



# SEMINAR ON EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

## *“DISABILITY AND EMPLOYMENT”*

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# “DISABILITY AND EMPLOYMENT: KEY CONCEPTS, EXISTING PROVISIONS OF EU ANTI-DISCRIMINATION LAW AND JURISPRUDENCE”

“DISABILITY AND EMPLOYMENT: KEY CONCEPTS, EXISTING PROVISIONS OF EU ANTI-DISCRIMINATION LAW AND JURISPRUDENCE: NON DISCRIMINATION, DIRECT AND INDIRECT DISCRIMINATION, REASONABLE ACCOMMODATION AND THE BURDEN OF PROOF IN DISABILITY PROCEEDINGS IN EU LAW”



## **DISABILITY AND EMPLOYMENT: OVERVIEW**

- **1- THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK**
- **2- KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT**
- **3- ECJ DISABILITY CASE LAW**
- **4- SPANISH JURISPRUDENCE**



## DISABILITY AND EMPLOYMENT: THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK (I)

- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.** The Directive means the introduction in the European Union of anti-discrimination law related to disability.
- Directive 2000/78/EC prohibits discrimination regarding to employment and vocational training on grounds of religion or belief, sexual orientation, age and disability.



## DISABILITY AND EMPLOYMENT: THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK (II)

- The **concept of discrimination** given by the Directive includes **4 forms of discrimination**:
  - a) **Direct discrimination** (art. 2.2.a)
  - b) **Indirect discrimination** (art. 2.2.b)
  - c) **Harassment** (art.2.3)
  - d) **Instruction to discriminate against another person** (art. 2.4)



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (I)

- **a) DIRECT DISCRIMINATION** (art. 2.2.a) Directive 2000/78/EC)
- DD shall be taken to occur “where one person is treated less favourably than another is, has been or would be treated in a comparable situation”, on the ground of disability.
- The claimant not necessarily must have a disability himself or herself (see *Coleman v Attridge Law*. Case C-303/06).



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (II)

- **b) INDIRECT DISCRIMINATION** (art. 2.2.b) Directive 2000/78/EC)
- ID shall be taken to occur “where an apparently neutral provision, criterion or practice would put persons having a particular (...) disability at a particular disadvantage compared with other persons unless:

(\*EXCEPTIONS)



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (III)

- that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art. 2.2.b).  
(i), **or**
- as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.” (art. 2.2.b).(ii)





## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (IV)

- **c) HARASSMENT** (art. 2.3)
- When unwanted conduct related to the ground of disability takes place with the purpose or effect of violating the dignity of a person and of creating and intimidating, hostile, degrading, humiliating or offensive environment.
- The claimant not necessarily must have a disability himself or herself .



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: FORMS OF DISCRIMINATION (V)

- **d) INSTRUCTION TO DISCRIMINATE** (art. 2.4)
- An instruction to discriminate against persons on the ground of disability is considered as a way of discrimination.



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: RECITALS TO DIRECTIVE 2000/78/EC (I)

- **(17)** “This 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”.
- **(18)** “This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they maybe called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services”.



## THE EU ANTIDISCRIMINATION LEGAL FRAMEWORK: RECITALS TO DIRECTIVE 2000/78/EC (II)

- **(20)** “Appropriate measures should 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”.
- **(21)** “To determine whether the measures in question give rise to a disproportionate burden, 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”.



# KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT

- **A) DEFINITION OF DISABILITY**
- **B) REASONABLE ACCOMMODATION**
- **C) POSITIVE ACTION**
- **D) BURDEN OF PROOF**



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: DEFINITION OF DISABILITY (I)

- **A) DEFINITION OF DISABILITY**
- Disability is considered in Directive 2000/78/EC as a ground of discrimination, but no definition of the term “disability” is given by the Directive.
- A definition can be found at *Chacón Navas v Eurest Colectividades, S.A.* Case C-13/05; the Court defined “disability” for the purposes of the Directive as:



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: DEFINITION OF DISABILITY (II)

“a limitation which results in particular from a physical, mental or psychological impairment which hinders over a long period of time a person’s participation in professional life”.

\* The definition of “disability” given by the Court is “autonomous and uniform”.

\* For any limitation to be regarded as a “disability”, “it must be probable that it will last for a long time”.

\* “Disability” is different from “sickness”.



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: DEFINITION OF DISABILITY (III)

- \* Nothing can be found at the Directive “to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness”.
- \* “Sickness” cannot be included into the list of grounds covered by the Directive.
- \* The judgement could be a door open for people suffering from long term illnesses which cause the required degree of limitation to be considered as “disabled” for the purposes of the Directive.





## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: REASONABLE ACCOMMODATION (I)

- **B) REASONABLE ACCOMMODATION** (art. 5 Directive 2000/78/EC): “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. 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”.



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: REASONABLE ACCOMMODATION (II)

- An individualised accommodation is required by the Directive (specific accommodation to meet the needs of a particular individual).
- Can we define “accommodation”? Recital 20 to the Directive 2000/78/EC define “appropriate measures” as “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 sources”.



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: REASONABLE ACCOMMODATION (III)

- Can we determine whether the measures in article five rise to a “disproportionate burden”? Recital 21 to the Directive 2000/78/EC establish 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”.



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: POSITIVE ACTION

- **C) POSITIVE ACTION** (art. 7.2 Directive 200/78/EC): “With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt 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”.



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: BURDEN OF PROOF (I)

- **D) BURDEN OF PROOF** (art. 10 Directive 200/78/EC): “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” (art. 10.1).



## KEY CONCEPTS ON DISABILITY DISCRIMINATION AND EMPLOYMENT: BURDEN OF PROOF (II)

- Establishment of *prima facie* case by the claimant.
- An adequate explanation must be provided by the respondent in order to discharge the burden of proof.
- Failing to discharge the burden of proof by the respondent implies that the Court must make a finding of unlawful discrimination.



## ECJ DISABILITY CASE LAW

- ***Chacón Navas v Eures Colectividades, S.A.*** Case C-13/05.
  - ***Coleman v Attridge Law.*** Case C-303/06.
  - ***Jette Ring v Dansk almennyttigt Boligselskab DAB.*** Case 335/11 (pending case):
- \* Considered in light of the UN Convention?



## SPANISH JURISPRUDENCE (I)

- ***TRIBUNAL SUPREMO (SPANISH SUPREME COURT):***
- Judgement of 12/7/2004 (RJ\2004\7075). Unfair dismissal, illness, discrimination.
- Judgement of 23/5/2005 (RJ\2005\9656). Unfair dismissal, illness, discrimination.





## SPANISH JURISPRUDENCE (II)

- Judgement of 22/11/2007 (RJ\2008\1183). Unfair dismissal, illness, discrimination, fundamental rights.
- Judgement of 11/12/2007 (RJ\2008\2884). Unfair dismissal, illness, discrimination, disability.
- Judgement of 18/12/2007 (RJ\2008\800). Unfair dismissal, illness, fundamental rights.



## SPANISH JURISPRUDENCE

- Judgement of 22/1/2008 (RJ\2008\1621). Unfair dismissal, illness, discrimination, disability.
- Judgement of 13/2/2008 (RJ\2008\2900). Unfair dismissal, illness, discrimination, disability.
- Judgement of 27/1/2009 (RJ\2009\1048). Unfair dismissal, illness, discrimination, disability.



## SPANISH JURISPRUDENCE

- Judgement of 21/10/2010 (RJ\2010\7821). Disabled workers, indirect discrimination.
- Judgement of 4/10/12 (RJ\2012\10002). Disabled workers.



## FINAL CONSIDERATION

- **PROPOSAL FOR A COUNCIL DIRECTIVE ON IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RELIGION OR BELIEF, DISABILITY, AGE OR SEXUAL ORIENTATION, COM(2008) 426 final. Brussels, 2/7/2008.**



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**THANK YOU VERY MUCH FOR YOUR ATTENTION!**

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