

So, we have been hearing lots about some of the theoretical aspects. Now, and in the workshop to follow, I'm going to be asking you to do some work.

In the sense of referring to your packs.

I will be referring to page numbers within the pack.

And I will be asking you to, if you can, have a look at those pages as we go along.

I am looking at how we deal with disability discrimination in employment.

In the light of the things we have been talking about so far.

And we start off with the international setting for the regional instruments. With which we are concerned.

Namely the framework directive.

We are going to be looking at the right to work. A couple of UNCRPD articles.

Specifically, article 27, which you'll find on page 20.

Of your pack.

But I'll read out some of the relevant bits quickly.

Essentially, the states parties recognize persons with disabilities to work on equal basis with others.

Includes the right to the opportunity to gain living by work freely chosen or accepted in a labor market and work environment that is open.

Inclusive and accessible to persons with disabilities.

Then there are specific rights that need to be secured.

A, states will prohibit discrimination on the basis of disabilities, all matters, concerning all forms of employment.

Including recruitment, hiring, employment, continuance of employment, career advancement and safe and healthy working conditions.

Just pausing there.

If you are in the room, you may want to flag that one up for later.

Little mark.

Because here is a hint. You may be using that one later on.

So, secondly, protect the rights of persons with disabilities on equal basis to just and favorable work. Equal value, including protection from harassment.

And then down at I. Sorry, J.

To promote the acquisition by persons with disabilities of work experience in the open labor market.

Finally, promote the acquisition by persons with disabilities of work experience.

In the, sorry. That was J. I. Ensure reasonable accommodation is provided to persons with disabilities in the workplace.

What does that mean? Well, that's one of the questions you'll be answering later on.

So, I have read out a few of the passages. 27.1 has subparagraphs A to K.

Some of which will be addressed by state at quite a high level.

Others will be pretty direct in their application and may be used as part of the interpretation exercise.

Of directive 2000/78. When we are looking at this, we are looking at the concepts of the scope of the directive.

We'll look at the concept of discrimination and associated concepts. Direct, indirect discrimination, harassment and associative-discrimination.

We'll also look at reasonable accommodations.

There we go.

Article 23. The UNDHHR deals with the right to work.

Free choice of employment.

Just and favorable conditions of work and protection against unemployment.

Equal pay for equal work. Right to just and favourable remuneration. And existence of human dignity. That concept of dignity is at the heart of the aspect of the protections.

The collective rights are also part.

The UN Covenant on economic, social and cultural rights.

Recognizes the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard.

The covenant on civil and political rights. Equality before the law. Effective protection against discrimination.

Coming more locally now.

To the European Union.

The community charter of fundamental social rights of workers. Article 4 of the charter. Every individual shall be free to choose -

and engage in an occupation according to the regulations governing each

occupation. All disabled persons, whatever the origin and -

nature of disablement, must be entitled to additional concrete measures, aimed at improving their social and professional integration.

n.

Okay.

The charter of fundamental rights, the European Union, has a special place.

And what I want to talk now about it. How to use that instrument.

Article 6.1 of the Lisbon treaty says the union recognises the rights and freedoms set out in it, which shall have the same value -

as the treaties.

These are in essence treaty rights.

Now, you can use a general principle. Of community law.

In a pretty specific way these days.

In the like of cases such as Rasmussen, which I didn't mention on the slide. This is your bonus track.

Rasmussen, which is C441-14.

This essentially pulls together the debate that was started in Mangold, Divici.

About whether general principles of European Union law can be applied directly in cases between individuals.

The way it works is this.

The principles of the charter are to be regarded as general principles of community law.

If you interpret a directive, which is the way in which the court of justice approaches charter questions.

The answer that the preliminary ruling will contain will be an answer about how the directive needs to be interpreted.

The charters to be interpreted. If you look at the operative part of the judgement.

It will be an interpretation of how the directive applies or doesn't apply in a particular case.

That's made clear in the case, the age discrimination case.

Of Mario Vital Perez.

But, here is the difficulty.

If national law conflicts with the charter, it has got to be disapplied in a claim litigated between private individuals. The Soci-

I case and the Rasmussen case.

National courts, in cases between individuals, can invoke the general principle.

The national court has to disapply it. If it doesn't apply with the charter. What, if I hear you cry.

It was a long evening.

Some of you are still recovering.

So what? Help us out.

I'm happy to. The fact of the matter is, that when you look it the concept of discrimination in the charter.

How are you going to interpret that?

When you look at disability and discrimination.

You are going to look back to the UNCRPD.

So, it is almost as if there is a hierarchy of interpretation that goes on here.

The convention at the top.

The charter.

General principle of European Union law.

Then the directive.

Which not only must be interpreted in the light of the charter.

And therefore in the light of the other international obligations.

Which are mentioned.

Apart from the UNCRPD in the preamble to the directive.

So, you have very powerful interpretative tools to bring to bear on the interpretation of the directive.

And hence on the interpretation of national law.

You can also refer if necessary to the charter.

In order to say the provision of national law must be disapplied.

It is inconsistent with the charter,, is interpreted via the UNCRPD.

Enough as the avalanche of bits of information about points of law.

More directly, you know from the recycles to the directive, that one of its main objectives set out in recite 9, on page 53, is a-labor market out to all.

Designed to make integration easier for people with disabilities.

If you have a choice of interpretation.

You go to the interpretation that will facilitate the integration into the labor market of persons with disabilities.

Now, we have looked at the UNCRPD. Its aim. And we talked a lot about is it interpretative.

Does it add rights. I'm not going to be talking about it more.
Even if it is just interpretation.
You are still going to use it effectively in the interpretation of the directive.
On the basis of the charter. On the basis of interpreting down the chain.
There is the definition of reasonable accommodation as well.
It is necessary and appropriate modification.
It is not everything. Only what is appropriate. There are going to be questions
about what is appropriate.
Adjustments, not imposing a disproportionate burden.
Anybody who is there to make an input.
It is going to be a question like is it day or night? Which a judge is going to have
to rule upon.
Has practical implications. If you are advocating for persons with disabilities.
It means that the quality of the information you put into the judge will make a
massive difference to the outcome.
Every case is an opportunity for judicial education.
How often have we looked at a judge and say, that judge can do with judicial
education.
In this case it may be true.
There is an area of ignorance.
Disability tends to be about the practical.
In relation to adjustments.
So, not imposing a disproportionate burden. To ensure to persons with
disabilities the enjoyment or exercise on equal basis with o-
hers.
Of all human rights and fundamental freedoms.
I'll spend time on that. When we come to the definition on the directive, you
want to be bearing this in mind
the definition of persons with disabilities.
It includes those who have this particular series of impairments.
Particular qualities. They have to be long term.
And they have to be ones which in interactions with barriers, may hinder their
full and effective participation in society on an e-
ual basis with others. It is important.
And it will be used to break away before the court of justice from the limited
way they are thinking the terms of concept of disab-
lity.
We'll come to that in a moment.
Article 2 provides a very familiar international definition of discrimination.
As nullifying and restricting various rights.
It also points out that it includes the denial of reasonable accommodation.
The concept of discrimination is to include denial.
So, the UNCRPD definition of reasonable accommodation once more.
To remind you, before we go on.
Is necessary and appropriate.
Not imposing disproportionate burden.
Which leads us happily to directive 2000 /78.
I ask you to turn to page 56. If you have the pack in front of you.

We are going to look first at the scope of the directive.
So far we spent long time looking at the concept of disability.
What I am now asking you to do is to think about a slightly different aspect of scope.
What it says is, within the limits of the areas of competence on the community.
This directive shall apply to all persons.
It says some more. It applies to all persons.
Right.
As regards both public and private sectors.
Including public bodies.
In relation to, and here come the limitations.
Conditions for access to employment. What does it mean?
To self employment or occupation.
Including selection criteria and recruitment conditions.
Whatever the branch of activity and at all levels.
Including promotion. Access to all types and all levels of vocational guidance and training, advanced training and retraining.
Including practical work experience.
Deals with employment, working conditions, dismissal.
Membership of trade organisations.
Organisations of workers.
There are 4 broad areas which I am not going to read the rest of out.
Turn back a page and look at article 2.
We can see the concept of direct discrimination.
Set out there.
And the concept of indirect discrimination.
I'll say something about those in a second.
If you look at article 2.3, on page 56.
It deals with the concept of harassment.
Concept of Harassment, which unwanted conduct on any of the grounds takes place with the purpose or effect of violating the dignity of person.
Now, those are the commonly used notions of discrimination and unlawful conduct.
Also the directive will preclude victimisation for a right.
Not to discriminate against.
And expressly says an instruction to discriminate is itself an act of discrimination.
All of these concepts direct, indirect and harassment, can be associative.
In other words, the person does not have to have the characteristic themselves.
If the characteristic plays a role in the decision making. Which disadvantages the person. Or less favourable treatment.
Or unwanted conduct.
That will be something that a complaint can be presented to a court or tribunal.
This is a slightly surprising conclusion to reach. In light of the wording of indirect discrimination.
The case of, I'm going to call it *Chez*. The case about electricity meters in Bulgaria.

Something like 3 meters, no 6 meters. As supposed as to standard 2 meters.
In districts, inhabited of persons of Roma origin.

The court there, it is 83-14.

The concep of indirect discrimination applies irrespective of whether the
collective measure, placing the meters at that leight.

Of persons that have an ethnic origin.

Or, those who without possessing that characteristic, suffer together with those
who do have the characteristic.

Either less favorable treatment. There is direct discrimination.

Or, particular disadvantage.

Resulting from that measure.

It is important to be clear that that is part of the judgement.

There is no doubt at all that this is a binding conclusion.

You' ll see it at the end of the judgement in heavy print.

In relation to, we' ll see why this is surprising.

Let' s turn to direct discrimination.

This might be familiar to people. Direct discrimination.

Where a person is treated less favourably than another is, has been or would be
treated in a comparable situation on the grounds o-
disability.

One of the things we did in the case of Coleman Attridge. What that provision
is talking about is the characteristic.

Rather than the characteristic possessed by any individual.

Where might this come in handy?

You might be doing this later on.

I' ll tell you. If an employer is going to say, next year, if you carry on to be ill,
you' ll become a disabled person.

I don' t want to do with those rights.

I' m going to sack you. Before you trigger the national law of disability.

Clearly, disability is a factor in that decision.

So, we pointed out that that kind of behavior would be on the ground with
disability.

That case dealt with a woman who was looking after a disabled child.

And that was the ground of the treatment.

Okay, so far so good. We understand associative discrimination.

Let' s look at indirect discrimination and the definition you' ll find on page 55.

I will read this out.

Indirect discrimination shall be taken to occur where an apparently neutral po
provision or practice would put persons having a di-
ability, compared with other persons.

Unless, there are 2 things we need to look at.

One is the standard, dare I say it, definition of justification.

Come to the next point in a moment.

Let' s see what this means.

Apparently neutral provision practice.

That means, one which glance is neutral.

It is not saying, I will not employ any disabled person.

That is not neutral.

I will employ anybody who can get up to the steps of my office.
Well, on his face. Doesn't say anything about disability. Does it?
So, person can get up to the steps, that's fine.
A lot of people with disabilities, with mobility problems, they wouldn't be able to do that.
So, the problem with the Chez decision is that it talks about persons having a particular religion or belief.
A particular disability.
Who seems to be saying, that person has to have the thing that triggers.
However, the court has clearly moved away from that literal interpretation.
Whether it stays away from it, who knows.
At the moment, that's where we are.
It gives rights to particularly interesting conclusions.
More so, when you add in the idea, the concept of particular disadvantage.
Doesn't mean some really serious disadvantage.
that disadvantage compared with other people
What the court says in the Chez case.
It means no particular degree of seriousness. It has to be a disadvantage essentially.
One other point is it talks about common.
You need to ensure that comparisons are concrete and specific.
The one way you can help the judge most in a discrimination case.
That's not true actually. There are a lot of ways.
If you help a judge with this they will be grateful.
Because the whole core of the discrimination and non discrimination project is to work out, are we treating like in a like way.
And unlike in an unlike way.
Or are we doing the opposite.
That question of comparability is at the core of what we are doing.
And the core in a court's Arsenal, 127 of 2007. Makes this point clear. Be specific about accountability.
So, there are relatively uncontroversial parts of indirect discrimination.
It draws the distinction in between the reason why somebody is treated in a way, is due to the protective characteristic.
I specify this area of the town as an area that's going to have this special treatment.
I know there are a lot of Roma living there.
And I think, that Roma cheat on their electricity bills.
They access these meters and they steal.
Everybody knows that.
Everybody knows. It is common knowledge.
We don't need to produce evidence.
I see some smiles.
I have been at some of these sessions where I have heard this.
An attitude which is prevalent.
Stereotyping of Roma. Be that as it may. The fact of the matter is. The reason why that condition, on its face is neutral.
Was of the presence of Roma in that area. Direct discrimination.

Clear distinction is drawn between those cases and the cases where the effect of the rule is to disadvantage group.

That's when you use indirect discrimination.

Which makes the conclusion more puzzling.

If anybody asks me a question about that.

Moving quickly onto the second way in which a person is, subject to the direct.

For indirect discrimination.

Look at this.

What it says. If you have all this.

And you can't justify the indirect discrimination.

You can also avoid liability if as regards persons with a disability, note these words.

the employer or any other person to whom it 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.

Who gets the benefit of that?

It is the organisation or any person to whom the directive applies who has an obligation to make reasonable accommodations under national law and who does it.

Bear that in mind.

Then we turn to article 5.

Look at the wording here.

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, when needed in a particular case, to enable a person with a disability to have access to participate in, in employment or undergo training, unless such measures would impose a disproportionate burden on the employer. It shall not be disproportionate when it is remedied by measures existing within the framework of the disability policy of the member state concerned. Look at public funding to help you need adjustments. This is disproportionate.

Who has access to public funds these days?

Anyway, so you have a provision which has several sentences.

The first one says, reasonable accommodations to guarantee the principle.

Does that create a right?

Did the words this means have any definitive quality? Are they restrictive?

Or are they inclusive?

How he says shall we work that one out?

I hope you are awake earlier.

Right.

Let's have a look at some of the case law which we have touched on.

I'm going to flag up passages.

And use the remainder of this talk time to cover these cases.

They have mainly examined the concept of disability as we know.

Chacon Navas, which you'll find on page 129, is the starting point for a rather unsatisfactory, he says, discussion.

Of the concept.

Of disability. It is worth reminding oneself. This was the case trying to work out whether all types of sickness fell under the concept of disability.

And, if you look on page 145, paragraph 43, it makes this point about the definition of disability.

It aims to combat certain types of discrimination, as regards in occupation. In that concept, the words in court of justice judgement sometimes mean something. They usually mean something.

It is always worth bearing in mind that they are answering a specific question of interpretation arising out of what the national court said to them.

Generally, they are careful to restrict the interpretation to the context in which they talk about.

When they use words, like in that context.

It is not verbage. Not just a nice link. Like the continuity announcer. From one program to another.

It means something. In that context, directive on employment and occupation. The concept of disability must be understood.

Consistent with the UNCRPD.

And, which hinders the participation of the person concerned in professional life. Oops. We have departed from the UNCRPD definition.

By some distance.

UNCRPD definition of disability is about participation in society broadly speaking.

The reason why it is down this route. It is the scope of the application of the directive.

They can't say, it depends on things which may have nothing to do with employment and occupation.

That's what is relevant in this context.

They go and say, concept to disability.

In that directive, chose a term.

Which differs from sickness.

Recite 16 they refer to. States, the provisions of measures of disabled persons in the workplace plays an important role of combating discrimination.

The importance of attaching the measures of the workplace demonstrates that it envisages situations in which participation in professional life is hindered over a longer period.

That's how they get there.

So, in order for the limitation to fall within the concept of disability it must be probable that it will last for a long time.

So, there is a latin expression non secuto. Some of you may be familiar with. Which translates, it doesn't follow.

It just doesn't follow. But that is the route by which they get where they are going.

So, sadly also, it is part of the operative of the judgement at the end.

That's our starting point.

If you turn to the HK Danmark case on page 79.

And what I want you to do is have a look at the way it deals...

I have taken you to the wrong case. Page 103. And look at page 109.

Again, I will read out how they have dealt here with the UNCRPD.

First of all they notice it is incorporated into the community legal order that there is a decision to that effect.

But then, they look at the concept of disability.

They remember Chacon Navas. The UN convention which is recognized, after Chacon Navas, acknowledges that disability is an evolving-concept.

And results from the interaction between persons with impairments and attitudinal barriers in environment and participation in society on equal basis with others.

So, they say, the second paragraph article 1 talks about long term.

And they set out the definition there.

So then, repeat the fact that the restriction and impairment hinders the full participation of persons concerned in professional life on equal basis with others.

Again, I suggest that's looking at the scope of the directive.

They note that the concept of long term is inherent in the UN convention definition as well.

They then say this.

That the directive isn't intended to cover any disabilities of congenital or resulting from accidents, caused by illness.

So, they then conclude that if a curable or incurable illness entails limitation, which in interaction with barriers may hinder effective participation in professional life, that's covered by the concept of disability.

Looking next to the case which is on page 79. FOA.

I want you to please look at page 85 and paragraph 53. Where again they deal with the definition of disability from the UNCRPD.

They note amongst other things the case of Danmark, and the case of Glatzal, I mentioned yesterday. It had to do with the eyesight and driving. But not employment and occupation.

Nevertheless, the court wrongly used the definition from Danmark.

It seems to me there is work that needs to be done there, to move the court away from a monolithic idea of what disability is.

And applying that to all of the contexts of European Union law.

So, this case, the FOA case, was the case about obesity.

What is important to note, is that extending on from the idea that disability is not restricted to incurable conditions, but can cover illnesses and impairments limitations.

It says this. This is paragraph 56.

The concept of disability within the meaning of directive 2000/78 does not extend to the person may not have contributed to the onset of his disability.

Many countries want to exclude certain conditions which are regarded as disabilities in medical terms.

Alcoholism for example.

Query, whether such exclusion is still possible in the light of this.

By the court of justice.

So, that is a remark, in paragraph 56. I don't think we see it repeated in the operative part of the judgement.

For those who want to argue there should be exclusions, there is some light at the end of the tunnel which is not a freight train.-

The court goes on to say that the concept of reasonable accommodations doesn't have anything to do with the definition of disability.

But they do say this. This is what grabbed the headlines. Obesity in itself doesn't constitute disability.

Any condition in itself doesn't constitute disability. It has to have effects.

In the next case we see a harsh application of that process.

This is the Z case. Which you'll find on page 89.

I want you to please look at page, actually, I want you to look at page 100 I think. Yes.

And paragraph 76. They deal with the UNCRPD convention definition limitation.

Long term impairments. In paragraph 77. They note that it has got to be referring to professional activity, and also the hindrance in such activity.

In paragraph 78. The case concerned a woman who did not have a uterus. And couldn't give birth.

They note that fact. They go on to say, there is no dispute.

It constitutes a limitation. From physical or mental impairment. It is also long term.

In paragraph 80, here is why the scope comes in.

However, the concept of disability in the meaning of directive 2000/78.

Limitation from which the person suffers may hinder that person's participation on an equal basis with others.

They conclude the condition doesn't constitute a disability.

I have taken you through that.

Because this issue of how the convention definition interacts with the directive has to be examined carefully.

For most disability cases, this idea of distinction between non work life and work life is spurious.

If I have got depression, then I can't concentrate at home. Can't concentrate at work.

I don't communicate at home and work.

And therefore in practical terms. When you are running one of these cases.

What you need to do is establish that link.

The faculty that is affected operates at both places. I have been told to stop.

What I'm going to do instead.

Is just, mention an interesting way.

You may need to use that later on.

Keep paying attention.

If something is outside the scope of the concept of reasonable accommodation under the directive.

What do you do?

Everybody who is affected by the directive is affected by the concept of indirect discrimination.

The concept of reasonable accommodation is increasingly being used in indirect discrimination arguments.

To remove the mystery. If you cannot use reasonable accommodation.

In any situation.

Then you will want to try and use reasonable accommodation as an aspect of justification. Z z Let me mention finally, finally, apologies to everybody.

This point.

In recent advocate general opinions, on the wearing of the... This concept of reasonable accommodation has started to be used in t-

e way in which it has been started to be used by the Strasbourg courts.

I have given you one reference. Cam in Turkey.

As an aspect of robotting justification.

It won' t be proportionate. If you could have avoided the impact on the disabled person by making reasonable accommodations.

This principle is more an more in other areas. Religion and belief is a good example.

My apologies for running over time.

That' s the end of my presentation.

I hope you find it useful in the hours and days and years to come.

Thank you.

- Thanks very much. For the master class in the different sorts of law. And disability employment.

I don' t have time for discussion.

We' ll take 2 questions.

1 question?

- I' ll settle for half a question.

Somebody in the back row?

There we go.

- Question around reasonable accommodations and whether or not money can be a total, objective justification.

Or other objective justifications?

- It is a really good question.

And one which you can tell by that start of an answer, i don' t have an answer. Generally speaking, the principle in all aspects of justification is you cannot run an argument based on pure costs.

However, purity is a very fragile concept.

And in age cases for example.

The ability of the courts to say, this is cost plus something else. Has been really quite remarkable.

Having said that, what they haven't accepted is costs plus worker flexibility as a general principle.

Could be a type of justification.

Because that too is basically boiling down to the same concept.

So, the directive I think does allow for proportionality based on costs as an element.

What it says is, unless such measures would impose a disproportionate burden on the employer.

So, the door would be open to a fairly loose concept of cost plus, potentially I'd say.

In an appropriate case.

Costs on its own argument.

I can see hands going up to correct me.

- Richard. Not to correct. Just to add hopefully clarification.

The reasonable accommodation duty assumes presupposes there will be some costs.

There will be some burden and cost in this case on the employer.

The other thing to bear in mind is that in reality many accommodations can be provided that have no costs.

To the employer. And depending on the relevant system, national, legal system, they may be public funding available to support those costs.

What I will say is that it depends on the legislative regime.

Whether it restricts the duty to certain sizes or types of employer.

But if it extends to all types of employer, you can envisage some situations where the cost of the accommodation is the most reasonable and effective accommodation would be too expensive.

And the purpose of anti discrimination law is not to put business out of business. It is about reconciling conflicting pressures z-

you can envisage the situation. I suggest those are going to be very few in number.