Disability and reasonable accommodation: EU law and UNCRPD

ERA Barcelona, 5 May 2016
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Introduction

- Introduction
- Disability as a human rights issue: role of UNCRPD
- Disability and employment
- Concept of disability
- Reasonable accommodation
Netherlands Institute for Human Rights

- Human rights and equal treatment

- Human Rights
- Equal Treatment
- Advice, research, promote
- CRPD monitoring body
- Tribunal-type judgment
- 2015: 149 judgments
- Disability: 23%

Disability as a human rights issue

- Concept of disability evolved over time: from medical model to social model.
- Current paradigm: society puts up barriers, preventing persons with disabilities to participate
- Found its way in UN Convention on the rights of persons with disabilities (CRPD):
  - Article 1 Concept of disability
  - Article 5 Non-discrimination
  - Article 12 Equality before the law
  - Article 27 Right to employment
Disability as a human rights issue

Case law European Court of Human Rights:
- Çam v. Turkey, 23 February 2016 (appl. no. 51500/08)
  - Student was refused to enrol in musical academy, because she was blind.
  - Court: ‘discrimination on grounds of disability also extends to the refusal to make reasonable accommodation to facilitate access by persons with disabilities to education.’
  - UNCRPD used to clarify article 14 ECHR

European Union: disability and employment

Concluding observations CRPD Committee on EU:
- Work and employment (art. 27):
  - Concerned about the high unemployment for persons with disabilities.
- Recommendations:
  - take effective actions to measure the employment of persons with disabilities
  - increase employment rate of PWD
  - provide training on reasonable accommodation and accessibility in employment.
European Union law on disability

- Article 19 TFEU: mandate to legislate
- Framework Directive 2000/78
  - Article 2: prohibition of direct and indirect discrimination in employment. Obligation to eliminate disadvantages.
  - Article 5: duty to provide reasonable accommodation to persons with disabilities.

European Union law on disability

- Charter of Fundamental Rights
  - Article 21: prohibition of discrimination based on (a.o.) disability.
  - Article 26: right of persons with disabilities to independence, integration and participation.
Concept of disability

- Disability as an evolving concept

- CJEU shapes ‘disability’:
  - Chacon Navas (2006)
  - Kaltoft (2014)
  - Coleman (2008)
  - Z (2014)

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Concept of disability

- Chacon Navas (C-13/05):
  1. Court defined disability as:
     ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.’
  2. Disability is different from sickness: a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down by Directive 2000/78.
Concept of disability

- *Kaltoft (C-354/13)*:
  - Disability: *a limitation which results in particular from long-term 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.*
  - Includes not only the *impossibility* of exercising a professional activity, but also to a *hindrance* to the exercise of such an activity.
  - Similar: *HK Danmark/Ring and Skouboe Werge (C-335/11 and C-337/11)*

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Concept of disability

- *Coleman v Attridge Law (C-303/06)*
  - Newborn son with disabilities; made redundant because as the primary carer she needed to spend time with the child.
  - CJEU: ‘discrimination by association’. Directive aims to prevent all forms of discrimination on grounds of disability, not just against disabled persons.
Concept of disability

- Z. (C-363/12)
- Female employee, had a child through surrogate pregnancy - she was unable to bear a foetus herself. Applied for maternity leave, which was refused. Discrimination on grounds of sex or disability?
- CJEU: No discrimination. ‘The health state of Mrs. Z was not of the nature that limited her from full and effective participation in professional life on an equal basis with other workers’.

Reasonable Accommodation

- Key element of Directive 2000/78
- Aims at substantive equality
- CRPD: refusal to provide RA is discrimination;
  - EU Directive: refusal to provide RA is not defined as discrimination. Depends on national legislation.
Reasonable accommodation

EU Directive vs. CRPD:

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<tr>
<th>Directive 2000/78 Art. 5</th>
<th>CRPD Art. 2</th>
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<td>... 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.</td>
<td>... 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.</td>
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- **Appropriate measures?**
  - **Recital 17:** Directive does not require the recruitment, promotion, maintenance of an individual who is not competent, capable and available to perform the essential functions of the post.
  - **Recital 20:** effective and practical measures to adapt the workplace to the disability, concerning premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
Reasonable accommodation

- Disproportionate burden?
  - Recital 21: look at financial and other costs, scale and financial resources of the organisation and the possibility of obtaining public funding or any other assistance.
  - Article 5 Directive: 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.

Case law in NL:
- Student at nursing school with dyslexia - was refused alternative type of testing. Discrimination, because school did not investigate alternative tests (2014-169).
- Employee with visual impairment was refused 23-inch laptop. Discrimination (2014-138).
Thank you!

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