

# THE ANTI-DISCRIMINATION DIRECTIVES 2000/43 AND 2000/78 IN PRACTICE

SEMINAR FOR MEMBERS OF THE JUDICIARY

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## **Disability: EU jurisprudence and the UN Convention on the Rights of Persons with Disabilities**

### **Introduction**

1. Disabled people represent 80 million persons in the European Union (more than 15% of the population), the equivalent to the population of Belgium, the Czech Republic, Greece, Hungary and the Netherlands together. One in four Europeans has a family member with a disability. Six Europeans out of ten know someone, in close or more distant circles, who has a disability.
2. People with reduced mobility represent more than 40% of the population. Disabled people are two to three times more unemployed than non-disabled people.
3. Only 16 % of those who face work restrictions are provided with some assistance to work. Many disabled persons are 'discouraged workers' and don't even attempt to enter the labour force. They are therefore classified as inactive.
4. The more severe the degree of disability, the lower the participation in the labour force. Only 20% of people with severe disabilities, compared to 68% for those without disabilities. Persons with disabilities are less likely by more than 50% to reach third level education as non disabled persons.
5. 38% of disabled people aged 16 - 34 across Europe have an earned income, compared to 64% of non-disabled people. Disabled people's income is dramatically lower than the income of non-disabled people.<sup>1</sup>

### **UK statistics**

6. Over 10 million people in Great Britain are disabled: more than one in seven of the adult population. Only 50% of disabled people of working age are in work compared to 81% of non disabled people.
7. There are over one million people with learning disabilities in the United Kingdom. People with learning disabilities are 58 times more likely to die aged under 50 than other people. Four times as many people with

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<sup>1</sup> European Disability Forum [http://www.edf-feph.org/Page\\_Generale.asp?DocID=12534](http://www.edf-feph.org/Page_Generale.asp?DocID=12534)

a learning disability due of preventable causes as people in the general population. Less than one in five people with a learning disability work – compared with one in two disabled people generally. Fifty percent of disabled adults in the UK are in work compared to 79% of non disabled adults.

### **Background: The legal framework**

8. Council Directive 2000/78/EC included the prohibition against disability discrimination within its scope and the concept of discrimination and the principle of equal treatment set out in article 2, discussed in detail this morning, applies in relation to the protected characteristic of disability as it does to the other protected characteristics. The provisions concerning the burden of proof and victimisation also apply equally to the disability strand.
9. Additional protection for disabled people was also provided for in the duty of reasonable accommodation or adjustments which will be discussed further below. The Directive therefore permits more favourable treatment of disabled people without offending the principle of non-discrimination. Member States were however given an additional 3 year period to effect implementation of the disability strand until 2 December 2006.

### **United Nations Convention on the Rights of Persons with Disabilities (CRPD)**

10. In order to consider the full scope of disability rights in employment the EU, in addition to Directive 2000/78/EC, the CRPD has become directly relevant to the consideration of disability rights under the Directive. It was adopted in 2006 and entered into force on 3 May 2008. Its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.<sup>2</sup> It was the most rapidly negotiated human rights treaty to date and, since its adoption, it has received impressive support globally. Disabled people and disability organisations were key participants in influencing and drafting the CRPD. This influence is visible not merely through the broad range of substantive rights the CRPD guarantees, including both civil and political rights and socio-economic rights, but also through the procedures it puts in place for mechanisms such as monitoring.
11. It requires state parties to consult with and actively involve persons with disabilities in developing and implementing legislation and policies to implement the Convention<sup>3</sup> which is seen as an important means of both empowering those with disabilities in the formulation of policies which affect them, and also increase the chance of ensuring effective measures are introduced. CRPD places particular emphasis on issues

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<sup>2</sup> Article 1

<sup>3</sup> CRPD Article 4(3)

of legal capacity for disabled persons wherever possible<sup>4</sup> and requires state parties to take appropriate measures to protect persons with disabilities from violence and abuse<sup>5</sup>.

12. On 23 December 2010, the European Union (EU) ratified the CRPD. It was a significant occasion and is the first time in its history that the EU has become a party to an international human rights treaty.
13. The implication of ratifying the CRPD is that it must be read into Recital 4 of the Council Directive by the EU organs, including the CJEU. Therefore, the CRPD forms part of the foundation of the universal right to equality before the law and protection against discrimination. On this basis, the CJEU must seek consistency with the CRPD. In addition, with the entry into force of the Charter of Fundamental Rights of the European Union, the CJEU may be aided by the provisions of the CRPD in interpreting the scope of Article 2150 and Article 2651 of the Charter.

### **What is disability?**

14. The concept of 'disability' is not defined by Directive 2000/78 itself. Nor does the Directive refer to the laws of the Member States for the definition of that concept. It is not therefore surprising that one of the first disability discrimination cases to be referred to the CJEU concerned the scope of the definition, *Chacon Navas v Eurest Colectividades SA*<sup>6</sup>. Ms Chacón Navas, who was certified as unfit for work on grounds of sickness and was not in a position to return to work in the short term, was dismissed solely on account of the fact that she was absent from work because of sickness. The Spanish Court referred two questions around the issue of sickness and disability – whether dismissal solely on the grounds of sickness amounted to a disability discrimination, and whether sickness was an additional ground or protected characteristic to be added to the list of religion or belief, disability, age and sexual orientation set out in Article 1.
15. The court held that the concept of “disability” must be given an autonomous and uniform meaning across the EU. It “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.”<sup>7</sup> It also concluded that in order for the limitation to fall within the concept of 'disability', it must be probable that it will last for a long time. It reasoned that given the importance the Community legislature attaches to measures for adapting the workplace to the disability, it followed that it envisaged situations in which participation in professional life is hindered over a long period of time.

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<sup>4</sup> CRPD Article 12

<sup>5</sup> CRPD Article 16

<sup>6</sup> C-13/05, ([2006] 3 CMLR 40, [2006] ECR I-6467, [2006] EUECJ C-13/05, [2006] IRLR 706

<sup>7</sup> At paragraph 43

16. There is thus a distinction between sickness and disability – the two concepts are not the same - and there is no protection of itself for sickness. However sickness may result in, or amount to disability, or may over time become a disability in accordance with the definition. The Court therefore found that a person who has been dismissed by his employer solely on account of sickness is not thereby protected by the prohibition against discrimination on grounds of disability in Directive 2000/78.
17. The CRPD provides a more expansive definition of disability:
 

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>8</sup>
18. There is an argument that the definition in Article 1 moves away from the historically dominant medical model of disability and towards the social model understanding of disability<sup>9</sup>. In this understanding, “disabled people experience disability as a social restriction, whether those restrictions occur as a consequence of inaccessibly built environments, questionable notions of intelligence and social competence, the inability of the general population to use sign language, the lack of reading material in Braille or hostile public attitudes to people with non-visual disabilities”.<sup>10</sup>
19. Since the CRPD Article 1 definition is partly based on the individual experience, it is more capable of accurately framing discussions which are relevant to disabled people, identifying hidden sources of discrimination and improving our understanding of human rights. As a result of defining disability in a way that takes into consideration the impairment of the individual *and* the barriers that hinder their social participation (for example, environmental, built or human barriers), Article 1 of CRPD entitles a broad range of people who are vulnerable to discrimination on grounds of disability to protection.
20. *Chacan Novas* was decided before CRPD was in force and consideration of the meaning of disability under Directive 2000/78 will now also involve consideration of the CRPD definition.

**Associative discrimination: the scope of the protection.**

21. In UK law, when disability discrimination legislation was first introduced (other than for claims of victimisation) it was limited to persons who were themselves disabled. In *Attridge Law v Coleman*<sup>11</sup> Ms Sharon

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<sup>8</sup> Article 1

<sup>9</sup> See for example Clifford J, Equal Rights Review, Vol Six, (2011)

<sup>10</sup> Scotch K R “Models of Disability and the Americans with Disabilities Act” Berkeley Journal of Employment and Labor law 21(1) 2000, p 215

<sup>11</sup> C-303/06, ([2008] 3 CMLR 27, [2008] All ER (EC) 1105, [2008] CEC 986, [2008] EUECJ C-303/06\_O, [2008] EUECJ C30306\_O, [2008] ICR 1128, [2008] IRLR 722; [2008]IRLR 722

Coleman alleged that although she was not herself disabled, she was subjected to harassment, abuse and less favourable treatment on grounds of disability, by her association and caring role for her son. The question arose as to whether such treatment was prohibited by Directive 2000/78 and was referred to CJEU.

22. CJEU held that the prohibition of direct discrimination in the protected characteristic of disability in 2000/78 (and by implication the other strands as well) includes “associative” discrimination: where a person who is not him or herself disabled, is treated less favourably based on that person’s association with a disabled person, such as carer or parent of a disabled person. It applies to direct discrimination and harassment, but not the reasonable accommodation duty.
23. The explanation for this interpretation was made in the opinion of Advocate General Poiares Maduro:

“As stated, the effect of the Directive is that it is impermissible for an employer to rely on religion, age, disability and sexual orientation in order to treat some employees less well than others. To do so would amount to subjecting these individuals to unjust treatment and failing to respect their dignity and autonomy. This fact does not change in cases where the employee who is the object of discrimination is not disabled herself. The ground which serves as the basis of the discrimination she suffers continues to be disability. The Directive operates at the level of grounds of discrimination. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well. Put differently, the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation.”<sup>12</sup>

### **Reasonable accommodation**

24. An important aspect of providing rights for disabled people in law includes the introduction of a right, in certain circumstances, to reasonable accommodation. In this regard disability discrimination legislation is different in concept to other forms of discrimination such as sex and race which is largely predicated on the concept of traditional equality that all people should be treated alike regardless of differences of, for example religion or sexual orientation. In the field of disability something more, and different, is required to enable disabled people to participate as fully as possible in society. Asymmetrical rights for

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<sup>12</sup> Opinion of AG Poiares Maduro, 31.1.2008, Case 3\_303/06, para 22.

accommodations or adjustments to be made for disabled people, that are not equally available to people without disabilities are at the heart of the legislation providing equality for the disabled. It is the difference between formal and substantial equality.

25. The reasonable adjustment duty exists in addition to the formal equality measures introduced by the prohibition against direct and indirect discrimination.
26. The recitals to Council Directive 2000/78/EC explain the rationale behind the substantial equality provisions introduced by the reasonable accommodation duty:

- (16) Provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

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- (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 organisation or undertaking and the possibility of obtaining public funding or any other assistance.

27. The purpose expressed in the recitals finds form in 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 the 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.”

28. The positive action envisaged by Article 5 has four key features:

- That appropriate measures must be taken;
- On an individual basis;

- To enable the disabled person to participate more fully in work and access to work;
- Unless the burden of doing so is disproportionate.

## EU Case Law

29. Surprisingly, no case has yet been determined by the CJEU to determine the scope of the reasonable accommodation duty or indirect discrimination specific to disability rights.

## CRPD

30. Article 5(3) requires State Parties to take all appropriate steps to ensure that reasonable accommodation is provided for persons with disabilities in order to promote equality and eliminate discrimination. The CRPD also specifically requires that State Parties provide reasonable accommodation in respect to the right to liberty and security of the person,<sup>13</sup> the right to education<sup>14</sup> and the right to work and employment<sup>15</sup>. Reasonable accommodation is defined in Article 2 of the CRPD as follows:

“‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>16</sup>

31. The application and coverage of the reasonable accommodation duty is therefore much wider than that of Directive 2000/78 and extends beyond the employment field, but the scope of the duty itself is similar.

## The UK Experience

32. Anti discrimination legislation in the field of disability was introduced in the United Kingdom in 1996 in advance of Directive 2000/78. The Disability Discrimination Act 1995 (DDA1995) introduced the concept of the duty to make reasonable adjustments. We are therefore now in the luxurious position of having over 15 years for the rights to become established and a significant body of case law.
33. The reasonable adjustment duty soon became acknowledged as perhaps the most important measure in DDA 1995 as employers, employees and trade unions began to embrace the obligations imposed and rights conferred. It was also problematic. It was famously referred to as a “revolutionary” piece of legislation in a judgment of the Court of

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<sup>13</sup> CRPD Article 14(2)

<sup>14</sup> CRPD Article 24(2) & (5)

<sup>15</sup> CRPD Article 27(i)

<sup>16</sup> CRPD Article 2

Appeal<sup>17</sup> for both a duty of reasonable accommodation closely modelled on the Americans with Disabilities Act and the introduction of the concept of “less favourable disability-related treatment”.

34. In other respects however the DDA1995 as first introduced was seen as an unsatisfactory piece of legislation which in many ways fell short of the more comprehensive rights in the sex and race discrimination legislation in accordance with EU legal requirements and contained many exemptions and exceptions. For example small employers were exempt from its provisions, as were the fire service and police forces and it lacked the coverage and scope of the other anti-discrimination legislation then in force.

### **The current law: Equality Act 2010**

35. Following the coming into force of Directive 2000/78/EC the DDA 1995 was strengthened to comply with the obligations imposed by 2000/78, although the amendments to the reasonable adjustment duty were largely cosmetic than substantive which preserved the existing body of case law.
36. The UK law is now contained in Equality Act 2010. The duty to make reasonable adjustments comprises of three requirements as follows:
  - s.20(3) The first requirement is a requirement, where a provision criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
  - 20(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
  - 20(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
37. The intention of the first requirement is to change the way things are done, the second to make changes to the built environment and the third to provide auxiliary aids and services (such as providing a special computer software or providing a different service). In relation to the

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<sup>17</sup> *Clark v TDG Ltd t/a Novacold* [1999] IRLR 318 CA

built environment it includes removing the physical feature in question, altering it or providing a reasonable means of avoiding it.

38. It is an important principle of the duty that the disabled person is not required to pay to any extent the costs of the employer of complying with the duty.

### **Statutory Code of Practice**

39. A statutory code of practice on employment written by the UK Equality and Human Rights Commission is read alongside the Equality Act 2010<sup>18</sup>. It does not have the same standing as either legislation or case law but failure by an employer to observe any provision of a code of practice whilst not in itself unlawful, may be taken into account by a Tribunal or court and it is admissible as relevant evidence.
40. The code of practice describes the duty to make reasonable adjustments thus:

“[the reasonable adjustment duty is] A corner stone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non disabled workers and applicants are not entitled”.

### **Employer’s Knowledge**

41. The duty is not one which is owed at large and is, therefore unlike indirect discrimination. The obligation arises in individual cases and the employer is not subject to a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:

- (1) In the case of an applicant or potential applicant for a job that an interested disabled person is or may be an applicant for the work in question;
- (2) In any other case that the interested disabled person has a disability and is likely to be placed at a substantial disadvantage.

22. The Code of practice assists in understanding when an employer could reasonably be expected to know of the disability and the disadvantage, even though where they do not in fact know of either or both. An employer may be expected to make enquiries to establish whether a person has a qualifying disability and it is good practice for employers to provide an opportunity for an employee to declare a disability if they so choose – for example on joining an organisation or at annual

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<sup>18</sup> <http://www.equalityhumanrights.com/advice-and-guidance/information-for-advisers/codes-of-practice/>

reviews or appraisal meetings. Also behaviour consistent with a disability may put an employer on notice to make further enquiries – such as patterns of ill-health absence, weeping at work. If an employer asks questions of an employee and the employee chooses not to disclose a disability, the employer will not be stuck with knowledge unless the employee’s response is patently and obviously incorrect as was actually known to the employer.

### **Sequential Process in Reasoning:**

#### **Provision, criterion or practice**

23. Is there a provision, criterion or practice (PCP) applied by or on behalf of an employer?
42. The concept of a PCP has been widely interpreted and includes “arrangements made by or on behalf of an employer”.
43. PCPs have been held to include the rules governing the holding of disciplinary or grievance hearings, non payment of allowances such as sick pay (*London Clubs Management Ltd v Hood*<sup>19</sup>) It includes the allocation of parking spaces (as per code of practice). The essential functions of the job are a PCP (*Archibald v Fife Council*<sup>20</sup>) job related arrangements are PCPs including the requirement to have occupational health clearance (*Paul v National Probation Service*<sup>21</sup>). It does not include offering ill health retirement (*Thameside Hospital NHS Trust v Mylot*<sup>22</sup>).Nor does not extend to personal care needs such as assistance on the lavatory which are said not to be job related.

#### **Physical Feature of Premises Occupied by the Employer**

44. The definition covers any physical feature of premises occupied by the employer. In a case considered under the goods, facilities and services provisions of the Disability Discrimination Act 1995 a bank was required to install a platform lift to allow access into a bank for a customer (*Royal Bank of Scotland Group v David Allen*<sup>23</sup>). Special provisions apply when the making of adjustments to premises is regulated or restricted by building regulations, by the need to obtain statutory consent to alterations, and by the content of leases. Consent needs to be sought and obtained prior to the making of any alterations and the law requires landlords not to withhold consent unreasonably.
45. Physical features includes features arising from the design or construction of a building on the premises; any feature on the premises of any approach to, exit from or access to such a building; any fixtures, fittings, furnishings, furniture, equipment or material in or on the

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<sup>19</sup> [2001] IRLR 719 UKEAT

<sup>20</sup> [2004] UK HL32

<sup>21</sup> [2004] IRLR 190 UKEAT

<sup>22</sup> UK EAT0399/10

<sup>23</sup> [2009] EWCA Civ 1213

premises; and any other physical element or quality of any land comprised in the premises (s.20(10) EqA2010).

### **Auxiliary aid or service**

46. Auxiliary aids include specially adapted furniture, large print application forms for visually impaired people, acquiring or modifying equipment, providing a reader or interpreter or providing supervision or other support. Special computer software or providing a British sign language/English interpreter for the assistance of people who have hearing impairments are well established as being the type of auxiliary aids that may be required in a particular case.

### **Comparators and the Nature and Extent of Disadvantage**

47. Once the complainant has established the existence of a PCP or physical features or an auxiliary aid or service, it is then necessary for the employee or job applicant to establish a substantial disadvantage in comparison to people who are not disabled.
48. There is no need for actual comparators and hypothetical comparators are not always essential and can be something of a distraction. The recommended approach is to identify with specificity the PCP/physical feature/lack of auxiliary aid said to create the substantial disadvantage and then consider the proper comparator. For example in *Smith v Churchill's Stair Lifts Plc*<sup>24</sup>, the PCP that the disabled person could not meet was a requirement that potential employees should be capable of carrying a particular heavy article. The disadvantage he relied on was that as a consequence of his inability to lift the object he was not offered the job. The proper comparators were potential employees who could meet that requirement – lift the heavy object - and were not disadvantaged as a result as they would have been offered a position. It is not a comparison with the general population.
49. The Tribunal may look at the cumulative effect where there is more than one PCP or a combination of a PCP(s) and physical features and/or auxiliary aids. It is necessary to look at the overall picture (*Environment Agency v Rowan*<sup>25</sup>).
50. In order for a disadvantage to be substantial it must be more than minor or trivial and it is for the employee to establish the disadvantage.

### **Reasonableness of Adjustments**

51. Once it is established that a PCP or physical feature or a lack of an auxiliary aid which places the disabled person at a substantial disadvantage when compared with persons who are not disabled, the employer (or prospective employer) is under a duty to take such steps as are reasonable, in all the circumstances of the case for him to have

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<sup>24</sup> [2005] EWCA Civ 1220

<sup>25</sup> [2008] IRLR 20

to take in order to prevent the PCP or physical features or lack of auxiliary aid from having that effect.

52. The duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs.

### **The Type of Adjustment, Adaptation or Accommodation Envisaged**

53. A wide interpretation has been given to the kind of steps which a person may need to take in order to comply with the duty to make adjustments. They include:

Adjustments to the premises

Allocating some of the disabled person's duties to another person

Transferring him or her to fill an existing vacancy

Altering hours of work or training

Assigning him or her to a different place of work or training

Allowing him to be absent during working or training hours for rehabilitation, assessment or treatment

Giving, or arranging for, training or mentoring (whether for the disabled person or any other person)

Acquiring or modifying equipment

Modifying instructions or reference manuals

Modifying procedures for testing or assessment

Providing a reader or interpreter

Providing supervision or other support

54. It may include creating a new job for a disabled employee if the particular facts of the case support such a finding (*Chief Constable of South Yorkshire Police v Jelic*<sup>26</sup>). It may also be a reasonable adjustment not to dismiss the disabled employee (*Aylott v Stockton-upon-Tees Borough Council*<sup>27</sup>).

### **Will it be reasonable to make the adjustment?**

55. The test is entirely objective: it imports an objective standard which is independent from and not necessarily met by an employer showing that they followed a fair procedure or consulted appropriately or had a

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<sup>26</sup> [2010] IRLR 744 UKEAT

<sup>27</sup> [2010] EWCA Civ 910

genuine belief at the material time that the step would be, for example excessively expensive (*Tarback v Sainsburys Supermarket Ltd*<sup>28</sup>) and more recently *Royal Bank of Scotland v Ashton*<sup>29</sup>). It is assessed objectively with the benefit of hindsight at the time of the Tribunal hearing.

56. Factors in Determining Whether the Step is Reasonable include:
1. The extent to which taking the step would prevent the effect in relation to which the duty is imposed.
  2. The extent to which it is practicable for the employer to take the step.
  3. The financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities.
  4. The extent of the employer's financial and other resources.
  5. The availability to the employer of financial or other assistance with respect to taking the step.
  6. The nature of his activities and the size of his undertaking.
  7. Where the step would be taken in relation to a private household, the extent to which taking it would disrupt the household or disturb any person residing there.
57. The most important factor is the extent to which the adjustment would or might prevent the disadvantage created (*HM Prison Service v Johnson*<sup>30</sup>, *Noor v Foreign and Commonwealth Office*<sup>31</sup>).
58. The extent to which the claimant must show that the adjustment or accommodation sought might help remove the disadvantage has been subject to considerable litigation. The first cases required a court or tribunal to be satisfied that there was a "real prospect" the adjustment would help, in order for the adjustment to be a reasonable one to make (*Romec v Rudham*<sup>32</sup>). The threshold was then lowered when it was held that it is sufficient if the adjustment sought gave the Claimant a "chance" of getting better through a return to work (*Cumbria Probation Board v Collingwood*<sup>33</sup>). Most recently the case of *Leeds Teaching Hospital NHS Trust v Foster*<sup>34</sup> found that for an adjustment to be reasonable there is no need to show that there was a good prospect, or even a real prospect, of the adjustment removing a disabled

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<sup>28</sup> [2006] IRLR 664 UKEAT

<sup>29</sup> [2011] ICR 632 UKEAT

<sup>30</sup> [2007] IRLR 951 UKEAT

<sup>31</sup> [2011] ICR 695 UKEAT

<sup>32</sup> [2007] All ER (D) 206 (Jul) UKEAT

<sup>33</sup> [2008] IRLR All ER (D) 04 (Sep) UKEAT

<sup>34</sup> UKEAT/0552/10

employee's advantage, provided there was a prospect that would be sufficient.<sup>35</sup>

59. Since the purpose of the reasonable adjustment duty is, as a matter of policy, to enable employees to remain in employment or have access to employment, the duty does not extend to accessing ill-health retirement or other financial compensation for loss of employment (*Tameside Hospital NHS Trust v Mylott*<sup>36</sup>).
60. Examples of cases where it has been held there has been a breach of the reasonable adjustment duty include considering promotion for a manual worker unable through disability to perform manual work (*Archibald v Fife*<sup>37</sup>), providing a specially adapted computer for a blind candidate for examination arrangements (*Project Management Institute v Latif*<sup>38</sup>).

### **Burden of Proof**

61. Once the Claimant has established the reasonable adjustment duty arises in his or her case it is for the Respondent to establish that it has complied with the duty.
62. There has been considerable debate in the case law on the extent to which it is for the Claimant to identify the adjustments that would remove or reduce the disadvantage. It is the duty of the employer to provide the adjustments, and the purpose of the law was to place the task of considering what steps can reasonably be taken on the employer, but in practice it helps if the complainant knows what he or she thinks would be necessary for the employer to comply with the duty. It is extremely helpful if the nature of the adjustment can be identified at an early stage in the proceedings, even though it does not need to come from the Claimant (*Project Management Institute v Latif*<sup>39</sup>). The degree of specificity in identifying the adjustment will depend on the nature of the evidence and the issues in each case. Evidentially it is helpful for a Court of Tribunal to be aware, in order to focus the mind.

### **Sick Pay as Reasonable Adjustment**

63. Whilst the provision of sick pay is, in theory, the type of step that could form part of the reasonable adjustment duty, in practice it will rarely be considered reasonable. In *O'Hanlon v Commissioners for Revenue & Customs*<sup>40</sup> the Court of Appeal stressed that the provision of full sick pay during disability related absences, above and beyond sick pay provided to all staff, could act as a disincentive for the employee to

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<sup>36</sup> UKEAT 0399/10

<sup>37</sup> *supra*

<sup>38</sup> [2007] IRLR 5790

<sup>39</sup> *supra*

<sup>40</sup> [2007] EWCA Civ 283

return to work, contrary to the policy aim of the legislation and the importance of reintegrating the disabled into the work force. The courts have been more sympathetic to requests for unpaid time away from work for recovery and rehabilitation than to extending sick pay provision.

### **European Convention of Human Rights (ECHR) and European Court of Human Rights (ECtHR): relevant case law**

64. Article 14 ECHR provides that: “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
65. Although disability is not listed as a protected characteristic, recent ECtHR cases have held that physical and mental disability as well as HIV status is protected under ECHR Article 14 as “other status”, relying in part on CRPD. In *Glor v Switzerland*<sup>41</sup> diabetes Sven Glor was protected on account of his diabetes under Article 14 in the exercise of his private life under article 8. His diabetes deemed him medically unfit for military service yet not severe enough to relieve him from paying a military service exemption tax on his income for several years. ECtHR found there to have been a violation of convention rights and, using CRPD was critical of the Swiss government for failing to provide a reasonable accommodation to his individual circumstances.
66. The ECtHR built on the *Glor* decision in its 2010 judgment of *Alajos Kiss v Hungary*.<sup>42</sup> The applicant in this case had manic depression and for that reason had been placed under partial guardianship. The Hungarian Constitution contained an absolute voting ban for people put under guardianship. Consequently, the applicant could not vote in the 2006 parliamentary elections. The ECtHR held unanimously that such an absolute ban violated the right to free elections of Article 3 of Protocol 1 ECHR. In reaching its decision the court stated:

“The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law (...). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote.”

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<sup>41</sup> Application No. 13444/04, 30 April 2009

<sup>42</sup> Application no. 38832/06, 20 May 2010.

67. The CRPD was relied on to support the court's conclusion that the same level of scrutiny should be used to assess distinctions made on the ground of disability, as sex and race.
68. Most recently in *Kiyutin v Russia*,<sup>43</sup> discrimination on grounds of HIV-positive status has been held to be a violation of Articles 8 and 14. ECtHR upheld the complaint of Mr Kiyutin, an Uzbek national with HIV, relying in part on CRPD. The court held that Russia had been in violation of his rights in using his HIV-positive status to deny him Russian residency for which he would otherwise have qualified. His application for a residency permit would have been successful since he is married to a Russian national with whom he was a child but according to Russia's Law on the Legal Status of Foreign Nationals he was required to demonstrate he was HIV negative. The Court was willing to take account of the stigma surrounding HIV status in reaching its conclusion

“Ignorance about how the disease spreads has bred prejudices which, in turn, has stigmatised or marginalised those who carry the virus. As the information on ways of transmission accumulated, HIV infection has been traced back to behaviours – such as same-sex intercourse, drug injection, prostitution or promiscuity – that were already stigmatised in many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny.”<sup>44</sup>

## Conclusion

69. Disability discrimination has come a long way in a short space of time. The introduction of a powerful reasonable accommodation duty to provide substantial rights for persons with disabilities in Directive 2000/78, together with the focus provided by CRPD and the recent ECtHR jurisprudence has strengthened protection from disability discrimination.
70. It is extraordinary to consider how far we have progressed in less than 10 years, so that disability rights are now accepted protected and entrenched across the EU.

Mary Stacey,  
Employment Judge,  
London, 28 May 2012

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<sup>43</sup> Application 2700/10, 10 March 2011

<sup>44</sup> Paragraph 64