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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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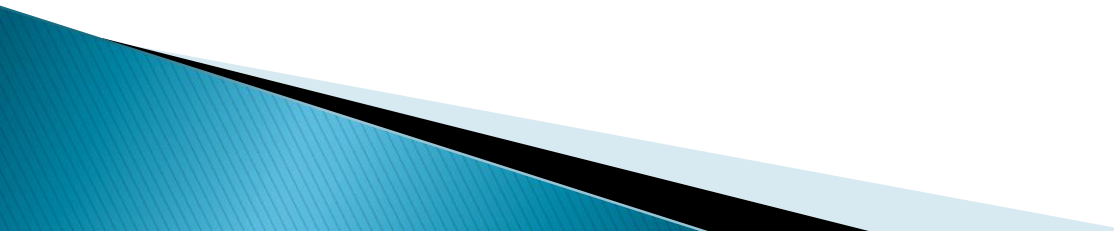
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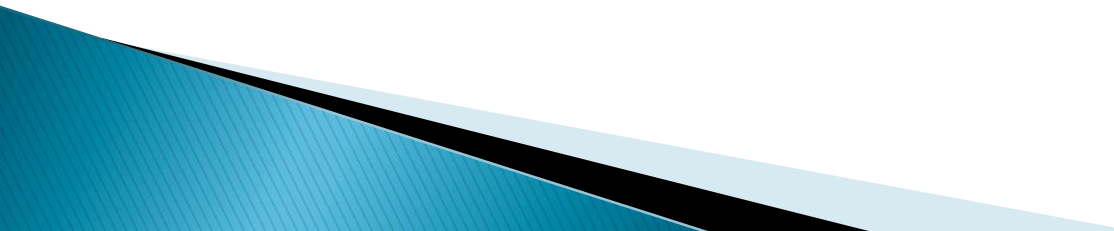
Introduction

- ▶ 10% world population have a disability
- ▶ Barriers to participation persons with disabilities
- ▶ *“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*

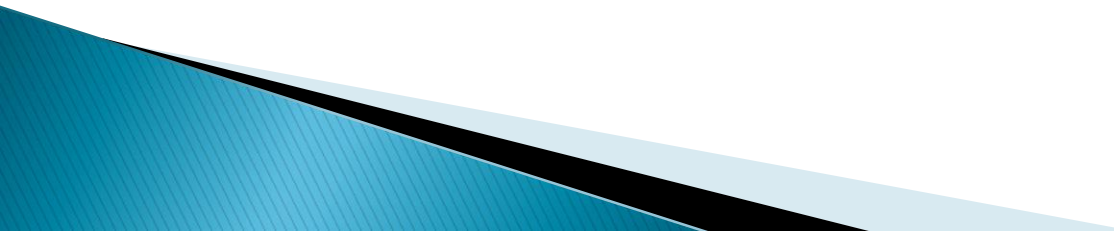
Introduction

- ▶ Development of disability discrimination
 - ▶ Definition of disability
 - ▶ Non discrimination
 - ▶ Reasonable accommodation
 - ▶ Burden of proof and exceptions
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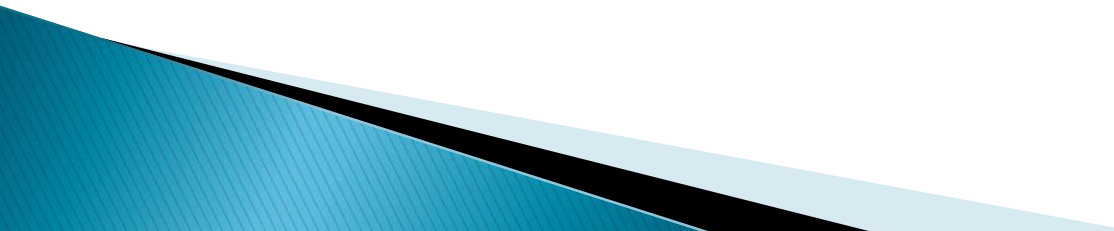
Background Framework Directive

- ▶ Previous approach welfare/charity approach: objects of welfare, charity programmes
 - ▶ Article 19 of TFEU measures to combat discrimination on grounds of disability
 - ▶ Framework Directive (Directive 2000/78/EC)
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Overview Framework Directive

- ▶ Article 3(1): areas of access to employment – selection criteria, recruitment conditions, promotion, retraining, employment and
 - ▶ working conditions, including dismissals and pay.
 - ▶ All areas of vocational training and membership of an organisation of workers.
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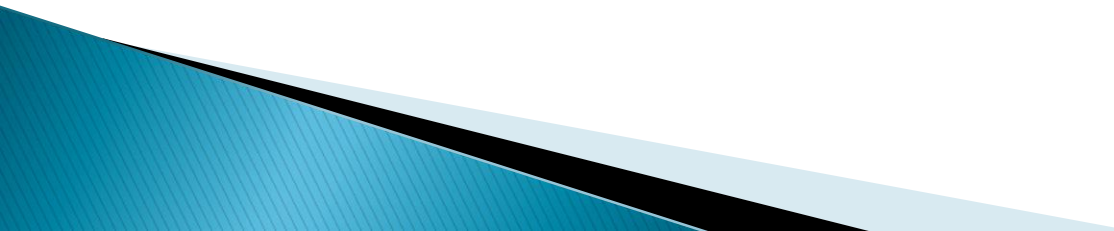
Overview of Framework Directive

- ▶ Direct discrimination
 - ▶ Indirect discrimination
 - ▶ Harassment
 - ▶ Reasonable accommodation: crucial concept
 - ▶ Positive action
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Definition of disability

- ▶ Theories of disability:
 - ❑ Medical model: impairment physical or mental. List of conditions.
 - ❑ Social model: societal barriers. Attitudes. Change by society required. UNCRPD.

Definition of disability

- ▶ No definition in Framework Directive
 - ▶ Common approaches: threshold of disability, exclusion of conditions, imputed disabilities, temporary disabilities.
 - ▶ *Chácon Navas*, CJEU: restrained approach to definition. Reference from Spain. Relationship between sickness and disability
 - ▶ Disability is not the same as illness.
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Definition of disability

- ▶ *Chácon Navas*, CJEU

“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.”

Definition of disability

- ▶ UNCRPD, Article 1 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”

Definition of disability

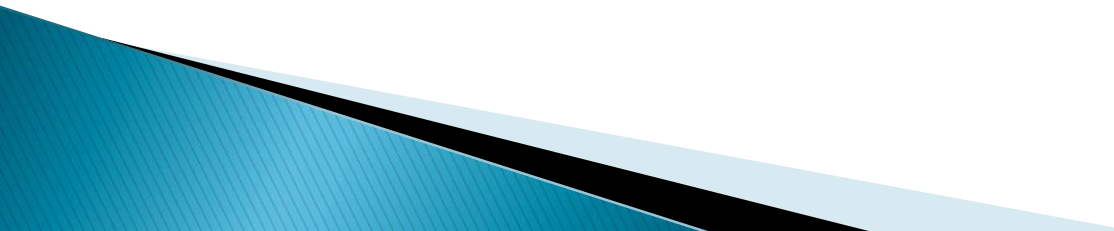
- ▶ Advocate General in *Ring v Dansk Almennyttigt Boligselskab DAB* (C-335/11). Clarification on Chácon Navas
- ▶ UNCRPD provisions discussed by AG.
- ▶ Distinction between illness as possible cause of disability and resulting disability
- ▶ Restriction/impairment lengthy
- ▶ Pending referral Z (C-363/12)

Direct discrimination

- ▶ Article 2 of the Framework Directive:

“one person is treated less favourably than another is, has been or would be treated in a comparable situation”.

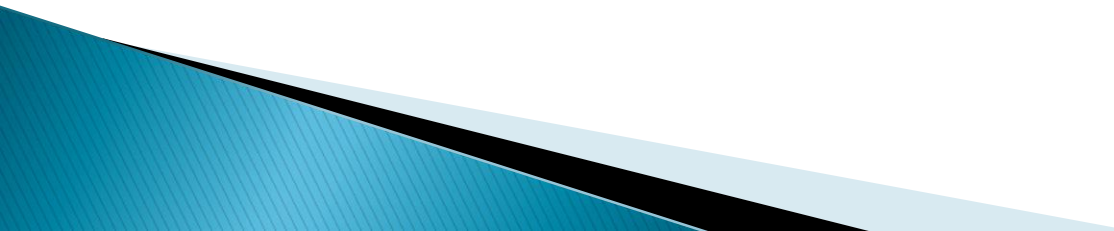
Direct discrimination

- ▶ Less favourable treatment;
 - ▶ An actual or hypothetical comparator;
 - ▶ Comparable circumstances between the claimant and the comparator; and
 - ▶ Causation.
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Discrimination by Association

- ▶ Less favourable treatment due to connection with person with a disability
- ▶ *Coleman v. Attridge Law*. (C-303/06)
“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).”

Indirect discrimination

- ▶ Article 2(2) of the Framework Directive where a neutral provision, criterion or practice would put persons having a particular disability at a particular disadvantage compared with other persons.
 - ▶ Two defences: objective justification (Article 2(2)(i) and indirect discrimination and reasonable accommodation (Article 2(2)(ii))
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Reasonable accommodation

- ▶ *“Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change*
- ▶ Article 5: reasonable accommodation unless disproportionate burden
- ▶ Appropriate measures (Article 5) aim to enable a person with a disability to *“have access to, participate in, or advance in employment, or to undergo training”*.

Reasonable accommodation

- ▶ 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”*. (Recital 20)

Reasonable Accommodation

- ▶ Article 2 UNCRPD:
- ▶ *“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”.*

Reasonable Accommodation

- ▶ Recital 17 of the Framework Directive:

(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.”

Reasonable Accommodation

- ▶ Disproportionate burden (Recital 21):

“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”

Burden of Proof

- ▶ Difficult to prove discrimination, rules devised now codified
- ▶ Article 10 of Framework Directive
- ▶ *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 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.*

Burden of Proof

- ▶ *Kelly v UCD* (C-104/10)
- ▶ *“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.”*

Burden of Proof

- ▶ *Meister v Speech Design Carrier Systems GmbH* (C-415/10)

“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.”

Exceptions / permitted discrimination

- ▶ genuine and determining occupational requirement 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. Article 4(1), Article 3(4).

Proposed Directive

- ▶ 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.
 - ▶ clear desire to implement the UNCRPD through EU legislation
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