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REASONABLE ACCOMMODATION A NEW CONCEPT?

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Article 5 Directive 2000/78/EC:

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



Article 5 CRPD:

“3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”



Article 4 draft Non-Discrimination Directive outside the labour market:

“Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden .”

Aims of Presentation

1. What is a reasonable accommodation (in Directive 2000/78/EC)?
2. How does it relate to the direct and indirect discrimination?
3. (How) can it be enforced?

1. What is a RA?

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.



1. What is a RA?

First recognised with respect to religion, later
with respect to disability.



1. What is a RA?

Many countries now have legislation prohibiting the denial of a reasonable accommodation – either as a (part of a) general norm for employers or as a form of discrimination / measure to ensure compliance with the principle of equality.



1. What is a RA?

Reasonable accommodation in Directive 2000/78/EC entails a combination of both approaches, but above all obligation for employers



1. What is a RA?

In CRPD and draft Non-Discrimination Directive:
less clear who is the duty holder.



1. What is a RA?

Requirements:

- 1) The worker / job applicant is otherwise qualified;
 - 2) The employer is aware of the needs of the worker / job applicant;
 - 3) With an effective accommodation the worker can (safely) perform the essential duties of a job;
 - 4) The accommodation shall not pose a disproportionate burden
- * The burden is not disproportionate when remedied within the framework of disability policy.

1. What is a RA?

Draft Non-Discrimination Directive:

To enable effective non-discriminatory access to
...



1. What is a RA?

Note:

A reasonable accommodation is not the same as:

- general accessibility standards;
- positive action measures.

What to do in case of:

- exclusionary reasonable accommodations?
 - various reasonable accommodation resulting in an accumulation of costs?
- employer dependent on others (e.g. office owner)?

2. How does RA relate to Discrimination?

In Europe, the concept of reasonable accommodation is not very new:

- standards for young, elderly and pregnant workers;
- Fürsorgepflicht / eis goed werkgeverschap.

New is that reasonable accommodation is now (also) defined as a right (right to be accommodated), failure of which results in discrimination/denial of equal treatment.

2. How does RA relate to Discrimination?

Burden of proof: as with direct and indirect discrimination?

Exceptions/justifications:

- 1) Employer was not aware of need;
- 2) Effective accommodation is not available;
- 3) Disproportionate burden on employer.

2. How does RA relate to Discrimination?

Direct discrimination

Centred around 'equal treatment'

Directive requires 'comparable situation'

Can disability be compared with pregnancy or other (sub)ground?



2. How does RA relate to Discrimination?

Indirect discrimination

Directive requires “apparently neutral provision ... particular disadvantage”

Who is the comparator?

Reasonable accommodation centred around individuals, not group comparisons.



2. How does RA relate to Discrimination?

Thus: Reasonable Accommodation is (also) a *sui generis* form of discrimination

3. How to enforce



3. How to enforce?

Plaintiffs shall provide facts from which it may be presumed that:

- 1) They are (otherwise) qualified for the job;
- 2) The employer was aware of the needs;
- 3) With an accommodation they could (safely) perform the essential functions of a job

3. How to enforce?

Respondents shall prove that:

- 1) The plaintiff was not (otherwise) qualified for the job;
- 2) They were not aware of the needs of the plaintiff;
- 3) Even with an accommodation the plaintiff could not (safely) perform the essential functions of a job;
- 4) The accommodation would pose a disproportionate burden

3. How to enforce?

In the absence of case law of the European Court of Justice, we are not yet absolute sure how Article 5 of the Framework Directive is to be interpreted.



Questions or Comments????

