



**Non discrimination, reasonable  
accommodation and the burden of proof in  
disability proceedings under EU Law:**

Catherine Casserley



Talk will be divided into four sections:

- definition of disability
- non discrimination
- reasonable accommodation
- the burden of proof



## Definition of Disability

*Chacón Navas v Eurest Colectividades SA*  
(C-13/05)

- EC legislature had deliberately chosen the word 'disability' rather than 'sickness' and that the two concepts were not the same;
- A person must have 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.



## Non discrimination

Direct discrimination on grounds of disability

Article 2 of Directive 2000/78:

- (a) less favourable treatment
- (b) an actual or hypothetical comparator
- (c) comparable circumstances between the claimant and the comparator
- (d) causation.



## Non discrimination

### Discrimination arising from disability

Section 15 of the Equality Act 2010 (UK):

- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.



## Non discrimination

### Associative discrimination

*Coleman v Attridge Law* Case C-303/06:

A mother (and principal carer of a disabled child) was able to bring a direct discrimination claim against her employer alleging less favourable treatment because of her son's disability.



## Non discrimination

### Indirect discrimination (1)

Article 2(2) of Directive 2000/78:

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



## Non discrimination

### Indirect discrimination (2)

Article 2(2)(b)(i) of Directive 2000/78:

The employer can justify the PCP by 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.



## Non discrimination

### Indirect discrimination (2)

Article 2(2)(b)(ii) of Directive 2000/78:

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 pcp



## Non discrimination

### Indirect discrimination (3)

Particular disadvantage:

*O'Flynn v Adjudication Officer Case C-237/94*



## Reasonable accommodation

Article 5 of Directive 2000/78:

Employers must take 'appropriate measures' when needed in a 'particular case' to enable a person with a disability to

- (a) have access to
- (b) participate in
- (c) advance in employment
- (d) undergo training.



## Reasonable accommodation

Recital 20 to the Directive:

'Appropriate measures' are defined 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.



## Reasonable accommodation

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
- the possibility of obtaining public funding or other assistance.



## Burden of proof

Article 10 of Directive 2000/78

- For claimant to establish *prima facie* case
- For respondent to provide an explanation which is adequate to discharge the burden of proving that a prohibited ground was not any part of the reason(s) for the treatment in question
- If respondent fails to discharge the burden, court must make a finding of unlawful discrimination.



## Burden of proof

Exemplified in:

- *Timishev v Russia*, ECtHR, Nos 55762/00 and 55974/00, 13 December 2005
- *Igen v Wong* [2005] 3 All ER 812 (UK)
- The AG's opinion in *Meister v Speech Design Carrier Systems GmbH* Case C-415/10



## Pending references

- *Jette Ring v Dansk almennyttigt Boligselskab*
- Definition of disability as well as nature of discrimination
- Consider in light of UN Convention





## Conclusion

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