

Disability – The EU jurisprudence and the UN Convention on the Rights of Persons with Disabilities

Overview

- The EU disability legal framework
- Key concepts on disability discrimination and employment
- The ECJ Case Law in the field of disability
- The UN Convention of the rights of people with disabilities as an interpretation tool and legal status under EU law

The EU legal framework

- Anti-discrimination law in respect to disability was introduced in the European Union through the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- This “general” framework entails “specific” provisions dealing with disability discrimination

Indirect discrimination (art.2 (1)(b))

Indirect discrimination shall not be taken to occur when *“as regards persons with a particular disability, the employer or any person or organization 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”*.

Reasonable accommodation (art 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”

Positive action (art.7) (2))

“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.”

Recitals

- (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

Key concepts on disability and discrimination

- Disability as a ground of discrimination
 - Definition of disability
 - Typology of approaches versus disability
- Reasonable accommodation
- Fitness for work
- Positive action

Definition of disability

- As with other grounds specified in the framework directive, no definition is provided of the term disability
- *“The Commission's view that definitions of key concepts can simply be "left to Member States" is an over-simplification. EU-wide definitions will evolve as cases reach the Court of Justice. This will be a long process, and there will inevitably be a period of uncertainty as cases are taken through the courts”* House of Lords Select Committee (2000)

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 : key terms

- Reasonableness
- Disproportionate burden
- Fitness for work
- Reasonable accommodation vs. positive action

The ECJ jurisprudence on disability

- **Chacón Navas** v Eurest Colectividades SA (2006) - Case C-13/05
- **Coleman** v Attridge Law and anor (2008) - Case C-303/06
- Pending case :
 - **Jette Ring** v Dansk almennyttigt Boligselskab DAB – Case C-335/11 en **LoneSkouboe Werge** v Pro Display A/S- Case C-337/11.

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

ECJ Ruling on Chacon Navas

- 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.
- *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 on Community disability policy" Liza Waddington*

Coleman

- 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.

ECJ Ruling on Chacon Navas

- 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.
- *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)

Jette Ring

Main questions referred :

- Is any person who, because of physical, mental or psychological injuries, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in paragraph 45 of the judgment of the Court of Justice in Case C-13/05 Nava covered by the concept of disability within the meaning of the directive ?
- Is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC ?
- Does Council Directive 2000/78/EC preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of illness for a total of 120 days during a period of 12 consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the directive ?

The UN Convention on the Rights of Persons with disabilities

- Adoption by the United Nations General Assembly
- 13 December 2006
- Opened for signature - 30 March 2007
- Entry into force – 3 May 2008
- Signed by all the EU Member States
- Ratified by the European Union as a whole –
23 December 2010

The UNCRPD - The Key Principles

- Respect for inherent dignity, individual autonomy and independence
- Non-discrimination
- Full and effective participation and inclusion in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility

The UNCPRD - The Content Areas

- **Civil and political rights**
Right to life, Equal recognition before the law, Equality, Access to justice, Liberty and security of person, Freedom from torture or cruel, inhuman or degrading treatment or punishment, Freedom from exploitation, violence and abuse, Protecting the integrity of the person, Liberty of movement and nationality, Freedom of expression and opinion, and access to information, Respect for privacy, Respect for home and the family, Participation in political and public life.
- **Economic, social and cultural rights**
Living independently and being included in the community, Personal mobility, Education, Health, Habilitation and rehabilitation, Work and employment, Adequate standard of living and social protection, Participation in cultural life, recreation, leisure and sport.

The accession of the European Union to the UNCPRD

- The European Union acceded to UN Convention on the Rights of Persons with Disabilities, with the Council Decision 2010/48/EC, formally adopted on 26 November 2009
- The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council.

The UNCPRD ratification as a first time in history

- The EU competence to conclude the UNCPRD derives from Article. 19 TFEU which addresses disability discrimination and article 114 TFEU which addresses the internal market.
- It is the first time ever that the EU becomes a party to an international human rights treaty
- It is also the first time that an intergovernmental organization join a United Nations human rights treaty.

The UNCPRD as a mixed agreement

- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand
- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States
- The UNCPRD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence by the regional organization, specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States

Effects of international agreements concluded by the Community in the EC's legal order

- The ECJ has adopted a “monist” approach for evaluating the legal effects of international agreements: an international agreement has legal effect in the EU legal order and does not require further acts of implementation, as a regulation or directive (Case 181/73, Haegeman/État Belge)
- AND international agreements have a superior level to secondary legislation such as the EU directives.
- AND Under certain condition they can be invoked before the court by an individual; there is direct effect (Demirel - Case 12/86)

The UNCPRD has an interpretation tool of European Union law

- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94)
- The accession to the UN CRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention

Conclusion

- The accession of the EU to the UNCPRD mandates for better consistency in the interpretation of some key concepts of the current EU disability legal framework such as the definition of disability, discrimination and reasonable accommodation
- A good example can be taken from the recent ECHR jurisprudence (*Glor v Switzerland* (2009) and *Alajos Kiss v Hungary* (2010))