

## Applying EU Anti-Discrimination Law – 5 March 2024

### Discrimination on the grounds of disability



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## Program

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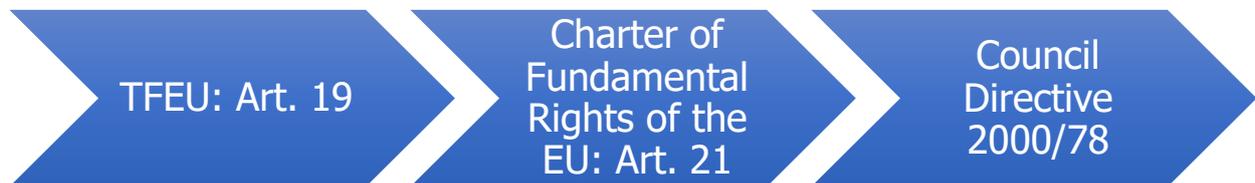
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# 1

## Preliminary remarks: Disability and EU anti-discrimination law

### A. EU Law



## B. The importance of the UN Convention

The UN Convention on the Rights of  
Persons with Disabilities

Part of the EU legal order  
Broader scope than the  
Framework Directive  
Implemented in two other  
Directives

*Defining*  
**disability**

*noun* | dis·abil·i·ty | \,dis-ə-'bi-lə

(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;

(t) "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support;

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**The material scope of the Directive: Defining disability**

## A. A limitation hindering the participation in professional life

### First definition (2006)

- No definition in the Directive, nor a reference to national law → "A limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" ; **medical** model (Chacón Navas, C-13/05)
- An "autonomous and uniform" definition

### Second definition (2013)

- Ratification of the UN Convention by the EU in December 2010
- Consistent interpretation of instruments of secondary EU law with international agreements concluded by the EU



### HK Denmark (C-335/11 and C-337/11, 11 April 2013):

- "a limitation which results in particular from physical, mental or psychological impairments which **in interaction with various barriers** may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" ; **social** dimension
- Impairments must be **long-term** (factual assessment: Daouidi case, 2016)
- NOT necessarily a complete exclusion from work/professional life: **hindrance** rather than impossibility

## A. The Z. case (C-363/12)

### Facts:

- Ms Z. has no uterus and opted for surrogacy
- No maternity leave since she was not pregnant
- Claim before the Equality Tribunal: Discrimination on the grounds of disability

### Question referred to the Court:

- Does a refusal to provide paid leave in such a case constitute a discrimination on the ground of disability?

### Decision

- No
- The inability to have a child by conventional means is **not a disability** since it does not hinder the participation in professional life
- Critical observations

## B. The origin of disability

### HK Denmark (2013)

- Aim of the Framework Directive = implement equal treatment
- **Irrelevance** of the origin of the disability (congenital, accident, sickness)



Deciding otherwise would run counter the very aim of the Directive

### Kaltoft (2014, C-354/13)

- **Irrelevance** of the extent to which the person has contributed to the onset of his disability



## 1) The origin of disability: Sickness (Chacón Navas and HK Denmark)

### Can sickness be considered as a disability? (2006)

- Sickness  $\neq$  disability
- Discrimination on grounds of sickness is not prohibited as such BUT Member States can choose to extend anti-discrimination protection to health



Can sickness be considered as a disability in some cases?

### YES (2013)

- Must entail a **long-term** limitation (cancer, diabetes, cystic fibrosis, etc.);
- Which results "from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers"

## 2) The origin of disability: Obesity – The Kaltoft case

### Facts:

- Mr Kaltoft was a childminder for 15 years
- Dismissal in 2010 because of a decline in the number of children
- Claim that the dismissal amounts to a discrimination on grounds of obesity

### Question referred to the Court:

- Can obesity be deemed to be a disability covered by the protection of the Framework Directive?

### Decision

- No general principle of non-discrimination on grounds of obesity
- BUT **can constitute a disability** under the Directive if it entails a limitation
- Assessment by national courts



## C. Discrimination by association: The Coleman case (C-303/06)

### Facts:

- Ms Coleman gave birth to a child requiring specialized care in 2002
- In 2005, voluntary redundancy
- Complaint: Less favourable treatment than other employees because she was the primary carer of her disabled child



### Questions referred to the Court:

- Is the protection of the Framework Directive limited to people who are themselves disabled? Can the protection extend to employees treated less favourably on the ground of their association with a disabled person?

## C. Discrimination by association: The Coleman case

### Decision:

Extension of the protection to people subject to less favourable treatment on the grounds of their child's disability, for whom they are the primary carer



It does NOT follow from the Directive's provisions that the principle of equal treatment is limited to people who are themselves disabled



The Court did NOT hold that this principle, nor the scope *ratione personae* of the Directive, must be interpreted strictly



Application by reference to **specific grounds**, NOT a category of persons



## D. Discrimination by assumption?



Discrimination based on the **assumption** that the person is disabled



Extension of the Coleman reasoning?



Already applied at national level in some MS



## E. Conclusion: The EU concept of "disability"

- A well-established definition since the HK Denmark case of 2013
- On the model of the **UN Convention** which is part of the EU legal order



- **Origin** is NOT relevant (e.g. obesity)
- **Sickness** CAN be a disability
- Does NOT have to amount to a complete exclusion

- Discrimination by **association**
- Discrimination by **assumption**?

! HK Denmark: Definition, (ir)relevance of origin, ...



# 3

## Reasonable accommodation under EU Law

## A. The concept of "reasonable accommodation"

### Provided for by the Framework Directive...

- Article 5 of the Directive
- Appropriate measures that do not impose a disproportionate burden
- Specific to disability
- Absence of reasonable accommodation = **indirect discrimination** (Art. 2 2(2)(b)(ii))
- Guidance by the Preamble (Recitals 20 and 21)

### And clarified by the CJEU case law

- **Consequence** of the disability
- $\neq$  Constituent element



## B. Types of reasonable accommodations

### Working part-time (HK Denmark, 2013)

- Material and **organisational** measures (Recital 20 Preamble)
- Patterns of working time = rythm or speed



A reduction in working hours **may** constitute an accommodation measure

- Assessment by national courts of the proportionality of the burden
- Financial and other costs entailed by the measure must be taken into account (Recital 21)



## B. Types of reasonable accommodations

### A change of function (XXX v. HR Rail – 2022, C-485/20)

#### Facts:

- Trainee working on the railway tracks
- Diagnosed with a heart condition which makes it impossible for him to exercise his function
- Leading to his later dismissal



#### Question referred to the Court

- In case a worker is no longer capable of performing the essential functions of his post because of a disability, does his employer have an obligation to assign him to another post for which he has the requisite skills, capabilities and availability?

#### Decision

- **Yes**, unless it imposes a disproportionate burden on the employer
- Raises questions: what about **the principle of access to the civil service?**

## C. Conclusion

- An obligation specific to disability
- Coming from the UN Convention
- Not a lot of case law
- Must be assessed after the notion of disability
- Working part-time
- Change of function



# Q&A



**Thank you for your attention!**

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