but no disability, or a diner who was a very untidy eater but had no disability-related for eating in that way...[It would be attractive], if possible, to identify an intermediate comparator group (c) which would avoid absurdity and give fair effect to the statute. But I do not think that any such intermediate comparator group has been suggested, and none is identified by the statutory language. I find it hard to accept that *Novacold* was rightly decided. I am in any event satisfied that a different principle must be applied in the present context.

16. I would accordingly, not without misgiving, hold the correct comparison in this case...to be with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere. Mr Malcolm has not been treated less favourably than such persons. He has been treated in exactly the same way.

Baroness Hale

42. This [case] raises questions about the fundamental principles underlying disability discrimination law. Is it intended simply to secure that disabled people are treated in the same way as other people who do not have their disability? Or is it intended to secure that they are treated differently from other people in order that they can play as full as possible a part in society whatever their disabilities?

80. ...in the light of the Parliamentary history, I do not think that it is possible, either to hold that *Clark v Novacold Ltd* was wrongly decided or to distinguish it on the ground that the same words mean something different

in the context of employment. They must mean the same throughout, however inconvenient the result may now appear to be.

81. In reaching this conclusion I believe I am faithfully following the intention of Parliament. I am sorry to be disagreeing with your Lordships, but even more sorry that the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships' disapproval of *Clark v Novacold*.

H. BOTTA v ITALY [1998] 26 EHRR 241

'Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities...this provision may nonetheless, in certain cases, impose on those States positive obligations inherent in an effective respect for private life even in the sphere of the relations of individuals between themselves...Such positive obligations may exceptionally arise in the case of the handicapped [sic] in order to ensure that they are not deprived of the possibility of developing social relations with others and thereby developing their own personalities. In this regard, the Commission observes that there is no water-tight division separating the sphere of social and economic rights from the field covered by the Convention. This is an area in which a wide discretion must inevitably be accorded to the national authorities. Nevertheless, the crucial factor is the extent to which a particular individual is so circumscribed and so isolated as to be deprived of the possibility of developing his personality'.

I. PRICE v UK [2001] 34 EHRR 1285

In a civilised country...society considers it not only appropriate but a basic humane concern to try to ameliorate and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's bodily integrity. It follows that, for example, to prevent the applicant, who lacks both ordinary legs and arms, from bringing with her the battery charger to her wheelchair when she is sent to prison for one week, or to leave her in unsuitable sleeping conditions so that she has to endure pain and cold - the latter to the extent that eventually a doctor had to be called - is in my opinion a violation of the applicant's right to bodily integrity. The applicant's disabilities are not hidden or easily overlooked. It requires no special qualification, only a minimum of ordinary human empathy, to appreciate her situation and to understand that to avoid unnecessary hardship - that is, hardship not implicit in the imprisonment of an able-bodied person - she has to be treated *differently from other people because her situation is significantly different*'.

J. A, B, X AND Y v EAST SUSSEX COUNTY COUNCIL [2003] EWHC 167

True it is that the phrase [human dignity] is not used in the Convention but it is surely immanent in Article 8, indeed in almost every one of the Convention's

provisions. The recognition and protection of human dignity is one of the core values – in truth, the core value – of our society and, indeed of all societies which are part of the European family of nations and which have embraced the principles of the Convention...The other important concept embraced in the “physical and psychological integrity” protected by Article 8 is the right of the disabled to participate in the life of the community...This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not “so circumscribed and so isolated as to be deprived of the possibility of developing his personality”.

K. COLEMAN v ATTRIDGE LAW [2008] C-303/06

Advocate General

7. ...In order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy.

10. The aim of Article 13 [Treaty of Amsterdam] and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person’s dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic...

12. Yet, directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.

13. Indeed the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.

14...When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy. Put differently, the person who belongs to the suspect classification is excluded from a range of possibilities that would otherwise have been open to him.

The Grand Chamber

50. Although...the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which...is the ground for the less favourable treatment which she claims to have suffered...Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1.

L. RECENT DDA CASES ON REASONABLE ADJUSTMENT

- Archibald v Fife Council [2004] UKHL 32: 'an element of more favourable treatment'
- O'Hanlon v The Commissioners for HM Revenue and Customs [2007] IRLR 404: provided reasonable adjustments and rehabilitation offered, no duty to extend sick-pay coverage
- Nottinghamshire County Council v Meikle [2004] IRLR 703: a different story if reasonable adjustments have not been offered
- Mid- Staffordshire General Hospitals NHS Trust v Cambridge [2003] IRLR 566: assessment a necessary pre-condition
- Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664: an alternative view
- Scottish and Southern Energy plc v Mackay UK EAT/0075/06: 'we follow the Tarbuck line'
- Latif v Project Management Institute [2007] IRLR 579: evidence needed to show there was in principle an adjustment that could be made
- HM Prison Service v Johnson [2007] IRLR 951: need for sufficient detail and broad nature of adjustment proposed; cf. DRC Code, 5.24, 'There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask), but where the disabled person does so, the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable'.

END