

The CJEU's Chacón Judgment and Reasonable Accommodation / The New Anti-Discrimination Law and Disability

Dr Babette Tondorf, lawyer
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- **Outline**

Disability: medical model / social model

Disability in the context of CJEU decisions
(Chacon, Coleman...)

The concept of reasonable accommodation

Objectives of the concept?

Implementation problems?

Summary

- **Disability**
- **CJEU: Chacón judgment (C-13/05)**
 - Spanish case
 - Person dismissed because of long period of sickness
 - Spanish court: discrimination because of long period of sickness could amount to discrimination on grounds of disability
 - CJEU: need to distinguish between sickness and disability
Discrimination grounds in Directive 2000/78/EC are comprehensive; they do not include sickness
 - Disability requires restriction of participation in professional life
 - Criticism: interpretation of Directive too narrow, guided by medical disability model, instead of social disability model

– CJEU: Coleman case (C-303/06)

- English dismissal protection case. Ms Coleman alleged that she had been treated less favourably than other employees and that her dismissal had been unjustified because she had a disabled child.
- Legal issue: Does the Anti-Discrimination Directive protect only persons who are themselves disabled or does it also apply to employees who suffer less favourable treatment because of disabled family members (e.g. children)?
- CJEU: Directive does not protect specific groups of persons, but is aimed at the type of less favourable treatment – i.e. Directive also provides comprehensive protection for family members if they suffer less favourable treatment because of the disability of their children, etc.

- Directive 2000/78/EC

Art. 5 **Reasonable accommodation:**

“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.”

• UN Convention on the Rights of Persons with Disabilities

- “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** (Art 2)
- General duty for States Parties (Art 5), Liberty (Art 14), Education (Art 24), Work and employment (Art 27)
- Ensure / Enable

- **Reasonable accommodation**

- For persons with disability, a key term in Article 5 of Directive 2000/78/EC: equal treatment in employment and occupation
- Reasonable accommodation
- Expression of a substantial equality concept (instead of only formal equal treatment)
Link to concept of indirect discrimination



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- Reasonable accommodation
 - Objective: to guarantee the application of the principle of equal treatment for individuals
 - Means: reasonable accommodation
 - → appropriate measures / needed in a particular case
 - Providing access / improving participation
 - Limit: No disproportionate burden on employer

- Recitals 16, 17, 20, 21 relating to reasonable accommodation
- 17: Limit to the criterion “reasonable accommodation”
 - The disabled person needs to be capable of performing the essential functions of the post concerned; in the absence of such capabilities, the Directive does not require any action (recruitment, training, promotion...)
- 20: Appropriate measures
 - Effective and practical measures
 - to adapt workplace to disability
 - e.g. adapting premises and equipment
 - changing patterns of working time, the distribution of tasks or the provision of training



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Status of the obligation to provide Reasonable accommodation

Article 2(2) (b) (ii): Concept of discrimination

- Reference
- Direct compensation for disadvantages suffered by disabled persons

Article 5: Reasonable accommodation for disabled persons

- Particularities of discrimination in relation to disabled persons
- Measures designed to eliminate barriers
- Aim is not to (positively) promote disabled persons in general, but to prevent indirect / direct discrimination in relation to individuals

Article 7(2): Positive action

- Right of Member States to adopt additional provisions aimed at promoting disabled persons
- Relating to a group / not individuals
- No obligation imposed by Directive

Limit to the requirement to adopt measures designed to prevent discrimination:

- Disproportionate burden
 - Economic category (not psychological)
- Elements (recital 21)
 - Financial and other costs entailed
 - Financial resources
 - Total turnover
 - Size of company
 - Possibility of obtaining public funding



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Definition of “disproportionate burden”:

- Article 5 sentence 3: negative definition
 - Not disproportionate if remedied by measures in disability policy of Member State
- Use of such measures mandatory?
 - → No, but then no disproportionate burden (who decides what is disproportionate?)

Summary of provisions in Directive 2000/78/EC

- Starting point: Prevention of discrimination against disabled persons (also) requires measures designed to eliminate barriers
- Problem: Initiative? Information obligation? Investigation obligation?
 - Employee / employer
- Time period?
 - Permanent? Meets purpose of legislation most effectively
 - However: no “particular case”
 - → At the latest when recruited / applying for a job
 - Differentiation between generally “appropriate measures” / specific “necessary steps”
- Refusal to take appropriate and necessary measures may be justified
- Burden of proof? Can need for reasonable accommodation be established?

Implementation in Germany

- Reference to German Equal Treatment Act (AGG), specific provisions for disabled persons also in social security code (SGB IX),
- SGB IX Equal Treatment: limited to seriously disabled persons (and persons treated as such: as of 30 degrees of disability)
- **81(3) SGB:** (3) Employers shall take appropriate measures to ensure that at least the mandatory minimum number of seriously disabled persons will find employment in their establishments and offices, if possible permanent employment suitable for their disability. Paragraph 4 sentences 2 and 3 apply *mutatis mutandis*.

- Another key point of the CJEU's judgment in case C-13/05:
- “Reasonable accommodation” and dismissal
 - Dismissing persons with disability = discrimination. Only admissible if a disabled person is not competent, capable and available to perform the essential functions of his post.
 - Always required: provide reasonable accommodation that will enable a disabled person to participate in professional life

- Reasonable accommodation and dismissal on grounds of disability:
- If employer fails to provide reasonable accommodation, long period of sickness becomes disability → participation in professional life is hindered.
- Chacón case:
- Court should have examined whether there was reasonable accommodation and whether such accommodation had been provided?

German jurisprudence on reasonable accommodation

- Adapting workplace to disability:
e.g. cargo lifter, special machinery, wheelchair-compatible workbench
- Employer is obliged to identify needs in a particular case (employer often does not know what is necessary / appropriate)
- Procedural rules in 84 SGB IX (necessary measures), 81(3) SGB IX (appropriate measures)
- Wide-ranging obligation to change and adapt organisation of work (breaks, part-time work, low-stress)

- “Reasonableness” of accommodation
- Not best conceivable adaptation
- Principle: If there are several options, employer has right to choose
- But in German law:
Right of self-determination for disabled persons under Section 9 SGB IX
- Example: Work assistant for blind computer specialist. Sign language interpreter for deaf lawyer.

- Case law in other countries
- Ireland: Reasonable accommodation required since 1998; rules have been amended to incorporate requirements under 2000/78/EC
- Harrington v. East Coast Area Health Board
 - Wheelchair user
 - Pre-employment interview was to be held in inaccessible building
 - Equality officer: Failure to provide reasonable accommodation for claimant

- **A computer component company v. a worker**
 - Employee with epilepsy unable to operate heavy machinery
 - Court decided: Operation of heavy machinery is minor part of production system; arrangements need to be made to ensure that claimant does not have to operate such machinery

- **An employee v. a local authority**
 - Employee with brain damage, recently employed as a messenger boy, had problems with his job because he took a long time to organise his work
 - Employment tribunal: Reasonable accommodation is a job coach for up to 3 months (longer period would constitute disproportionate burden for employer)

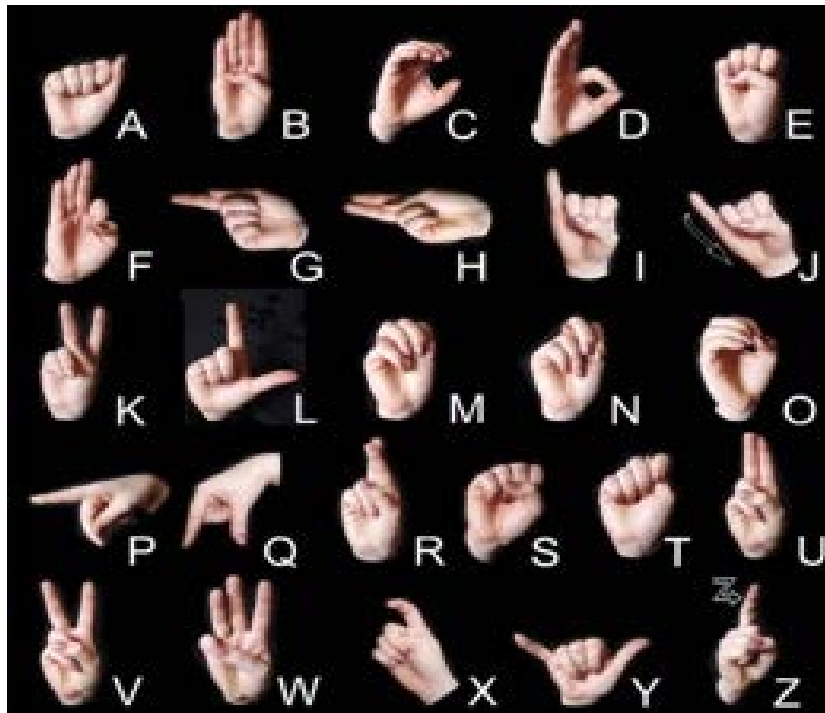
- United Kingdom
- Disabled Rights Commission (DRC):
 - Employee with learning difficulties employed by restaurant. Was unable to operate the till. Reasonable accommodation: He does not have to operate the till. Subsequently, this proved to be too much of a burden for the employer. He was forced to do till work, made errors and was dismissed. → Confidential settlement.

- Deaf sign language tutor was to be dismissed because of alleged breaches of his contract of employment.
- In disciplinary proceedings, employer failed to provide an independent BSL (British Sign Language) interpreter
 - There were no clear written transcripts of the proceedings, so that the deaf employee was unable to defend himself adequately against the employer's accusations. → Settled before court hearing.

- European Schools Complaints Board
Katsioulis 09/14
- European Schools: separate international legal entity
- Only a Complaints Board decision / no possibility to appeal / school has legal possibility to declare itself incompetent for a child
- Case: Autistic child in school; parents wanted a specific method of treatment for the child (ABA); doctors had recommended this method; school favoured only an assistant; decided on this basis after three months and declared itself incompetent.
- Complaints Board had to decide: what is reasonable accommodation? Is it what the child and the parents think? Or is it what the school thinks?
- Complaints Board: experts of the school can decide what reasonable accommodation is.

Reasonable accommodation when “applying for a job”

- Generally: new situation / instead of hiding disability, it should be proactively communicated
- Knowledge of disability / requirements
- Objective: adapt workplace to disability



- Information on possible reasonable accommodation

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- Sign language interpreter
- Meeting room accessible without barriers
- Possibility to bring along a guide dog
- Availability of equipment (computers) enabling persons without arms / blind persons to write
- Appropriate extension of time allowed for assessment test
- Explanations / employment contract in simple language

Summary

- Reasonable accommodation is a powerful instrument to overcome barriers
- Problem: late effect in recruitment process.
Example: job applications by deaf persons
- Part of the changing picture of disabled persons: from claims of specific individuals to needs of **specific individuals**
- For this reason: dynamic situation; needs to be further developed.



Failure to provide reasonable accommodation...

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Dr Babette Tondorf, lawyer
Kanzlei Menschen und Rechte
Borselstrasse 26
22765 Hamburg
+49-40-6000 947 00
+49-40-6000 947 47 (fax)
tondorf@menschenundrechte.de
www.menschenundrechte.de