

Discrimination on the grounds of Disability

Reasonable Accommodation, CJEU-Cases and CRPD

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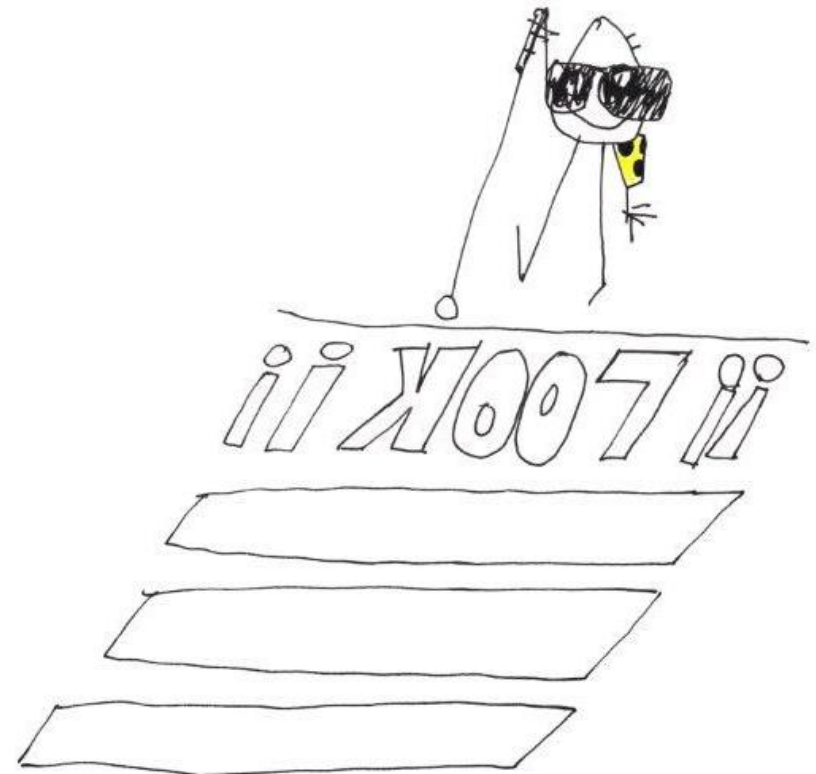
ERA Seminar Applying EU Anti-Discrimination Law, September 2014

- New view on disability: from medical model to human rights model
- CRPD and EC – overview
- Case Law CJEU on disability
- Reasonable Accommodation – the idea

- WHO
 - Disability: any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered **normal for a human being**. WHO Classification of Impairments, Disabilities and Handicaps, 1980

Disability Human Rights Approach

- CRPD Article 1: 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 lit e: disability is an evolving concept



- EU is party of the CRPD since 2011
- All 28 member states have signed CRPD, 25 have ratified it (not: Ireland, Finland, Netherlands)
- So CRPD is binding on institutions and states
- June 2014: European Commission issues
Report on implementation of CRPD by EU
SWD(2014) 182 final

- Employment Rate EU 2011 (20 to 64 years)
 - Disability: 46.9 %
 - Without Disability: 72.0 %
- People at risk of poverty or social exclusion
 - Disability: 36.7 %
 - Without Disability: 21.7 %

- Chacón Navas, C-13/05
 - Person dismissed because of longer period of sickness
 - Spanish Court: Discrimination because of long period of sickness could amount to discrimination on grounds of disability
 - CJEU: **sickness is not disability**
 - **2000/78/EC doesn't forbid discrimination because of sickness**
 - ➔ „disability“ requires person concerned to be hindered to participate in professional life

- Coleman C-303/06
 - English Case. Coleman alleges that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.
 - Does Directive protect only disabled themselves or does it apply also to an employee **who is treated less favourably by reason of the disability of his child?**
 - Court: Directive applies not to a particular category of person but by reference to the nature of the discrimination. Coleman could be discriminated against because of disability (of her child).

CJEU Cases Disability Ring and Skouboe Werge

- Ring and Skouboe Werge C-335/11 and 337/11
(also known as HK Danmark)
 - View on Disability has changed since Chacón Navas
 - Decision is based on new definition of disability (CRPD)
 - A curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability

- Z C-363/12 decided by Grand Chambre
March 18, 2014

- Z has a genetic child with her husband, born by a surrogate mother (Z has no uterus)
- In Ireland no paid maternal leave, no paid adoptive leave (but: nearly nine month paid because of sick leaf and school closures)
- ➔ discrimination because of sex or disability?

Inability to bear a child disability within 2000/78

- Reasoning CJEU
 - “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.”
 - “The inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment.”
 - Critique: Contradiction to Coleman?

CJEU Cases Disability

Obesity a form of Disability?

- Kaltoft C-354/13 (not yet decided, opinion by advocate general Jääskinen July 17, 2014)
 - Kaltoft (BMI 54) claimed job terminated because he is obese.
 - It is not prohibited to discriminate against on the grounds of obesity
 - Only severe, extreme or morbid obesity, will create limitations, such as problems in mobility, endurance and mood, that amount to a 'disability'
 - "In cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability."

- Long way from Chacón, HK Danmark to Kaltoft → CRPD plays an important role
- Difference disability and illness is not categorial, Illness or genetic constitution may result in disability
- Still there has to be a certain intensity of impairment (=> obesity)

- CRPD Art 2:
 - “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
- 2000/78/EC Art 5:
 - Reasonable accommodation means: “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.”

Reasonable Accommodation Without barriers

- Reasonable Accommodation:
 - Individualized
 - Concrete circumstances
 - No absolute duty
 - Reasonable (no optimum)
 - Not disproportionate/
not undue
- Without barriers:
 - For a specific group
 - (Absolute) duty – no test if „reasonable“ or „disproportionate“

- For the disabled: reasonable accommodation
= a key term of 2000/78/EG
- Substantial equality concept (vs. formal equality)
- No positive action in favor of disabled as a group, but breaking down stereotypical prejudices that have limited opportunities for disabled

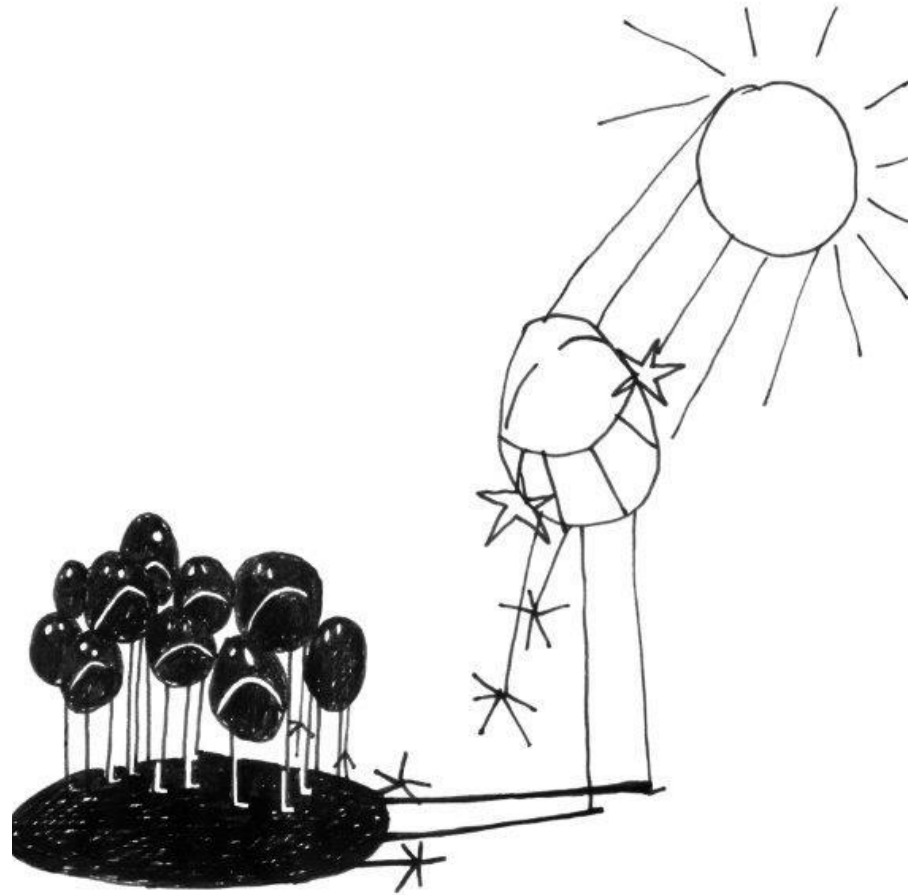
- Recital 17: Limits of Reasonable Accommodation
 - Individual must be competent, capable and available to perform essential functions of the post concerned
- Recital 20: Appropriate Measures
 - Effective and practical measures
 - Adapt workplace to disability
 - For example: adapt premises and equipment,
 - Change patterns of working time, distribution of
 - Tasks or the provisions of training

- Recital 21:
 - To determine disproportionate burden : Take in account financial and other costs
 - Scale and financial resources of organisation or enterprise
 - Possibility of obtaining public funding or other public assistance

- Article 5 (3): no disproportionate burden, if:
 - Sufficiently remedied by measures within framework of disability policy of member state
 - ➔ Important role of national legislation
 - ➔ Different level of reasonable accommodation for people with disabilities in different member states?
 - ➔ Role of CRPD?
- Enterprise obliged to apply for remedies?
 - ➔ No, but if not: no disproportionate burden

Reasonable Accommodation Resumé

- CRPD
 - No reasonable accommodation = discrimination



- Germany:
 - Reasonable Accommodation not part of the Antidiscrimination-Law „AGG“
 - SGB IX: Disability Law (rehabilitation, participation, workplace)
 - Law only for severely disabled : § 81 (4) SGB IX:
 - Disabled employee → accessible workspace, appropriate organisation of work, necessary resources

- „Flachschleifer“-Fall (surface grinding)
 - Employee needs to lift work pieces 30 kg and more
 - After operation couldn't lift more than 10 Kg
 - Employer dismissed him
 - Federal Labour Court:
Appropriate Accommodation ☐
change of work organisation,
special machine for work
pieces of 10 kg. Dismissal
unlawful
- Other Cases by German courts
- Reasonable Accommodation
≠ Best imaginable
Accommodation
- Different possibilities to
accommodate: Employer has
right to decide
- But: Right of self-determination
§ 9 SGB IX
- Example: Working Assistant
for blind computer specialist

- Ireland : Requirement to provide reasonable accommodation since 1998, provision has been amended to incorporate requirements of 2000/78/EC
 - Harrington v. East Coast Area Health Board
 - Wheelchair user
 - Pre employment interview was held in inaccessible venue
 - Equality Officer: Failure to provide reasonable accommodation for claimant

- Computer component company v. A Worker

- Employee with epilepsy could not operate heavy machinerie
- Court decided: Operations of heavy machinery is minor part of production system, arrangements need to take place to ensure A doesn't need to operate these machinerie

- An Employee v. A Local Authority

- Employee had brain damage, newly employed als clerk, problems at workplace because he needed longer to become accustomed to new work organisation
- Tribunal: Reasonable accomodation Job coach for up to 3 month

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- Feist v State of Louisiana
 - Feist: assistant attorney general, had osteoarthritis, no free on-site-parking
 - LDOJ: reasonable accommodation only if it facilitates job performance
- Fifth Circuit of Appeals:
 - employers may be obligated to provide accommodations unrelated to the “essential functions” of the job if necessary to provide an employee with equal access to or benefits and privileges of employment.

Reasonable Accommodation in cases of interviews

- New situation (compared to 1990ies): Not necessary to hide disability
- Knowledge of disability is prerequisite for reasonable accommodation
- Knowledge of possibilities to accommodate for disabled and for employers most important.

Reasonable Accommodations Examples

- Sign Language Interpreter
- Premises without barriers (wheelchairs, but also blind, learning disabled)
- Possibility to have a guide dog
- Possibilities to write (on computer) for blind or people without arms
- Possibility to give written answers for stammerer
- Appropriate more time for disabled in case of assessment test
- Documents in easy language

- Disability: Distinction Disability/Sickness
- Focus not only on Disabled, but Discrimination on grounds of Disability
- Reasonable Accommodation: powerful instrument to overcome barriers / chance to participation
- Problem: Reasonable Accommodation might come late (deaf people in application process)
- Part of a changing image on Disability
- Reasonable Accommodation needs to be individualized / supports individual needs
- Dynamic concept /Needs development

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