

Disability and employment: key notions, existing provisions and jurisprudence

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Key Concepts

- The key concepts are:
- Disability
- Direct discrimination
- Indirect discrimination
- Harassment
- Genuine Occupational Qualification
- Reasonable accommodation.

Directive 2000/78

- Recitals 6,8,11,12, 16-21, 23, 26, 27,
- article 19 TFEU – fundamental concept of equality
- C-555/07 Küçükdeveci v. Swedex GmbH & Co KG when a national court is hearing a dispute involving the principle of non-discrimination on the grounds of age as given expression in the Directive the national court must within the limits of its jurisdiction provide for the legal protection of the individuals derived from European Union law

Disability

- C-13/05 Chacón Navas v Eurest Colectividades SA
- deliberately chosen the word "disability" rather than "sickness"
- not defined; no express reference to the law of the Member States; therefore must normally be given an autonomous and uniform interpretation throughout the EU

Disability

- the concept of 'disability' must be understood as referring 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.
- 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.
- nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.

Criticism

- nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.
- BUT
- Cf Coleman: what do we do about protection against dismissal because the person might become a disabled person if action is not quickly taken?

Questions on disability

- How does the UN Convention affect this definition now? CF the UN Convention's definition of disability?
- Hindering professional life? Or is something else enough?

Direct discrimination on grounds of disability

- 1) less favourable treatment
- 2) an actual or hypothetical comparator
- 3) comparable circumstances between the claimant and the comparator
- 4) Causation.

Direct discrimination

- Comparators: real or hypothetical?
- Less favourable treatment
- Relevant circumstances the same or not materially different
- Causation – what role must the characteristic play?

Coleman

- *Coleman v Attridge Law*, Case C-303/06
- In the context of the prohibition of discrimination on grounds of disability, does the Directive only protect from direct discrimination and harassment persons who are themselves disabled?
- Emergent philosophy of the Directive – now supported by the UN Convention – AG Opinion in Coleman.
- The effect of Coleman – and its limits

Indirect discrimination

- (a) a neutral provision criterion or practice
 - (b) that this PCP would put persons having a particular disability at a particular disadvantage compared with other persons
 - and the employer must not be able to justify the PCP. This involves the employer showing:
 - (i) that there is a legitimate aim for using the PCP
 - (ii) that the PCP is objectively justified as an appropriate and necessary means of achieving that legitimate aim;
- BUT DISABILITY

Reasonable accommodation and indirect discrimination

- A specific provision exists relating to the situation of persons with disabilities. If (a) and (b) above are established, but as regards persons with a particular disability the employer or other person to whom the Directive applies is obliged under national law to take appropriate measures of reasonable accommodation in order to eliminate disadvantages entailed by such provision criterion or practice, then the question of justifying the indirect discrimination does not arise.

Indirect discrimination

- “would” possible to challenge a practice, criteria, or provision before it has been applied
- “particular disadvantage”:
- intrinsically liable to disadvantage those with the protected characteristic more than those who do not have it.
- there is a risk that it will work in particular against those with the protected characteristic because of the behaviour which those with the characteristic often exhibit (the normal behaviour).
- (c) those without the protected characteristic can (on evidence) satisfy the PCP more easily than those with the characteristic;
- (d) the majority of the pool to whom the PCP is applied are disadvantaged and have the protected characteristic

Justification

- (i) Is the criteria, provision or practice, imposed other than in order to discriminate on ‘protected grounds’?
- (ii) Do the means selected to achieve the chosen aim correspond to a real need?
- (iii) Are they appropriate to achieve that aim?
- (iv) Are they necessary in order to achieve that end?

Harassment

- (1) unwanted conduct
- (2) related to disability
- (3) takes place with the purpose or effect of violating the dignity of a person and the purpose or effect of creating an intimidating hostile, degrading humiliating or offensive environment. (The concept may be defined in accordance with the national laws of the member states).

Genuine and determining occupational requirements

- A member state may provide that a difference in treatment which is based on a characteristic related to disability shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
- **C-229/08 WOLF**

Reasonable Accommodation

- a restriction solely to employment situations? No
- Article 5 must be interpreted
- (a) as imposing an obligation to make reasonable accommodations
- (b) as applying to all persons
- (c) as providing a “defence” to a charge of indirect discrimination. In appropriate cases it redirects the court’s inquiry into whether the employer has made reasonable accommodations.

Reasonable accommodation

- employers must take appropriate measures, when needed in a particular case. Thus it appears to create an obligation in the particular case. The circumstances giving rise to the obligation are where measures are needed to enable a person with a disability
- (a) to have access to
- (b) to participate in
- (c) to advance in employment or
- (d) to undergo training.
- However the duty does not arise where the measures would impose a disproportionate burden on the employer. What is meant by disproportionate in this context is significantly different to that which is normally meant. Expressly the factor of expense is brought into account. Thus the recitals refer to financial expense as being a reason why it might be disproportionate for an accommodation to be carried out.

Treaty on the Functioning of the European Union

- Article 10
- “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

UNCRPD

- Dignity
- Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (article 1).

Convention

- “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Convention

- “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.

Convention

- Art 3 non-discrimination as one of the general principles as well as accessibility.
- article 4 (general obligations) requires states to take into account the protection and promotion of the human rights of persons with disabilities in all policies. Implications for state action?

Article 27

- right to work on an equal basis with others;
- includes right to opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.
- States Parties must safeguard and promote the realization of the right to work.
- Sets out action.

Conclusion

- Interpretation or action?
- Or both!