

# **EU Disability Law and the UN Convention on Rights of Persons with Disabilities**

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### **Non-discrimination, direct and indirect discrimination, reasonable accommodation and the burden of proof in disability proceedings in EU law: definition, scope, interpretation and the impact of the UNCRPD**

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#### **Introduction:**

1. It is estimated that approximately 10% of the world's population have a disability. The participation rates of such individuals in the workforce are very low. Therefore in practical terms as lawyers, there is much scope for litigation for the very real and detrimental barriers faced by persons with disabilities in the context of employment and occupation.
2. It is axiomatic to state that individuals with disabilities are at a significant disadvantage when it comes to employment and participation in the labour market. In the past, persons with disabilities have faced stigma, prejudice and exclusion in the labour market. This is evident from participation rates of individuals with disabilities in employment in Ireland which are unjustifiably low.<sup>1</sup>
3. Employers often concentrate on the disability of the individual, ignoring the individual's abilities. It is still the case today that many employers perceive individuals with disabilities as less capable of participating in the labour market and this attitudinal bias has been difficult to circumvent. Often, there is no rational basis

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<sup>1</sup> In 2004 , only 37% of persons with disabilities were in employment. Central Statistics Office, *Quarterly National Household Survey, Special Module on Disability*, (CSO, 2004). The 2011 census figures show that the labour market participation rate amongst the general public in 2011 was 61.9% whereas only 112,502 persons with a disability out of a total of 595,335 persons with a disability in Ireland were employed. These figures do not omit persons aged under 15 so the precise figures are not yet know. However, these figures provide a very strong basis for showing that the participation rates of persons with disabilities in the Irish labour market are significantly lower than non-disabled persons. See Central Statistics Office, *This is Ireland: Highlights from Census 2011, Part 1*, (Dublin: Stationary Office, 2012) at p. 10 and 43. See also B. Gannon and B. Nolan, 'Disability and Social Inclusion in Ireland' in L. Bond, F. McGinnity and H. Russell, *Making Equality Count: Irish and International Research Measuring Equality and Diversity*, (Dublin: Liffey Press, 2010), pp. 158-174.

for this generalised assumption, however, it still operates on the minds of employers hereby causing another barrier to disabled individuals and their quest to become part of society. Quinn acknowledges the role of unexamined presuppositions in particular in the employment sphere and therefore argues that:

*“one of the main tasks of non-discrimination law in the context of disability is to separate fact from fiction-to place a spotlight on the person behind the disability and, in the employment context, to get employers to focus much more rationally on what the individual has to offer as distinct from what the proxies suggest he has to offer.”<sup>2</sup>*

4. This paper will set the scene for the development of disability discrimination legislation in the EU and will consider the key legislative provisions and concepts involved. Case law of relevance will also be discussed and the import of the UNCRPD will be highlighted.

#### **Background to the Framework Directive and overview:**

5. In spite of a lofty and aspirational recommendation emanating from the Commission as far back as 1986 which asserted that disabled persons have the same right as all other workers to equal opportunity in training and employment, there was no basis for any legislation to be provided.<sup>3</sup> Prior to the inclusion of Article 13 in the EC Treaty (now Article 19 TFEU) by virtue of an amendment provided by the Treaty of Amsterdam, European law did not provide any legal protection against discrimination on grounds of disability. Prior to Article 19 and the Framework Directive, the measures in place at EU level to the employment of individuals with disabilities were based on the charity or welfare model which regarded individuals as dependent on assistance and care from the state.<sup>4</sup> This welfare approach regarded individuals with disabilities *‘not as subjects with legal rights, but as objects of welfare, health and charity programs.’<sup>5</sup>*

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<sup>2</sup> G. Quinn, ‘Disability Discrimination Law in the EU’ in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007) at p. 245.

<sup>3</sup> Council Recommendation 86/379/EEC.

<sup>4</sup> E.g. Council Recommendation 86/379/EEC (OJ [1986] L225/43) which included policies relating to sheltered employment, vocational rehabilitation and training and providing incentives to employers to assist with the special costs incurred when employing a disabled worker.

<sup>5</sup> G. Quinn and T. Degener, ‘A Survey of international, Comparative and Regional Disability Law Reform’ in M. Breslin and S. Yee (eds), *Disability Rights Law and Policy : International and national Perspectives* (Ardsley, New York: Transnational Publishers, 2002) at p. 5. See also G. Quinn, ‘Disability discrimination law

6. The introduction of Article 13 (now Article 19 TFEU) provided a legal basis for the introduction of measures designed to combat discrimination on a number of grounds, including that of disability as the competence of the EU in the area of equality was significantly broadened. Article 19 provides very clearly that the principle of equality is a fundamental principle of EU law.
7. In 2000 the European Council introduced the Framework Directive<sup>6</sup> for equality in employment and occupation covering the ground of inter alia disability.<sup>7</sup> It provides substantive legally enforceable rights for persons with disabilities in the area of employment and occupation and is designed to prohibit any discrimination, inter alia, on grounds of disability. It is based on the human rights based approach which focusses on the removal and prevention of barriers which denied equal access to persons with disabilities to the labour market and participation in the labour market.
8. The Directive pertains to the areas of access to employment including selection criteria, recruitment conditions, promotion, retraining, employment and working conditions, including dismissals and pay.<sup>8</sup> It also puts within its scope all areas of vocational training and membership of an organisation of workers. The areas of social security and social protection schemes are expressly beyond the coverage of the Directive. It provides for prohibits on direct discrimination, indirect discrimination, harassment, victimisation and instructions to discrimination. Significantly the Directive provides for the concept of reasonable accommodation which is solely applicable to the disability ground. There are a number of exceptions to the general principle of non-discrimination on grounds of disability. The Directive also provides

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in the European Union' in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007), at p. 236.

<sup>6</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education.

<sup>7</sup> For background to the development of the EC policy on anti discrimination on grounds of disability prior to the Framework Directive see C. Barnard, *EC Employment Law* 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2006) at pp. 391-393. For more detail for the implication of the Framework Directive from a disability point of view see R. Whittle, *The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective*, [2002] 27(3) E.L.R. 303, L. Waddington "Implementing the Disability Provisions of the Framework Employment Directive : Room for Exercising National Discretion" in A. Lawson and C. Gooding (ed), *Disability Rights in Europe: Essays in European Law*, (Oxford: Hart Publishing, 2005) pp 107-134 and A. Hendriks, 'Promoting Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: Essays in European Law*, (Oxford: Hart Publishing, 2005) pp 187-195.

<sup>8</sup> Article 3(1).

for elements of positive action specifically for the disability ground in particular “provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”<sup>9</sup>

**Definition of disability:**

9. In order to place the concept of disability within context, it is important to consider the two primary theories of disability which are common in the various jurisdictions which provide for anti-discrimination legislation. The dominant and most common theory of disability is the medical model. According to the medical/individual model of disability the problems disabled person face in their daily life are mainly caused by their impairment, either physical or mental, and these impairments inhibit the ability of such individuals to participate in the workforce. The role of employment in anti discrimination legislation under the medical model is to provide a list of the conditions or broad definitions of impairments which will be encompassed in a definition of disability and which therefore attract the protection of anti discrimination legislation.<sup>10</sup>
  
10. By contrast the second model of disability, the social model, locates the problems in societal and environmental barriers such as attitudes, policies and the physical environment outside of the individual disabled person which have operated to exclude or marginalize individuals with disabilities.<sup>11</sup> The social model of disability aims to integrate individuals with disabilities into the work force by recognizing that changes are required by society as opposed to the individual concerned, for example by setting out the rights of individuals with disabilities to participate in the labour market. The social model of disability underpins the UN Convention on the Rights of Persons with

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<sup>9</sup> Article 7(2).

<sup>10</sup> For more detail on the medical definition of disability see M. Oliver, *Understanding Disability : From Theory to Practice*, (Basingstoke: Macmillan, 1996), and C. Barnes and G. Mercer, *Disability*, (Cambridge: Polity Press, 2003).

<sup>11</sup> C. Barnes, ‘A Working Social Model? Disability Work and Disability Politics in the 21<sup>st</sup> Century’ (2000) 20 *Critical Social Policy* 441. See also L. Waddington, ‘Case note Chacón Navas’ (2007) 44 *C.M.L.R.* 487 at P. 491.

Disabilities (UNCRPD) and this should allow for an expansive definition of disability to develop.

11. The Framework Directive prohibits discrimination “on grounds of disability”<sup>12</sup> but does not provide any definition of disability and does not provide any guidance on who is protected from such discrimination. This is a common approach within EU anti discrimination legislation for example the Recast Gender Directive prohibits discrimination on grounds of sex but no further detail is provided.<sup>13</sup> In some member states, a threshold of severity for the condition or impairment to meet the definition is required.<sup>14</sup> The former approach on the UK was to exclude certain conditions from the definition though this has been amended by its more recent legislation.<sup>15</sup> The definition of disability in the Irish equality legislation includes situations where the disability exists, existed in the past, may exist in the future or is imputed to the person concerned thereby fully reflecting the social model of disability.<sup>16</sup> This definition has led to the temporary disabilities and imputed disabilities being protected by the Irish legislation.

12. In *Chácon Navas v. Eurest Colectividades SA*<sup>17</sup> the Court of Justice was asked to consider the parameters of the definition of disability for the purposes of the Framework Directive given that there was no express definition contained within it.<sup>18</sup> This was the first occasion on which the Court of Justice was asked to examine the Framework Directive on the grounds of disability and has been described as an “*unwelcome start by the ECJ in the disability equality field*”.<sup>19</sup> The applicant in this case challenged her dismissal as discriminatory as she had been on leave of absence

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<sup>12</sup> Article 1 of the Framework Directive.

<sup>13</sup> Recast Directive 2006/54/EC.

<sup>14</sup> UK Equality Act 2010 provides that the disability must have a threshold of “*a substantial and long-term adverse effect*” for it to be sufficient to come within the disability. Section 6 of the Equality act 2010. For its predecessor see section 1 of the Disability Discrimination Act 1995. The term ‘long term’ is further defined by the first Schedule as either the effect has lasted for 12 months, has not yet lasted but is expected to last 12 months or is likely to last for the rest of the person’s life.

<sup>15</sup> Alcoholism, drug addition, tendency to set fires, voyeurism and hayfever were all excluded. Disability Discrimination (Meaning of Disability) Regulations 1996

<sup>16</sup> Section 2 of the Employment Equality Acts 1998-2011.

<sup>17</sup> (C-13/05), [2006] E.C.R. I-0667, [2006] I.R.L.R. 706.

<sup>18</sup> See also D. Hoskins, ‘A High Bar for EU Disability Rights’ [2007] 36(2) I.L.J. 228 and Waddington, ‘Case note Chacón Navas’ (2007) 44 C.M.L.R. 487.

<sup>19</sup> O. Smith, *Disability Discrimination Law*, (Dublin: Roundhall, 2010) at p. 172.

and temporarily unfit for work for 8 months. The Spanish Court asked the Court of Justice for its view on the relationship between sickness and disability and whether sickness was subsumed into disability for the purposes of the Framework Directive.

13. The Court of Justice adopted a restrained interpretation of ‘disability’ perhaps due to the economic consequences which might flow from claims by disabled persons.<sup>20</sup> It took the view that the concept of disability must be understood to refer to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life<sup>21</sup> and that by using the concept of disability in Article 1 of the Directive which provides the aim of the Directive is to combat certain types of discrimination (including disability) as regards employment and occupation the legislature deliberately chose a term which differs from sickness. Therefore the Directive does not protect workers with illnesses. The Court also stated:

*“The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.”<sup>22</sup>*

14. The judgment has been criticised as putting forward a firmly medical model of disability by focussing on the impairment as opposed to the social model. In this regard the judgment has been stated to be firmly out of step with the requirements of the UNCRDP.<sup>23</sup> It raises questions as to whether a person is disabled only if their participating in professional life is hindered. In the UK for example the person must

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<sup>20</sup> This was expressly cited a reason by the Advocate General as a reason for adopting a restrictive definition of disability in his Opinion.

<sup>21</sup> (C-13/05), [2006] E.C.R. I-0667, [2006] I.R.L.R. 706. (paragraph 43).

<sup>22</sup> Paragraph 45 of the judgment.

<sup>23</sup> C. Bruton and S. Quinlivan, ‘Disability, EU law and the CRPD: A New Dawn?’ in G. Quinn and C. O’Mahony (eds) *The UN Convention on the Rights of Persons with Disabilities: Thematic, Comparative and Regional Perspectives Intersecting* (forthcoming).

show that the impairment has more than a minor effect on their ability to carry out day to day activities.<sup>24</sup>

15. There is no definition of disability within the UNCRDP but its purpose clause states that persons with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with the various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>25</sup>
16. A recent Opinion of the Advocate General in *Ring v Dansk Almennyttigt Boligselskab DAB*<sup>26</sup> has further considered (and refined) the definition of disability within the Framework Directive. The reference from Denmark to the Court of Justice asked it to consider the parameters of the definition of disability along very similar lines to those initially referred in *Chácon Navas*. For example amongst the questions raised is whether a “condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?” Clarification on the judgment of Chacon Navas and its practical application was sought. As the EU had ratified the UNCRPD, the AG had regard for its provisions.
17. The referral was concerned with two employees who were dismissed with a reduced notice period contained in Danish law which allowed for reduced periods of notice to be provided to employees where employees were absent for periods of more than 120 days due to illness and a number of questions were posed.
18. In dealing with the definition of disability, AG Kokott had express regard for the provisions of the UNCRPD and stated that in some instances the definition propounded by the Court of Justice in *Chacon Navas* represents a step backwards in comparison with the definition in the UNCRPD (mainly the social definition of disability contained in the UNCRPD). On that basis the AG expressed the view that there is cause to interpret it in accordance with international law. AG Kokott took a

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<sup>24</sup> Section 6 of the Equality Act 2010 (UK).

<sup>25</sup> Article 1 of the UNCRPD.

<sup>26</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

nuanced approach to the Chacon Navas judgment and stated that it is necessary to distinguish between the illness as a possible cause of disability and the resulting disability. She took the view that permanent limitations resulting from an illness and an obstacle in professional life also falls under the protection of the Directive<sup>27</sup> and further if the impairment is due to illness, the decision criterion is whether the restriction is lengthy.<sup>28</sup> She noted that the requirement (devised in *Chácon Navas*) that the limitation probably be long duration was in similar terms to the reference to disability being “long term” within the UNCRPD. Finally and very significantly, the AG found that a long term disability does not require the use of special equipment and a person who is not able to work full time is also included within the concept of disability provided there is an obstacle to participation in professional life. This was on the basis that there is no reference in the 17<sup>th</sup> recital of the Directive which reads as follows:

*“does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”*

to the exclusion of professional people from all aspects of professional life.

19. The issue of the relevance of the UNCRPD to interpretation of the Framework Directive is also raised in a recent referral from the Irish Equality Tribunal: Z (C-363/12) which poses the question as to whether the UNCRPD is capable of being relied upon for the purposes of interpreting and or challenging the validity of the Framework Directive. This question is posed as an alternative to the primary question which is concerned with whether potential discrimination arises in terms of the Recast Gender Directive where a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave from employment to maternity leave and or adoptive leave.

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<sup>27</sup> Paragraph 33.

<sup>28</sup> Paragraph 46.

## Direct Discrimination:

20. Direct discrimination is the classic exponent of formal equality and is based on treating one person less favourably on grounds of their disability than another person in a similar situation. Article 2 of the Framework Directive provides that direct discrimination is prohibited where “*one person is treated less favourably than another is, has been or would be treated in a comparable situation*”. This requires consideration of a comparator, actual or hypothetical.
21. Article 2 of the Framework Directive prohibits any direct discrimination (and indirect discrimination) “whatsoever” so clearly applies to unconscious or cover discrimination.
22. In order to successfully allege direct discrimination on grounds of disability the following elements must be proven:
- Less favourable treatment;
  - An actual or hypothetical comparator;
  - Comparable circumstances between the claimant and the comparator; and
  - Causation.
23. Less favourable treatment may be past, present or hypothetical treatment provided it is less favourable. The relevant circumstances of the claimant and comparator must be the same or not materially different. This has caused issues in the disability context as a person persistently absent from work due to illness will often result in the same treatment as a person persistently absent due to disability: i.e. termination of employment. It is for this reason that the UK legislation has a separate cause of action of “discrimination arising from disability/disability related discrimination” which prohibits discrimination due to something which arises from the disability or in consequence of his or her disability.<sup>29</sup> This is subject to a justification defence being invoked by an employer.

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<sup>29</sup> Section 15 of the Equality Act 2010.

## **Discrimination by Association:**

24. Whilst the Directive clearly covers direct and indirect discrimination on grounds of disability including harassment within the definition of discrimination), there was no express reference to discrimination or harassment by association within the Framework Directive. The prohibited conduct or reason for the conduct alleged will usually relate to the personal circumstances of the complainant. However that is not always the case. Discrimination by association refers to a situation where an individual is subjected to less favourable treatment not because they are a member of a particular protected class but rather due to their connection, relationship or association to a person who is. In other words effectively the discriminatory treatment is transferred to the individual who is not possessed with the relevant characteristic of the protected class. It is particularly useful in the disability context due to the increased responsibilities connected with caring with individuals with disabilities.
25. The issue of whether discrimination and harassment is the type of conduct prohibited by the Framework Directive was considered by the Court of Justice in 2008 in the much publicised case of *Coleman v. Attridge Law*.<sup>30</sup> The Employment Tribunal in the UK asked the Court of Justice for guidance as to whether Ms Coleman, a non-disabled person, was protected from discrimination and harassment due to her association with her disabled son. The facts of this case are extreme to say the least; the behaviour alleged of the employer was described by one commentator as “*crude and unpleasant*”.<sup>31</sup> Ms Coleman worked in a firm of solicitors in London as a legal secretary from January 2001. In 2002, she gave birth to a disabled child whose health condition required specialized care which was primarily provided by Ms Coleman. On 5 March 2005, Ms Coleman accepted voluntary redundancy from her employment which brought her contract of employment with her employer to an end. On 30 August 2005 she lodged a claim with the South London Employment Tribunal claiming that she had been constructively dismissed from her employment and treated less favourably than her fellow employees as she was the primary carer for her disabled son. She claimed she had been the subject of discrimination and harassment

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<sup>30</sup> (C-303/06) [2008] E.C.R. I-05603, [2008] I.C.R. 1128, [2008] I.R.L.R. 722.

<sup>31</sup> L. Waddington, ‘Case Note: *Coleman v. Attridge Law*’, [2009] 46 C.M.L.R. 665 at p. 665.

during her employment and relied on in particular her employer's refusal to allow her return to her previous job on her return from maternity leave, the refusal to allow flexibility as regards working hours and abusive and insulting comments made about her and her child.

26. The Court of Justice expressed the view that if an interpretation limiting the application of the Directive to people who are themselves disabled was given to the Directive, this would deprive the Directive of a vital element of its effectiveness and to reduce the protection which it is intended to guarantee.

27. The Court concluded that, Articles 1 and 2(1) and (2)(a) of the Council Directive 2000/78/EC<sup>32</sup>

*“must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).”*

28. The Court of Justice also concluded that the Directive outlawed harassment by reason of association or connection with a disabled person.

### **Indirect discrimination:**

29. Indirect discrimination is far more sophisticated than direct discrimination as it is sensitive to differences which apply in practice between different categories of people. The concept of indirect discrimination is contained in Article 2(2) of the Framework Directive and is defined as occurring where a neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons. The reference to “would” in Article 2(2) in the definition means that it is likely that it is possible to challenge a particular practice, etc which clearly have a discriminatory effect without waiting for their

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<sup>32</sup> 2000/78/EC

application in a particular case. The reference to “particular disadvantage” within Article 2(2) emanates from European law on free movement of workers and was designed to obviate the need for complex statistical proof.<sup>33</sup> Instead what is required to show is that there is a disadvantage to the individuals in the group. Finally given the reference to particular disability within the definition of indirect discrimination, it is likely that the concept of indirect discrimination by association would not be captured as a prohibited form of conduct within the Directive.

30. There are two defences available within the Directive to justify indirect discrimination: the first is the traditional defence of objective justification where an employer can demonstrate that a particular “*provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*”.<sup>34</sup>
31. The so called justification defence is a difficult hurdle for an employer to overcome and requires that it be demonstrated that the practice, etc corresponds to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end.<sup>35</sup>
32. The second defence, which is specific to disability, links reasonable accommodation and indirect discrimination which permits liability on the part of an employer to be avoided where indirect discrimination arises and the reasonable accommodation requirement is adhered to by an employer in order to eliminate the disadvantages entailed by the prima facie indirectly discriminatory practice, criterion or practice.<sup>36</sup> The section seems suggest that indirect discrimination will arise unless it is dealt with by way of the provision of reasonable accommodation and therefore that the provision of reasonable accommodation is a sufficient answer to claims of indirect discrimination as many of the obstacles which arise for cases of indirect

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<sup>33</sup> *O’Flynn v Adjudication Officer* (C-237/94) [1996] E.C.R. I-2617.

<sup>34</sup> Article 2(2)(i).

<sup>35</sup> *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* (C-170/84), [1986] E.C.R. 01607 at paragraph 33.

<sup>36</sup> Article 2(2)(ii). The view was adopted in the UK prior to the introduction of the Equality Act 2010 this section allowed Member States to omit indirect discrimination from its legislation concerning individuals with disabilities in the employment realm provided that the legislation provided for appropriate measures in line with the principles in Article 5 of the Framework Directive which is concerned with the obligation on employers to provide reasonable accommodation.

discrimination on grounds of disability can be removed by the obligation to provide reasonable accommodation.<sup>37</sup> If there is reasonable accommodation which can be made then there will be a less discriminatory means of achieving the legitimate aim (carrying on the job with the benefit of reasonable accommodation). On the other hand where an employer has carried out all of the steps of reasonable accommodation, it does not have to justify the use of the particular provision, criterion or practice.

33. The issue of indirect discrimination on grounds of disability was considered in the recent Opinion of the Advocate General in *Ring v Dansk Almennyttigt Boligselskab DAB*.<sup>38</sup> The AG expressed the view that the reduction of a period of notice for employees who are absent for more than 120 days due to illness constituted potential indirect discrimination as it indirectly disadvantaged disabled workers as compared to workers who are disabled (it applies to all workers who are absent by reason of illness including those who would not meet the threshold of disability as are absent due to mere illnesses). The issue of justification was not definitively addressed by the AG who noted that this was within the remit of the national court.

#### **Reasonable Accommodation:**

34. The concept of reasonable accommodation provided for in the Directive recognises that the inherent characteristics of disability and its accompanying impairment can result in individuals with disabilities have difficulties in performing the job or functions of the job in a traditional or conventional manner. This manifests itself in the form of barriers which without an obligation being placed on employers to provide reasonable accommodation would leave individuals with disabilities in a legal no man's land being excluded from the labour market and accompanying benefits. It is designed to ensure not only that the disabled person is treated equally but also is put on an equal footing and can therefore practice their profession. Therefore reasonable accommodation allows for employers to take account (on an individual basis) of

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<sup>37</sup> G. Quinn, 'Disability Discrimination Law in the European Union', in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge, Cambridge University Press, 2007) at p.p. 261-2.

<sup>38</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

relevant characteristic of their employee/prospective employee and by doing so making changes, etc to allow the employee concerned to do the work. In other words: “*Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.*”<sup>39</sup>

35. Article 5 of the Directive creates the obligation for employers to make reasonable accommodation for persons with disabilities unless this would create a disproportionate burden for the employer. It does not apply beyond the grounds of disability and this was made clear in the CJEU judgment in *Coleman*.
36. There is no mention within the Directive as to whether failure to provide reasonable accommodation constitutes a form of discrimination but the Commission and others have suggested that such action does amount to discrimination within the meaning of the Directive.<sup>40</sup> The aim of the provision of such reasonable accommodation (known as appropriate measures) is to enable a person with a disability to “*have access to, participate in, or advance in employment, or to undergo training*”.
37. Some expansion is provided to member states in the non-binding recitals where it states that appropriate measures “*shall be provided i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources*”.<sup>41</sup> Whilst these are mere examples, this indicates that reasonable accommodation measures should be designed to adapt normal procedures or working patterns. The reference in Article 5 of the Directive to an employer being required to take appropriate measures clearly places the duty on the employer to be proactive. As the aim of Article 5 is to “*to enable a person with a disability to have access to, participate in or advance in employment*”, it appears the

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<sup>39</sup> S. Fredman, ‘Disability Equality: A Challenge to the Existing Discrimination Paradigm?’ in A. Lawson and C. Gooding (ed), *Disability Rights in Europe: Essays in European Law*, (Hart Publishing, 2005) pp 199-218 at p. 203.

<sup>40</sup> EU Commission, *Disability Mainstreaming in the European Employment Strategy*, EMCO/11/290605 (Brussels, 2005) at p. 3 where the Commission explained its view of reasonable accommodation as an “obligation whose failure can constitute unfair discrimination.” See also G. Quinn, ‘Disability discrimination law in the European Union’ in H. Meenan (ed), *Equality Law in an Enlarged European Union*, (Cambridge: Cambridge University Press, 2007), at p 261 and R. Whittle, ‘The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Perspective’ [2002] ELR 303 at p. 312.

<sup>41</sup> Recital 20.

assessment of what is required is an individual analysis having regard to the specific requirements of the individual and the employment situation involved.<sup>42</sup> It is reactive in nature and therefore is consistent with the UNCRPD which at Article 2 provides:

*“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”.*

38. Advocate General in *Ring v Dansk Almennyttigt Boligselskab DAB*<sup>43</sup> recently stated that that the reduction in working hours may be part of the measures envisaged as part of Article 5 of the Framework Directive and stated that the is within the remit of the member state to determine whether such a measure, in each specific case, may involve a disproportionate burden on the employer. Further and potentially more significantly, she stated that where an employer applies of a reduced notice period to a worker who has been absent from the workplace due a disability and this reduced notice period amounts to a failure on the part of the employer to make reasonable adjustments within the meaning of Article 5, this cannot be justified.

39. Apart from the financial limitations on the duty of an employer to provide reasonable accommodation (non beyond the limitation of a disproportionate burden),<sup>44</sup> the non-binding recital 17 significantly provides that the Directive *“does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.”* Effectively this means that there is no requirement on an employer to employ a person with a disability where they are unable to perform the essential functions of the post even with the provision of reasonable accommodation. The inclusion of ‘essential’ as the all-important qualifier for an employee being deemed incapable of performing their

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<sup>42</sup> L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union*, (Brussels: European Commission, 2009) at p. 6

<sup>43</sup> (C-335/11), Opinion of Advocate General Kokott 6 December 2012. Judgment from the Court of Justice is awaited at the time of preparation of this paper.

<sup>44</sup> Article 5.

duties of employment means that where an employee is unable to perform minor or ancillary aspects of their employment duties (even with the provision of reasonable accommodation), an employer cannot justify the termination of employment on that basis.

40. Pragmatic guidance is also provided to member states in the non-binding recital on the crucial limiting provision of disproportionate burden of which it provides that *“account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance”*.<sup>45</sup>

**Burden of proof:**

41. In the normal course of events, it is up to the person who is making the case to prove their case i.e. the burden of proof rests on the claimant. However in practice it can be very difficult for a victim of discrimination to prove their case and generally claimants have little, if any, direct evidence of discrimination. European law recognises those difficulties in how it deals with the burden of proof and in particular in recognising that certain matters such as why an employee is being treated in a particular way may be peculiarly within the employer’s own knowledge. The reason burden of proof is treated differently than in other areas of law is in practice, discrimination is often difficult to prove as it is only in rare circumstances where direct evidence of discrimination is available.

42. In practice this requires that a prima facie case be established by the claimant, an adequate explanation be provided by the respondent in order to discharge the onus of proof and failure on the part of the respondent to discharge the burden of proof implies that the Court/Tribunal must make a finding of unlawful discrimination.

43. Article 10 of the Framework Directive is as follows:

*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be*

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<sup>45</sup> Recital 21.

*presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

44. An interesting attempt was made to expand the implications of shifting the burden of proof to give rights to discovery of documentation in *Kelly v University College Dublin*.<sup>46</sup> In this referral from the Irish High Court, the applicant alleged that he was entitled to information on other applicants for a vocational course to assist him in establishing facts from which there had been direct or indirect discrimination and meet the burden of proof required of him under Article 4(1) of the Burden of Proof Directive.<sup>47</sup> The Court of Justice rejected the applicant's argument and held that in general terms no such right as asserted by Mr Kelly arose as a result of the Burden of Proof Directive as it is within the national court's remit to determine whether sufficient facts from which discrimination could be presumed and therefore no right to the information as sought by Mr Kelly exists. However, the Court of Justice recognised that exceptions to this general proposition may exist and accordingly it also left open the possibility that the Directive might entitle a complainant to documentation where the objective of the Equality Directive would otherwise be undermined:

*“although Article 4(1) of that directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in accordance with that provision, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.”<sup>48</sup>*

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<sup>46</sup>(C-104/10) [2012] 1 W.L.R. 789, [2012] I.C.R. 322.

<sup>47</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. This is now consolidated into the Recast Gender Directive. At the time of writing there is a reference pending from a Romanian court concerned with whether certain statements made to the media by a Managing Director of a football club that he would not employ a homosexual player on his team could amount to facts from which discrimination could be presumed. ( C-81/12) *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*

<sup>48</sup> (C-104/10), at paragraph 34, [2012] 1 W.L.R. 789, at p. 796 [2012] I.C.R. 322 at p. 329. When the issue came back to the Irish High Court, the Court found that the original decision of the High Court that Mr Kelly was not entitled in national law, to discovery of the documentation sought was in accordance with the findings of the Court of Justice and therefore refused the application for discovery. (Hedigan J. 9<sup>th</sup> May 2012)

45. It carved out this caveat to the general proposition on the basis that it foresaw situations where the refusal of a defendant to provide disclosure in the context of a claimant establishing the necessary facts to meet his or her burden of proof could risk compromising the achievement of providing an effective judicial process to persons who considered themselves subjected to discriminatory treatment. In its judgment, the Court of Justice was particularly anxious to refer to the cornerstone principle of effectiveness which member states are required to uphold. Therefore as a result of the judgment in *Kelly* in circumstances where, in an equality claim, application of any domestic procedural rules relating to disclosure would frustrate the achievement of the objective of that Directive, those domestic rules should be adapted or disapplied to ensure that such frustration does not occur.
46. The carve out to the general principle provided by the Court of Justice in *Kelly* was invoked in a more recent judgment of the Court of Justice concerning allegations of discrimination on grounds of race, sex and age in the area of access to employment. Ms Meister applied for a position with the respondent as a software designer but was not selected for interview. She alleged that she was qualified for the position and the reason for the respondent not inviting her to interview was due to her sex, age and ethnic origin. Whilst the Court of Justice concluded that Employment Equality Directives<sup>49</sup> do not entitle a worker who claims to have been subjected to discriminatory treatment in a recruitment process to have access to the information on whether the employer engaged another applicant at the end of the recruitment process, some of the comments of the Court of Justice could have significant implications in the future. It determined that cannot be ruled out that a refusal of an employer to provide such information may be factor to be taken into account in the establishment of facts from which discrimination may be presumed.<sup>50</sup> This is fairly interventionist approach by the Court and indeed it provided guidance to member states in dealing with requests for information by employees in the context of claims of alleged

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<sup>49</sup> Article 8(1) of Directive 2000/43/EC, Article 8(1) of Directive 2000/78/EC and Article 19(1) of Directive 2006/54/EC. These provisions all relate to the burden of proof required of claimants in proceedings under these Directives and require member states to take such measures as are necessary to feel they have been subjected to discriminatory treatment to establish facts from which it may be presumed to have been discrimination and when this burden is met, it is for the respondent to show that there has been no breach of the principle of equal treatment.

<sup>50</sup> *Meister v Speech Design Carrier Systems GmbH* (C-415/10).

discrimination. It urged member states “*take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.*”<sup>51</sup> Amongst the circumstances highlighted by the Court of Justice as being worthy of note were the fact that the employer (unlike the employer in *Kelly*) had refused to provide the information sought by Ms Meister and Ms Meister had the necessary qualifications and expertise required for the job (admitted by the employer). This indicates that as a matter of EU law, the refusal of an employer to provide the information sought in these circumstances may give rise to an inference of discrimination in very limited circumstances. The fact that the employer refused to provide the information sought and admitted that Ms Meister was a suitable candidate for the position are rather extreme facts.

47. These decisions establish that although the Employment Equality Directives do not explicitly and expressly provide support for disclosure applications in equality claims, refusal of disclosure by a party in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination, could risk compromising the achievement of the objective pursued by that Directive and thus deprive it of its effectiveness. Indeed *Meister*, seems to go further and suggest that the refusal by an employer to provide information sought by a claimant in an equality claim may permit inferences of discrimination to be drawn in very limited circumstances.

**Exemptions/permitted discrimination:**

48. The Framework Directive includes a number of prescribed exemptions where unequal treatment on any of the prohibited grounds covered by the Directive (including disability) may be lawful. In relation to disability the potentially applicable exceptions are where the relevant characteristic constitutes a genuine and determining occupational requirement<sup>52</sup> and the option for member states to choose not to apply the provisions of the Directive concerning disability to all or part of their armed forces.<sup>53</sup> There are clear reasons why in certain circumstances, the requirement for a person to be of a particular sex or gender could be a legitimate and reasonable requirement having regard to the persons ability to perform the job effectively. In

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<sup>51</sup> At paragraph 42 of the judgment.

<sup>52</sup> Article 4(1).

<sup>53</sup> Article 3(4).

terms of the regulation of any discrimination, the grounds of justified discrimination prescribed within the Directives are limited and are significantly narrower than the broader objective justification concept which applies in the context of indirect discrimination.

49. It is difficult to imagine a situation where having a disability could be a genuine and determining occupational requirement and in fact the wisdom of extending the genuine occupational requirement beyond sex or gender can be questioned. Yet in spite of this, a number of member states have legislated for this exemption (including Ireland) on all of the protected grounds within the Acts. It is important from an equality perspective that the exemption is not interpreted in a symmetrical sense to operate to the effect that the absence of a disability is a genuine occupational requirement. In fact, it has been argued that it is necessary *“to police the invocation of this defence in the disability context. Otherwise a segregationist ethic could too easily masquerade as a genuine and occupational requirement.”*<sup>54</sup> It may be lawful for a disability rights organisation to employ a person with a disability to work as a counsellor or therapist with disabled persons or as a public face of its organisation.<sup>55</sup>

**Proposed Directive:**

50. There is a directive concerning gender discrimination in the area of goods and services which are available to members of the public, such as housing, but education is not covered.<sup>56</sup> In 2008, the EU Commission announced the publication of a draft directive which was proposed to extend the prohibition on discrimination in the areas of housing, social protection, education and goods and services beyond gender to other grounds such as disability.<sup>57</sup> However the inclusion of education has proved controversial with some member states being concerned, in particular, at the duty of reasonable accommodation contained in Directive. The Directive has reached a

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<sup>54</sup> EU Network of Independent Experts on Disability Discrimination, *Baseline Study: Disability Discrimination in the EU Member States* (2004) at p. 20. See also O. Smith, *Disability Discrimination Law*, (Dublin: Roundhall, 2010) at p. 82.

<sup>55</sup> O. Smith, “Disability Required? The Implications of the Genuine Occupational Requirement in Disability Discrimination Law”, paper presented at a conference entitled International and Comparative Perspectives on Employment and Disability Law at the Centre for Disability Law and Policy, NUI Galway on April 24, 2010.

<sup>56</sup> Directive 2004/13.

<sup>57</sup> For a detailed examination of the proposed Directive see L. Waddington, ‘Future prospects for EU Equality law: lessons to be learnt from the proposed Equal Treatment Directive’ [2011] 36(2) *European Law Review* 163.

stalemate and has not progressed beyond consideration by the Council of the EU as of July 2012.

51. The most recently published version of the Directive includes a recital based on Article 1 of the UNCRDP which in its definition of disability refers to the interaction between impairments and socially created barriers that limited participation. The proposed Directive also defines an unjustified failure to make reasonable accommodation as a form of discrimination and links this to the UNCRPD. This demonstrates a clear desire to implement the UNCRPD through EU legislation.<sup>58</sup>

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<sup>58</sup> L. Waddington, 'Future prospects for EU Equality law: lessons to be learnt from the proposed Equal Treatment Directive' [2011] 36(2) European Law Review 163 at p. 179.