

**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**

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**Disability discrimination under
EU law**

Directive 2000/78/EC establishing a general
framework for equal treatment in employment and
occupation:

the only Equality Directive prohibiting
discrimination on the ground of disability (together
with age, sexual orientation, religion or belief);
unequal protection against discrimination,
hierarchy of protected grounds (even the
European primary law sets equal standards)



Disability discrimination under EU law



Directive 2000/78/EC – material scope (application in both public and private sectors):

- conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience
- employment and working conditions, including dismissals and pay
- membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Disability discrimination under EU law



Personal scope:

Categories:

- persons discriminated against their actual characteristics
- persons discriminated against their assumed characteristics
- persons discriminated by association with someone of specific characteristics (**Colman** case)

Disability discrimination under EU law



Direct discrimination:

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 any of the grounds covered by the Directive

- comparator
- „what if not?“ test

- Principle 1: no justification (few exceptions only)
- Principle 2: overt and intentional, examination of less favourable treatment

Disability discrimination under EU law



Indirect discrimination

shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular characteristics at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

- (ii) 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.

Disability discrimination under EU law



Indirect discrimination / justification

„the test of three questions”

- legitimate aim
- means of achieving that aim are appropriate and necessary
- proportionality between the burden of discrimination and the discriminator’s interest

In case at least one of above-mentioned questions are answered negatively – indirect discrimination

Disability discrimination under EU law



Burden of proof

‘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’.

Directives: 2000/43/WE, 2000/78/WE, 2004/113/WE, 2006/54/WE

Disability discrimination under EU law



Aim of shift of burden of proof:

provides an effective tools and procedures to enforce their rights of victims of discrimination

ensures unified standards of protection against discrimination in all EU countries

Disability discrimination under EU law



What does shifting the burden of proof mean in practice for the plaintiff?

This is not a complete plaintiff's release to show authenticity of his/her assertions

Obligation to show facts, which may suggest suspicion of a biased unequal treatment

Unequal treatment should be associated with any of the legally protected characteristics (sex, age, disability, etc.)

a *prima facie* case of discrimination

Disability discrimination under EU law



What does shifting the burden of proof mean in practice for the defendant?

Proving that the action was not against the law

Showing objectivity of the actions (not being motivated by legally protected characteristics)

Not showing objectivity of the actions (objective justification) means that the plaintiff's justification should prevail (the court's evaluation based on presumption of fact – based on the court's life experience)

EU law and the burden of proof

EU legislator allowed the Member States to introduce even more plaintiff friendly rules

Shift of burden of proof principle does not apply to criminal proceedings and those in which the basic principle is the principle of the presumption of innocence



Burden of proof in the jurisdiction of the CJEU

Danfoss C-109/88 (one of the first judgements in this area)

Lack of clarity in the remuneration system which does not allow to identify the criteria that were used by the employer, leads to transferring the burden of proof of lack of discrimination on the employer

The employee only needs to prove that the average salary of employees of one sex is less than of the opposite sex, compared with a sufficiently large number of employees



Burden of proof in the jurisdiction of the CJEU

Kelly (C-104/10) oraz Meister (C-415/10)

allegation of discrimination at the recruitment stage

The EU legislation does not provide for employee's right, who claims that he/she meets the conditions set by the employer in recruitment advertisement but his candidacy has not been taken into account, to obtain information on whether or not as a result of the recruitment process another candidate was hired. The same applies to access to other information - archived applications of other candidates, candidates score cards)

Protection of personal data, as guaranteed by EU law

However, the CJEU left the door open for further explanatory actions to the national court



Burden of proof in the jurisdiction of the CJEU

Brunnhofer (C-381/99)

Objective factors (non-discriminatory) can justify the unequal treatment if they are related to the real purpose and are appropriate and necessary for its implementation. They must be proportionate, must not go beyond what is necessary to achieve the objective and can not be in any way related to discrimination based on one or more legally protected characteristics



Burden of proof in the jurisdiction of the CJEU

Feryn (C-54/07)

- the intention, reluctance to specific groups does not matter
- lack of individualized victim does not matter
- the effect matters (even non-intentional)
- public announcement of discriminatory actions constitutes an evidence of discrimination



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.

Reasonable accommodation



TSUE interpretation of reasonable accommodation:

Ring and Skouboe Werge (C-335/11 and C-337/11) „the concept of reasonable accommodation must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers”

Reasonable accommodation



Recital 20 (Directive 2000/78/EC):

„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.”

- reasonable accommodation concerns all aspects of employment
- CJEU: the list of measures defined in recital 20 is not ended and includes other possibilities

Reasonable accommodation



Recital 21 (Directive 2000/78/EC)
disproportionate burden

„ 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.”

Thank you for your attention

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Used ie. materials prepared by K. Wencel, Thien Uyen Do, F. Moyse and L. Waddington

