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The Concepts of Disability and Reasonable Accommodation

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Structure of Presentation:

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2. The Employment Equality Directive and reasonable accommodation.
 - 2a. What is an accommodation?
 - 2b. What is a disproportionate burden?
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 - Who is regarded as a person with a disability?
 - Person must be competent capable and available to perform the essential functions of the post
 - 2d. Relationship of reasonable accommodation to other provisions in the Directive
3. National Case Law and Legislation on Reasonable Accommodation

1. The background to the duty to provide for a reasonable accommodation (1)

Reasonable accommodation builds on the understanding that only applying a formal approach to non-discrimination will do little to help many people with disabilities.

Reasonable accommodation recognizes the relevance of “impairment” - if one ignores the impact of an impairment, and treats a person with a disability in exactly the same way as one treats a person without a disability, a de facto situation of inequality will arise.

The notion of reasonable accommodation was developed to address this situation.

1. The background to the duty to provide for a reasonable accommodation (2)

Requires an employer to take account of the characteristics related to disability, and to accommodate them by, e.g. changing the job or the physical environment of the workplace.

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

This obligation to accommodate is not unlimited – and is subject to the requirement that the accommodation does not result in a disproportionate burden.

2. The Employment Equality Directive and reasonable accommodation (1)

Art. 5 of the Employment Equality Directive:

"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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate."

2. The Employment Equality Directive and reasonable accommodation (2)

The Directive requires an individualised accommodation to meet the needs of a particular person.

The Directive does not explicitly define a denial of an accommodation as a form of discrimination.

2a. What is an accommodation? (1)

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."

2a. What is an accommodation? (2)

Accommodation requirement applies to all aspects of employment *and* employment related benefits.

Accommodation does not need to be the best or ideal solution – but must be “effective and practical”.

Good practice for employer to engage in dialogue with disabled person to identify appropriate accommodation. Failure to do this may result in breach of obligation.

2b. What is a disproportionate burden?

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."

2c. Who can claim an accommodation? (1)

Who is regarded as a person with a disability?

Case Case C-13/05, *Chacón Navas*

Court defined disability for the purposes of the Directive as:

"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"

For any limitation to be regarded as a "disability", *"it must be probable that it will last for a long time"*

2c. Who can claim an accommodation? (2)

“Disability” is different from “sickness”, and there is nothing in the Directive “to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness”.

Court’s definition of disability is “autonomous and uniform”.

Sickness could not be added to the list of grounds covered by the Directive.

But judgment may leave the way open for people who have a long term illness which does cause the required degree of limitation to be regarded as disabled for the purposes of the directive.

2c. Who can claim an accommodation? (3)

The Chacón Navas Definition of Disability and National Law

- i. No definition of disability in non-discrimination law
 - courts should follow *Chacón Navas* definition.
- ii. Definition of disability in non-discrimination law which is similar to that found in *Chacón Navas*.
- iii. Definition of disability for non-discrimination law which is taken from national law which provides for disability social security benefits.
- iv. Two definitions of disability in two non-discrimination laws. Definition used with regard to reasonable accommodation is same as definition used in the context of social security.

2c. Who can claim an accommodation? (4)

- These last two approaches seem to breach the Directive and are not compatible with the judgment in *Chacón Navas*.

2c. Who can claim an accommodation? (5)

Person must be competent, capable and available to perform the essential functions of the post after the accommodation has been made.

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 the essential functions of the post concerned or undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities."

2d. Relationship of reasonable accommodation to other provisions in the Directive (1)

Article 2 (2)(b)(ii) Indirect Discrimination

- No indirect discrimination if the employer is obliged to provide for a reasonable accommodation to eliminate the disadvantages caused by the otherwise discriminatory measure.

Article 5 Reasonable Accommodation

- Goal is to remove barriers that impede equal participation.
- Not a form of charity or positive action – but part of the equality paradigm.

2d. Relationship of reasonable accommodation to other provisions in the Directive (2)

Article 7 Positive Action

- Positive action measures can promote the integration of disabled people in the working environment.
- Member States are allowed – under EU law – to take positive action measures, but are not required to do so.
- Contrast – reasonable accommodation – obligation to provide for a duty to provide for a reasonable accommodation.

3. National Case Law and Legislation on Reasonable Accommodation (1)

What is an accommodation?

A Company v. A Worker

Irish Labour Court, 2002

Failure to reassign task (sorting mail) and provide a reserved parking space amounted to a breach of duty to provide a reasonable accommodation.

3. National Case Law and Legislation on Reasonable Accommodation (2)

Dutch Equal Treatment Commission, Opinion 2004-21

Failure to provide an adapted workplace or reassign worker to another vacant position within the organisation amounted to a breach of duty to provide a reasonable accommodation.

Italy, Court of Pistoia, 2005

Requiring worker to relocate to another position amounted to indirect discrimination; worker had to be accommodated by being allowed to continue working at location near to her home.