



Judging Disability Discrimination in the EU

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Outline of the Paper

- The EU as a party to the UN Convention on the Rights of Persons with Disabilities
- Personal scope - Who is Protected?
- Reasonable Accommodation
- Concluding Thoughts

The EU as a party to the UN Convention on the Rights of Persons with Disabilities

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 the Committee on the Rights of Persons with Disabilities
- Strategic driver of EU Disability Strategy 2010-2020

The EU as a party to the UN Convention on the Rights of Persons with Disabilities

Implications for EU and Domestic Law

- Mixed agreement - relevance of competences
- Duty of 'sincere co-operation'
- Interpretative guide to EU law
- *HK Danmark v Dansk Arbejdsgiverforening*, 2013
para 30 - 32

Personal scope – Who is Protected?

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.”

Personal scope – Who is Protected?

Meaning of ‘Disability’ in the CRPD

Treaty Provisions

Preamble, para (e)

- an evolving concept
- the interaction between persons with impairments and attitudinal and environmental barriers

Personal scope – Who is Protected?

Meaning of ‘Disability’ in the CRPD

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

Concluding observations

- social model perspective



<http://www.youtube.com/watch?v=9s3NZaLhcc4>

Personal scope – Who is Protected?

Meaning of ‘Disability’ in the CRPD

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

Personal scope – Who is Protected?

Meaning of ‘Disability’ in the CRPD

Paradigm Shift?

The 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.

Personal scope – Who is Protected?

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

Personal scope – Who is Protected?

Meaning of ‘Disability’ in EU Non-Discrimination Law

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)

Personal scope – Who is Protected?

Meaning of ‘Disability’ in EU Non-Discrimination Law

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)

Personal scope – Who is Protected?

Meaning of ‘Disability’ in EU Non-Discrimination Law

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

“... the concept of ‘disability’ within the meaning of Directive 2000/78 pre-supposes 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)

Personal scope – Who is Protected?

Meaning of ‘Disability’ in EU Non-Discrimination Law

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

Obesity ?

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

Personal scope – Who is Protected?

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))

Personal scope – Who is Protected?

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.

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

Reasonable Accommodation

... in the CRPD

Part of Discrimination – Article 2

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

Reasonable Accommodation

... in the CRPD

Within Prohibition of Discrimination – Article 5

5(2) - Prohibition of all discrimination on the basis of disability

5(3) “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”

Reasonable Accommodation

... in the CRPD

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

- *HM v Sweden, 2012*
- General Comment No 2 (accessibility)
- Concluding observations

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.”

Reasonable Accommodation

... in EU Non-Discrimination Law

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.”

Reasonable Accommodation

... in EU Non-Discrimination Law

Transposition Progress and Challenges

European Commission v Italian Republic, 2013

Commission's assessment, 2014

Reasonable Accommodation

... in EU Non-Discrimination Law

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

Reasonable Accommodation

Suggestions for Judges

Normative shift

- ✓ Equality requires action to remove barriers / disadvantages
- ✓ Reasonable accommodations are non-discrimination measures
 - **not** affirmative action
 - **not** 'special' treatment or indulgence
 - **not** welfare or other handouts

Reasonable Accommodation

Suggestions for Judges

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.

Reasonable Accommodation

Suggestions for Judges

Purpose / Function

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))

Reasonable Accommodation

Suggestions for Judges

Assessment of Appropriateness of Adjustments
Requires 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))

Reasonable Accommodation

Suggestions for Judges

Assessment of Appropriateness of Adjustments Requires Focus on *Individual Person* and *Particular Case*

- 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)

Reasonable Accommodation

Suggestions for Judges

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

Concluding Thoughts

Importance of the judge

Nyusti and Takács v Hungary, 2013