

Judging Disability Discrimination in the EU

by
Professor Anna Lawson
School of Law and Centre for Disability Studies
University of Leeds

Outline of the Paper

1. The EU as a party to the UN Convention on the Rights of Persons with Disabilities
2. Personal scope - Who is Protected?
3. Reasonable Accommodation
4. Concluding thoughts

1. The EU as a Party to the UN Convention on the Rights of Persons with Disabilities

1.1 Historical Context

EU's participation in negotiations leading to the CRPD
EU's ratification of the CRPD (but not Optional Protocol)
Submission of EU's Initial State Report to Committee on Rights of Persons with Disabilities
Strategic driver of EU Disability Strategy 2010-2020

1.2 Implications for EU and Domestic Law

Mixed agreement - relevance of competences.
Duty of 'sincere co-operation'
Interpretive guide to EU law

HK Danmark v Dansk Arbejdsgiverforening, 2013

"30 ... the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order

...

31 Moreover, ... Directive 2000/78 is one of the European Union acts which refer to matters governed by the UN Convention.

32 It follows that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention."

2. Personal scope – Who is Protected?

2.1 Meaning of ‘Disability’ in the CRPD

Treaty Provisions

Article 1 – Purpose (not definitions) provision

“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.”

Preamble, para (e)

“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”

Additional Guidance from Committee on the Rights of Persons with Disabilities

Concluding observations

<http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>

Paradigm Shift?

Shift towards a ‘social model’ approach to disability

-focusing on socially created causes of disadvantage and exclusion.

Shift away from more traditional ‘individual’ or ‘medical’ model of disability

-focusing on biological causes of disadvantage and exclusion

Social model does not (generally) involve denial of the existence of an ‘impairment’ or biological difference, but stresses that people with impairments are disabled by exclusionary social factors which include discrimination.

2.2 Meaning of ‘Disability’ in EU Non-Discrimination Law

Legislation

No definition in the treaties

No definition in the Charter of Fundamental Rights

No definition in transport legislation, but the broader term “‘disabled person’ or ‘person with reduced mobility’” is defined (eg in Council Regulation No 1371/2007, Art 3(15))

No definition in Directive 2000/78/EC, but relevant CJEU caselaw

Chacón Navas v Eurest Colectividades SA 2006

“... a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” if “, “it [is] probable that it will last for a long time” (para 43)

HK Danmark v Dansk Arbejdsgiverforening, 2013

“... a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one” (para 47)

Z v A Government Department and the Board of Management of a Community School, 2014

“Having regard to the concept of ‘disability’... it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman’s inability to bear her own children may be a source of great suffering for her” (para 79)

but

“... the concept of ‘disability’ within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers.” (para 80)

FOA, acting on behalf of Kaltoft v Billund Kommune – pending

Is obesity a disability for purposes of Directive 2000/78/EC?

See UK approach

-*Walker v Sita Information Networking Computing* 2013 (Employment Appeal Tribunal)

2.3 Discrimination by Association and Perception

Based on Association - *Coleman v Attridge Law and Steve Law*

Based on perception – *Coleman* reasoning?

Commission’s views (COM(2014) 2 fina.ml)

2.4 Suggestions for Judges

- Too heavy a focus on ‘disability’ will put the alleged victim on trial instead of the alleged discriminator.
- Although ‘impairment’ is relevant, the need to show it has a substantial impact can undermine the purpose of discrimination legislation.

- Restrictions in the material scope of discrimination legislation (eg to employment) should not be relevant to the meaning of disability.
- Discrimination on the basis of perception may provide a creative way around restrictive legislative definitions of disability.

3. Reasonable Accommodation

3.1 Reasonable Accommodation in the CRPD

Meaning – Article 2

“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”

Removal of disadvantage
 Appropriate to individual
 Not imposing disproportionate or undue burden

Part of Discrimination – Article 2

“Discrimination on the basis of disability’ ... includes all forms of discrimination, including denial of reasonable accommodation”

Within Prohibition of Discrimination – Article 5

- “(2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- (3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”

Additional Guidance from the Committee on the Rights of Persons with Disabilities

HM v Sweden, 2012
 Concluding observations

3.2 Reasonable Accommodation in EU NON-Discrimination Law

Explicit Requirement – Directive 2000/78/EC

“5. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.”

Meaning – Directive 2000/78/EC

“5. ... 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.”

Appropriate measures – recital 20

Disproportionate burden – recital 21

HK Danmark v Dansk Arbejdsgiverforening, 2013

Transposition Progress and Challenges

European Commission v Italian Republic, 2013

Practical (and Judicial) Implementation

“The main challenge now is to increase awareness of the already existing protection and to ensure better practical implementation and application of the Directives.” (COM(2014) 2 final)

Judges as arbitrators of ‘reasonableness’, ‘appropriateness’ and ‘disproportionate’ burdens

3.3 Suggestions for Judges

Normative shift

Equality requires action to remove barriers

Reasonable accommodations are non-discrimination measures,

- not affirmative action
- not ‘special’ treatment or indulgence
- not welfare or other handouts

Purpose/Function

- Reasonable accommodations are required in order to prevent discrimination in accessing employment opportunities (and other services/entitlements)
- Reasonable accommodations ensure that a disabled person can access employment opportunities (and other services/entitlements) on an equal basis with others.
- On occasion, the appropriate reasonable accommodation may involve conferring some sort of advantage on a particular disabled person because the disadvantage could otherwise not be effectively removed (see eg *Archibold v Fife* (UK))

Assessment of Appropriateness of Adjustments Require Focus on Individual Person and Particular Case

- Not simply a medical question that can be delegated to ‘professionals’
- Individual’s expertise and preferences (see eg *PMI v Latif* (UK))
- Individual’s circumstances, including ones related to other discrimination grounds (see eg Opinion 2006-256 of the Dutch Equal Treatment Commission, (Netherlands))
- Importance of dialogue and consultation
- Appropriate measures may include ones primarily targeted at others (eg training of colleagues)

Assessments of Disproportionality of Burdens Require Focus on Particular Duty-Bearer and Particular Case

- Same accommodation will impose different burden on different duty-bearers
- Includes potential benefits as well as costs incurred
- Costs may be reduced by subsidies and grants
- Requirement on duty-bearers to think creatively and proactively about solutions and engage in dialogue

4. Concluding Thoughts

- Importance of the judge
- *Nyusti and Takács v Hungary*, 2013

References

Cases

CJEU Cases

- Case C-13/05 *Chacón Navas v Eurest Colectividades SA* (Case C-13/05) [2006] ECR I-6467.
- Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, [2008] ECR I-5603.
- Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, judgment of 11 April 2013.
- Case C-312/11 *European Commission v Italian Republic* [2013], Judgment of the Court (Fourth Chamber) of 4 July 2013.
- Case C 363/12 *Z v A Government Department and the Board of Management of a Community School*, Judgment of the Court (Grand Chamber), 18 March 2014.
- Case C-354/13 *FOA, acting on behalf of Kaltoft v Billund Kommune* (pending).

Other Cases

- Opinion 2006-256 of the Dutch Equal Treatment Commission, (Netherlands)
- *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 197 (United Kingdom)
- *Project Management Institute v Latif* [2007] IRLR 579 ((United Kingdom)
- [2013] Equality Law Reports 476 (United Kingdom)
- *HM v Sweden*, Communication No 3/2011, Views adopted 16-27 April 2012 (UN Committee on the Rights of Persons with Disabilities)
- *Nyusti and Takács v Hungary*, Communication 1/2010 21 June 2013. Views adopted 15-19 April 2013. (UN Committee on the Rights of Persons with Disabilities). Available at http://www.ohchr.org/Documents/HRBodies/CRPD/Jurisprudence/CRPD-C-9-D-1-2010_en.doc.

Bibliography

- European Commission, Report from the Commission to the European Parliament and the Council: Joint Report on the Application of Directive 2000/43/EC of [the] ... Racial Equality Directive and of ... [the] Employment Equality Directive' COM(2014) 2 final.
- A. Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *Industrial Law Journal* 40.4: 359-383.
- VE. Perju, Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States, *Cornell International Law Journal* 44 (2011), 101.
- S.J. Schwab and S.L. Willborn, 'Reasonable Accommodation of Workplace Disabilities' (2003) 44 *William and Mary Law Review* 1197.
- M. Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, Intersentia (2011)
- L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union: Analysis of disability discrimination law within and beyond the employment field*, (European Network of Legal Experts in the Non-discrimination Field, 2009) <http://www.ec.europa.eu/social/BlobServlet?docId=6154&langId=en>.
- L Waddington, "Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006" - 499.