

NON DISCRIMINATION, REASONABLE
ACCOMMODATION AND THE BURDEN OF PROOF IN
DISABILITY PROCEEDINGS FOR EQUAL TREATMENT
IN EMPLOYMENT UNDER EU LAW: DEFINITION,
SCOPE, INTERPRETATION AND THE IMPACT OF THE
UNCRPD

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Introduction

1. This talk will be divided into four sections:
 - definition of disability
 - non discrimination
 - reasonable accommodation
 - the burden of proof.
2. Although falling under the heading of non discrimination, the concepts of harassment and victimisation will not be covered.
3. Directive 2000/78 (also known as the Framework Directive) sets out the basic practical framework for disability discrimination in the field of employment and occupation. Its Recitals are useful in helping to understand the aims of the Directive, in particular Recitals 6, 8, 11, 16, 20, 21, 26 and 27.
4. The principle of equality is a fundamental principle of EU law and is found in Article 19 of the Treaty on the Functioning of the European Union (also known as the Lisbon Treaty).

Definition of disability

5. Disability is not defined in Directive 2000/78.
6. The main case on definition of disability is *Chacón Navas v Eurest Colectividades SA*.¹ The facts are as follows. At a time when Mrs Chacón Navas was certified as 'unfit for work' on the grounds of sickness she was given notice of dismissal by her employer, Eurest. She brought legal proceedings against Eurest on the basis that her dismissal

¹ Case C-13/05.

amounted to disability discrimination. The Spanish court took the view that a dismissal on the grounds of disability could amount to a form of disability discrimination, but given the lack of a definition of disability under Spanish law, the court referred the case to the European Court of Justice ("ECJ").

7. The ECJ held that the EU legislature had deliberately chosen the word 'disability' rather than 'sickness' and that the two concepts were not equivalent to one another. The Court required that a person have a limitation which results in particular from a physical, mental or psychological impairment and which 'hinders' over 'a long period of time' the participation of the person concerned in professional life.
8. This definition gives rise to the question whether a person is disabled if the impairment only affects their ability to participate in professional life. There is scope for differences of approach between the member states on this fundamental issue. By way of example, in the UK a person must show that the impairment has a more than minor effect on their ability to carry out normal day-to-day activities² while according to an Executive Regulation of the Flemish Government the limitation 'may constitute an obstacle to fair participation in the employment market'.³
9. There is no definition of disability in UNCRPD but its purpose clause states:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in

² Equality Act 2010 ("EqA") section 6.

³ Act XXXVI of 1998 on the Rights of Disabled Persons and Guaranteeing of their Equal Opportunities, Art. 4.

interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".⁴

10. Thus the focus is not on participation in professional life (like *Chacón Navas*) but rather on whether the impairment, in interaction with various barriers, *may* hinder effective participation in society.

11. Commentators have argued that the approach set out in *Chacón Navas* is a 'strongly medical model', focusing firmly on the limitation brought about by the impairment rather than a social model (which focuses on barriers to society).⁵ This, it is said, means that the Framework Directive is 'significantly out of step with the requirements of the CRPD'.⁶

Non Discrimination

Direct discrimination on grounds of disability

12. Article 2 of Directive 2000/78 defines the concept of direct discrimination in employment and occupation. The EU member states are placed under an obligation to ensure that there is no discrimination whatsoever on the framework grounds: the use of the term 'whatsoever' indicates that there should be neither direct (overt or covert) or indirect (overt or covert) discrimination. Nor should discrimination form any part of the justification defence to *prima facie* indirect discrimination.

⁴ Article 1. This should be read together with provisions of the preamble including:
(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

⁵ See for example S. Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40 ILJ 428, 432-434.

⁶ *Ibid.*

13. The following elements are comprised in direct discrimination:

- less favourable treatment
- an actual or hypothetical comparator
- comparable circumstances between the claimant and the comparator
- causation.

14. Less favourable treatment may be past, present or hypothetical treatment – i.e. treatment that would be less favourable. The relevant circumstances of the claimant and the comparator must be the same or not materially different. This has raised particular problems in the disability context because a hypothetical (or real) comparator's circumstances e.g. being persistently absent from work would often result in the same treatment as is meted out to a disabled person also persistently absent. There is no provision to assess the abilities of the disabled person as they would have been following compliance with the duty of reasonable accommodation.

15. In the UK claimants are assisted by a second type of direct discrimination termed 'discrimination arising from disability', which is unfavourable treatment of the claimant (thus requiring no comparator) because of the claimant's own disability and is subject to a general justification defence.⁷

16. It has been argued that the justification defences for discrimination arising from disability and indirect discrimination are inconsistent with the UNCRPD because the text of the Convention does not provide for such defences.⁸

⁷ EqA s.15.

⁸ See S. Fraser Butlin, above n. 4, 436-438.

17. A counter position is that although the UNCRPD does not refer explicitly to justification, its definition of discrimination accords with those used in earlier UN human rights treaties and as such should be read in light of relevant general comments from the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. These general comments have accepted that certain forms of treatment may be discriminatory only if they cannot be justified (for the defendant to prove that the unfavourable treatment is 'a proportionate means of achieving a legitimate aim').⁹ Thus the justification defence to 'discrimination arising from disability' seems to be UNCRPD-compliant.

18. The concept of 'on any of the grounds' in Article 2 of Directive 2000/78 is sufficiently broad to capture both the situation in which A discriminates against B on grounds of B's own disability but also the situation in which A discriminates against B because of C's disability. This latter situation was brought before the ECJ in *Coleman v Attridge Law*.¹⁰

19. In this case a mother (and principal carer of a disabled child) brought a direct discrimination claim against her employer alleging less favourable treatment because of her son's disability. The UK Employment Tribunal referred the matter to the ECJ asking whether Directive 2000/78 must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of an employee who is him/herself disabled or whether the directive applies equally to an employee who is treated less favourably by reason of the disability of his/her child.

⁹ A. Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 ILJ 359.

¹⁰ Case C-303/06.

20. The ECJ held that the Directive applies not to particular category of person but by reference to the nature of the discrimination. Were it to be limited in its application only to people who are themselves disabled, then it would be liable to deprive the Directive of an important element of its effectiveness and reduce the protection which it is intended to guarantee. So in the case of direct discrimination it is necessary for national law to be interpreted to include 'associative discrimination'.

Indirect discrimination

21. The concept of indirect discrimination is contained within Article 2(2) - to establish it a claimant must identify:

- a neutral provision criterion or practice ("PCP")
- that this PCP would put persons having a particular disability at particular disadvantage compared with other persons

and the employer must not be able to justify the PCP. This involves the employer showing:

- that there is a legitimate aim for using the PCP
- that the PCP is objectively justified as an appropriate and necessary means of achieving that legitimate aim.

22. Article 2(2)(b)(ii) provides a defence to a charge of indirect discrimination 'as regards persons with a particular disability'. The employer is obliged under national legislation to take appropriate measures in line with the principles contained in Article 5 (reasonable accommodation) in order to eliminate disadvantages comprised in the PCP.

23. This is an important provision: failure to make reasonable accommodation means that the PCP may theoretically still be capable of justification but in practice is unlikely to be. This is because if there is a reasonable accommodation that can be made then there will be a less discriminatory means of achieving the legitimate aim (namely carrying out the job with the benefit of reasonable accommodation). Conversely, where the employer has carried out all the steps of reasonable accommodation, it does not have to justify the use of the PCP.
24. The use of the word 'would' in Article 2(2) ('this PCP *would* put persons having a particular disability ... ') suggests that it is possible to challenge a PCP before it has been applied. The logical conclusion of this is that it should be possible to challenge provisions etc which clearly have a discriminatory effect without waiting for their application in a particular case.
25. A claimant need not use statistical evidence to show that the protected group of which s/he is a member is affected disproportionately to other groups to whom the provision applies. The words 'particular disadvantage' in Article 2(2) indicate that what is required is to show that there is a disadvantage to the individuals in the group: see *O'Flynn v Adjudication Officer*.¹¹
26. The test for justification has been set out by the ECJ in the case of *Bilka-Kaufhaus GmbH v Weber von Hartz*.¹² It can be distilled into the following four questions:
- Is the PCP imposed other than in order to discriminate on 'protected grounds'?

¹¹ Case C-237/94.

¹² Case C-170/84.

- Do the means selected to achieve the chosen aim correspond to a real need?
- Are they appropriate to achieve that aim?
- Are they necessary in order to achieve that end?

27. Where an individual employer advances a defence of justification it will be scrutinised very carefully: more so than if a state puts forward such a justification to defend a measure of law, see for example *Stapleton v The Revenue Commissioners and Department of Finance*.¹³

Reasonable accommodation

28. Article 5 of Directive 2000/78 covers reasonable accommodation for disabled persons. Employers must take 'appropriate measures' when needed in a 'particular case'. Thus the Directive creates an obligation in the particular case and the circumstances giving rise to that obligation are where measures are needed to enable a person with a disability to:

- have access to
- participate in
- advance in employment
- undergo training.

29. Article 5 does not explicitly state that a failure to make a reasonable accommodation amounts to a form of discrimination.¹⁴ Instead it provides that the obligation to make a reasonable accommodation is

¹³ Case C-243/95.

¹⁴ In spite of the fact that Directive 2000/78 does not address this point, the European Commission was the leading proponent for the proposal that the UNCRPD should define an unjustified breach of the reasonable accommodation as a form of discrimination, see G de Búrca, 'The European Union in the negotiation of the UN Disability Convention' (2010) 35 E.L. Rev. 174, 192.

necessary 'in order to guarantee compliance with the principle of equal treatment'.

30. 'Appropriate measures' are defined in Recital 20 to the Directive as being effective and practical measures to adapt the workplace to the disability for example adapting premises and equipment, patterns of working time, distribution of tasks or provision of training or integration of resources.
31. The duty does not arise however where the measures would impose a disproportionate burden on the employer. Recital 21 to the Directive demonstrates the method for determining 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 and the possibility of obtaining public funding or other assistance.
32. An example of a case of reasonable accommodation is that of *Boutheiller v Ministère de l'éducation*.¹⁵ A wheelchair-bound job applicant brought a claim against the Ministry of Education for failure to be appointed to a particular post. The complainant's application was ranked third in the list of candidates. When the first two candidates turned down the offer of the post, rather than offer it next to the complainant, it was offered to the candidate fourth on the list and the complainant was offered a post in a different department which had been adapted for wheelchair access. The decision was justified on behalf of the state on the basis that it was not in the public interest to pay for alterations to the premises in order to fulfil the duty of reasonable accommodation. The court held that the Ministry had failed in its duty, which could not be diminished by management considerations.

¹⁵ Rouen Administrative Court, Judgment No. 0500525-3, 24 June 2008.

33. The concept of reasonable accommodation is innovative because it obliges the employer to take steps to allow a person who is suitably qualified for the job to be able to take it up by requiring the disability to be accommodated without undue burdens on the employer. It is also reactive in that the employer looks to accommodate a disabled person in a particular case in view of their individual circumstances rather than looking at the working environment and anticipating difficulties which it might present to disabled persons.

34. The fact that it is reactive is consistent with 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.¹⁶

The Burden of Proof

35. The burden of proof is set out at Article 10 of Directive 2000/78:

Member states shall ... ensure that, when persons who consider themselves wronged because of 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

¹⁶ See A. Lawson, above n. 9, 369.

direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.¹⁷

36. The reason why the burden of proof is treated differently than in other areas of law is that in practice discrimination is often difficult to prove because direct evidence of it is only rarely available. Frequently the relevant evidence is in the hands of the respondent, i.e. the employer. As stated by Lord Browne-Wilkinson in the UK case of *Glasgow City Council v Zafar*, "those who discriminate ... do not in general advertise their prejudices: indeed they may not even be aware of them".¹⁸

37. An example can be found in the European Court of Human Rights ("ECtHR") case of *Timishev v Russia*.¹⁹ The applicant was a Russian national of Chechen ethnic origin. Part of his complaint related to an occasion when he was prevented from passing a checkpoint into a particular region, which he claimed was as a result of race discrimination. The ECtHR found he was prevented from passing the checkpoint because of his ethnic origin; it did not accept the state's explanation that the applicant had left the checkpoint voluntarily after being refused priority in the queue, due to inconsistencies in this account. The court's decision was corroborated by official documents which noted the existence of a policy to restrict the movement of ethnic Chechens.

38. There is no firm rule under ECtHR jurisprudence that the burden of proof shifts to the respondent once the applicant presents a *prima facie* case of discrimination. Instead the court has developed a discretionary norm, as illustrated in *Timishev*, that permits it to draw inferences of

¹⁷ Member States do not need to apply the shifting of the burden of proof to proceedings that are inquisitorial rather than adversarial, see Art. 10(5) of Directive 2000/78.

¹⁸ [1997] 1 WLR 1659.

¹⁹ Nos 55762/00 and 55974/00, 13 December 2005.

discrimination depending on the facts and the particular part of the Convention which is engaged.

39. This approach seems similar to the initial steps taken by national courts to the question of the burden of proof. The UK case of *Igen Ltd v Wong*²⁰ is illustrative, it authoritatively set out the position with regard to the drawing of inferences in discrimination cases:

(1) Pursuant to s 63A of the SDA 1975 [Sex Discrimination Act 1975],²¹ it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but

²⁰ [2005] 3 All ER 812.

²¹ The Equality Act 2010 which came into force on 1 October 2010 has since consolidated this legislation. Section 136 provides:

Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) (...)

merely based on the assumption that 'he or she would not have fitted in'.

- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word 'could' in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

- (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

40. This approach has been essentially supported in the Advocate General ("AG")'s decision in the case of *Meister v Speech Design Carrier Systems GmbH* which was delivered on the 12 January 2012.²² The case was brought by a job applicant who was not invited for interview on two separate occasions when the same position was advertised and she applied for it. The applicant fitted the required profile set out in the advertisement. The company failed to provide information when rejecting the application.

41. The German court asked if these circumstances (where the employer does not disclose the requested information) gave rise to a presumption that the discrimination alleged by the worker existed. In answer the AG told the referring court that it must assess the wider factual context in addition to the fact of the employer's failure and from this make its own decision about the presumption of discrimination. The fact that the applicant's qualifications clearly matched the post to be filled, the failure to call her for a job interview and the fact that the employer persisted in refusing to call her for an interview seem to point in the direction of such a presumption.

Conclusion

42. Almost four years ago, the European Commission proposed a new directive to complement the existing EU equality directives and to prohibit discrimination in areas outside of employment on the grounds of religion or belief, sexual orientation, disability and age.²³

²² Case C-415/10.

²³ European Commission, 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) 425, Brussels, July 2, 2008.

43. The proposal is still the subject of negotiation; most recently being discussed at the European Council meeting on 1 December 2011.²⁴ It represents a more ambitious approach to disability, which uses the directive as a tool to implement parts of the UNCRPD.²⁵
44. The current version of the proposal includes a recital based on the relevant provision in Article 1 of the UNCRPD which, in its description of disability, refers to the interaction between impairments and socially created barriers that limit participation.
45. The proposal also defines an unjustified failure to make a reasonable accommodation as a form of discrimination, and links this to the UNCRPD.²⁶
46. Whether or not the proposed Equal Treatment Directive is adopted, its text (according to L Waddington) 'reveals a strong desire among both the Commission and the Member States to implement the non-discrimination provisions of the CRPD, and to do this through EU legislation.'²⁷ Watch this space!

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²⁴ L Waddington comments that 'all the signs are that, owing to the lack of enthusiasm among some Member States, and absolute opposition by others, the proposal will not be adopted' in 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' E L Rev 163, 164.

²⁵ Ibid.

²⁶ The original proposal therefore provided in art.2(5): 'Denial of reasonable accommodation ... as regards persons with disabilities shall be deemed to be discrimination ...' Furthermore, Recital 2 specified: 'In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination.'

²⁷ L Waddington, n. 24 above, 179.

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