

Reasonable Accommodation in the EU Present and Future

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1. Meaning

1.1 Purpose

"Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change" (Fredman 2005 p 203).

1.2 Ability to Perform the Essential Functions

"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" (Directive 2000/78/EC, recital (17)).

1.3 Distinctiveness

Direct discrimination distinguished.

Indirect discrimination distinguished.

Positive action distinguished.

Accessibility distinguished

Welfare benefits distinguished.

1.4 A Form of Discrimination?

Directive 2000/78/EC.

UN Convention on the Rights of Persons with Disabilities.

Draft Goods and Services Directive.

2. History and Coverage

2.1 US Origins

Equal Employment Opportunity Act 1972 (amending Civil Rights Act 1964).

Rehabilitation Act 1973, interpretive regulations.

Americans with Disabilities Act 1990.

2.2 European Union

Pre-Directive – UK, Ireland and Sweden.

Current Directive – Employment Equality Directive,

Article 5 - “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.”

Future Directive - Draft Goods and Services Directive

2.3 Council of Europe

European Convention on Human Rights 1950

Glor v Switzerland

European Social Charter 1961, revised 1996

Autisme-Europe v France

MDAC v Bulgaria

2.4 United Nations

Convention on the Rights of Persons with Disabilities. 2006

3. In Whose Favour?

3.1 Disabled people and others?

3.2 Defining relevant disabled people

Chacón Navas v Eurest Colectividades

UN Convention on the Rights of Persons with Disabilities

4. Examples

4.1 Employment

UK Disability Discrimination Act 1995, s 18B(2) –

- (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 (*Archibald v Fife Council*);
- (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.

UK Employment Code of Practice –

- permitting flexible working;
- allowing a disabled employee to take a period of disability leave;
- participating in supported employment schemes, such as Workstep;
- employing a support worker to assist a disabled employee;
- modifying disciplinary or grievance procedures;
- adjusting redundancy selection criteria;
- modifying performance-related pay arrangements.

4.2 Non-Employment

Education - *Flemish Government v FEVLADO*

Transport – *Ross v Ryanair and Stansted Airport*

Prison accommodation – *Hamilton v Jamaica*

5. Assessing What Steps the Duty Requires – The Substantive Component

5.1 Claimant-Centred Considerations

“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” (Directive, Art 5)

Effectiveness.

Individualisation.

5.2 Respondent-Centred Considerations

Disproportionate burden/ undue burden/ undue hardship

Cost.

Impracticability.

Disruptiveness.

“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” (Directive, Art 5)

6. The Importance of Dialogue – The Procedural Component

Schwab and Willborn 2003.

PMI v Latif

7. Facilitating Effective Implementation

Flexibility of “reasonableness”.

Dangers –

“if the reasonable person characteristically holds common or ordinary beliefs and attitudes, then precisely because discrimination is constituted by widely shared beliefs about the lesser humanity of certain others, the reasonable person standard will actually tend to build discrimination into the legal standard itself” (Moran 2007 p 149).

Detailed statutory guidance or codes of practice

State funding

Training and awareness-raising

References

(a) Cases

Archibald v Fife Council [2004] IRLR 197

Autisme-Europe v France, Committee on Economic and Social Rights, Collective Complaint No 13/2002',

Case C-13/05 *Chacón Navas v Eurest Colectividades SA*, [2006] ECR I-6467.

Flemish Government v FEVLADO, Ghent, March 2009

Glor v Switzerland, Application No 13444/04, 30 April 2009

Hamilton v Jamaica, Human Rights Committee, 28 July 1999 (CCPR/C/66/D/616/1995)

MDAC v Bulgaria, Committee on Economic and Social Rights, Complaint 41/2007

Project Management Institute v Latif [2007] IRLR 579

Ross v Ryanair and Stansted Airport [2004] EWCA Civ 1751

(b) Legislative Material

Disability Discrimination Act 1995(UK)

Employment Code of Practice - Disability Rights Commission, *DDA 1995 Code of Practice: Employment and Occupation* (London, Stationery Office, 2004)

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303, 2 December 2000 P 16)

'Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation' COM (2008) 426.

United Nations Convention on the Rights of Persons with Disabilities

(c) Books and Journals

J Cooper, 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 *University of Pennsylvania Law Review* 1423

S Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?' in A Lawson and C Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005)

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M Moran, 'The Reasonable Person and the Discrimination Inquiry' in S Tierney (ed), *Accommodating Cultural Diversity* (Aldershot, Ashgate, 2007)

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L Waddington, 'Reasonable Accommodation' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007)