
The concepts of disability and reasonable accommodation

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Overview of the presentation

- Origins and foundations of the concept of reasonable accommodation
 - Changing approaches in the field of disability
 - Key concepts of Directive 2000/78
 - ECJ Case Law in the field of disability
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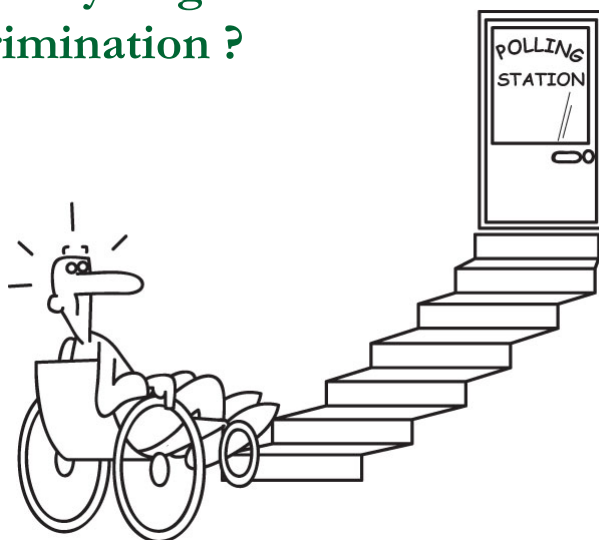
Origins of the concept of reasonable accommodation

- The concept of reasonable accommodation did not originate in the context of disability but in reference to discrimination on the grounds of religious practice.
- Reasonable accommodation was an exception to be granted to a person upon whom a working time rule would have a discriminatory effect on grounds of their religion.
- See also *Vivien Prais v Council*, Case 130/75.

The expansion of the concept of reasonable accommodation to disability



Disability as ground of discrimination ?



Typology of approaches of disability

(Marcia Rioux)

The individual model

Disability as an individual pathology (locating the problem inside the individual)

- Medical approach
- Functional approach

The social model

Disability as a social pathology (locating the problem outside the individual)

- Environmental approach
- Human rights approach

Reasonable accommodation or translating the new approach into rights

The concept of reasonable accommodation emerged in response to barriers erected by the physical or social environment resulting in an inability to perform a function in a conventional manner.

Aart Hendriks

Art.5 Directive 2000/78 - 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 the disability policy of the Member State concerned.

Recitals Directive 2000/78

- (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 the 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
- (18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.
- (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
- (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 organization or undertaking and the possibility of obtaining public funding or any other assistance

Some key elements of the concept of reasonable accommodation

- Reasonableness
- Disproportionate burden
- Fitness for work

The reasonableness of the accommodation

- Causality : relationship between the impairment, the need and the adjustment.
- Effectiveness : the accommodation must enable the individual to perform the essential functions of the position.

Disproportionate burden

- Proportionality : seeking to strike a balance between the rights of individuals with disabilities en the economic interest of employers.
- Issues related to health and safety legislation.

Fitness for work

- Reasonable accommodation is often an aspect of the decision whether a disabled person is competent, capable and available for a job.
 - The disabled person must satisfy the requisite abilities for the “essential functions” of the job.
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The concepts in practice

- **Plaintiffs alleging for a denial of reasonable accommodation shall provide facts from which it may be presumed that**
 - they are able to perform the essential functions of the job;
 - the employer was aware of the needs;
 - with an accommodation they could effectively perform the essential functions of a job.
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The concepts in practice (cont)

■ Employer shall prove that:

- ❑ the plaintiff is not capable of competent to perform the essential functions of the job;
- ❑ he was not aware of the needs of the plaintiff;
- ❑ even with an accommodation the plaintiff could not perform the essential functions of a job;
- ❑ the accommodation would pose a disproportionate burden.

Tensions and grey areas around the concepts of disability and reasonable accommodation

- Reasonable accommodation and positive action.
- Disability discrimination, incapacity for work and invalidity.
- Who is protected ?
 - ❑ The Chacon Navas judgment (Case C13-05)
 - ❑ The Coleman judgment (Case C312-06)

Reasonable accommodation and positive action

- Article 7 : *“With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”*
- Reasonable accommodation does not amount to positive action
- Reasonable accommodation has not the effect of providing a preference to the rights of the disabled over those of the non-disabled

Disability and incapacity

- Disability, incapacity for work and invalidity - although the terms may overlap - are conceptually distinct.
- People can be disabled without being unable to work, and unable to work without being disabled.
- Understanding these (sometimes conflicting) distinctions is fundamental.

The Case Chacon Navas

- Mrs Chacon Navas who had been certified as being 'unfit for work' on the grounds of sickness was given notice of dismissal by her employer, Eurest.
- Ms Navas took a legal claim against Eurest on the basis that her dismissal amounted to disability discrimination.
- The Spanish court, to which the claim was taken, took the view that a dismissal on the grounds of sickness could amount to a form of disability discrimination. However, in the absence of a definition of disability under Spanish law, the court referred the case to the ECJ.

The ruling of the ECJ

- Someone dismissed solely on account of sickness could not fall within the general framework laid down in the directive for combating discrimination on grounds of disability.
- 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 life.
- 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.

Criticism over Chacon Navas

“By embracing the medical model of disability, and focusing on the limitation caused by impairment and the need to prove such limitation, the Court's decision flies in the face of values underlying the Directive and Community disability policy”

Liza Waddington

Suprême Court of Canada *(City of Montréal vs Commission des Droits de l'homme du Québec 3 mai 2000)*

- *« A handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances »*
- *« Because the emphasis is on the effects of the discriminatory conduct rather than on the precise nature of the handicap, the cause and origin of the handicap are immaterial »*

The Coleman Case

- Mrs Coleman lodged a claim with the Employment Tribunal, London South, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.
- The Employment Tribunal referred the matter to the Court of Justice, asking whether the directive on equal treatment in employment and occupation must be interpreted as prohibiting direct discrimination on grounds of disability and harassment related to disability only in respect of an employee who is himself disabled, or whether the directive applies equally to an employee who is treated less favourably by reason of the disability of his child.

The Coleman ruling

- 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.
- 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.

Conclusion

By placing the focus on the commission of the discriminatory act in preference to the condition of the employee, Coleman represents a fundamental development in EC equality Law.

Tim Connor
