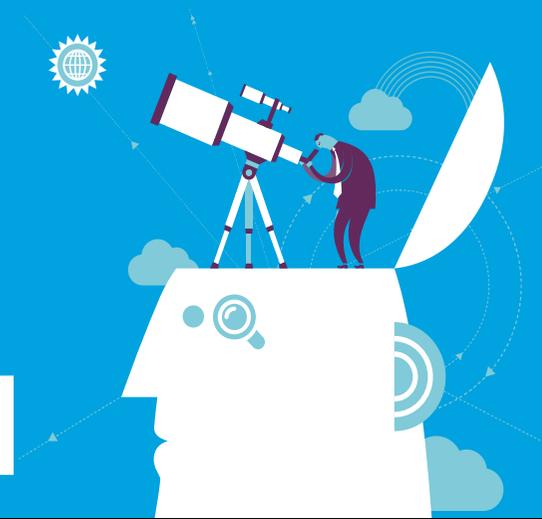


Exploring the Definition of Disability and the Reasonable Accommodation Duty through the case law of the CJEU and Member States

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Structure of the Presentation

Introduction/context and outlining the main aims of the report

PART 1: Defining disability in EU law and providing an overview of the situation at Member State level

PART 2: Reasonable accommodation, the Employment Equality Directive and providing an overview of the situation at Member State level

Concluding remarks

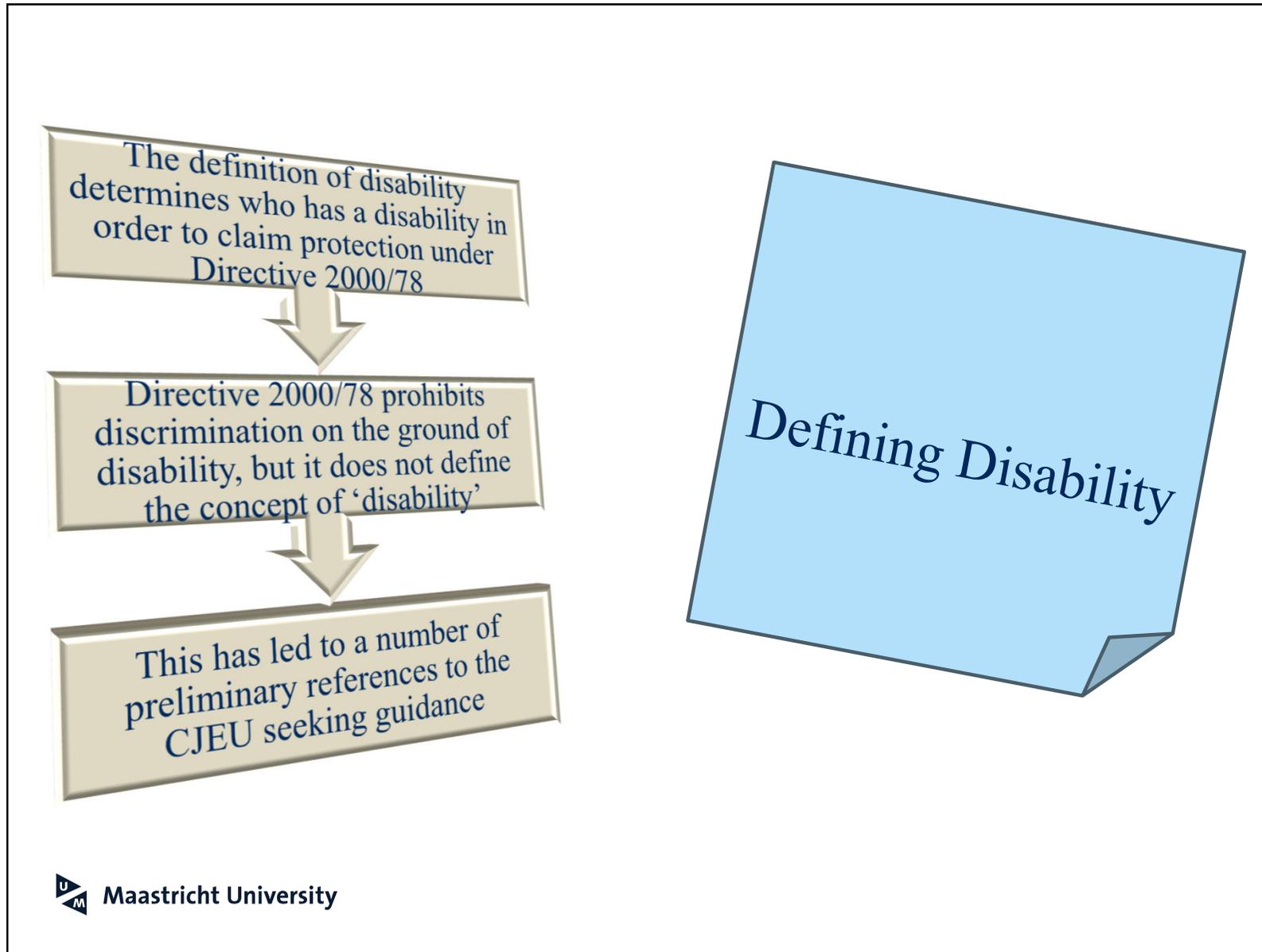
Introduction/Context



Three Aims of the Report

- i. Identifying, analysing and synthesizing how the CJEU is interpreting the disability-related provisions of the Employment Equality Directive
- ii. Analysing how courts and quasi-judicial bodies in the 27 Member States have interpreted and applied national law concerning disability
- iii. Analysing case law (individual communications) of the CRPD Committee and determining if the decisions of the CJEU are in alignment with that case law

***PART 1: THE EU LAW
DEFINITION OF DISABILITY
AND THE SITUATION AT
MEMBER STATE LEVEL***



EU law: Shifting from the Individual to Social Model

- In *HK Danmark (Ring and Skouboe Werge)*, C-335/11 and C-337/11, ‘disability’ was defined as:

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

EU Law: The Interactional Elements of the Definition

Z v. A Government department, C-363/12

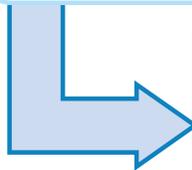
Although Ms. Z had a recognised limitation resulting from her inability to conceive naturally, this did not amount to a disability under the Directive, as it did not impact on her ability to work

HR Rail, Case C-485/20

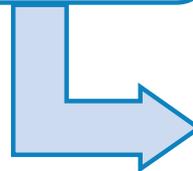
In the more recent judgment of *HR Rail*, the CJEU interpreted broadly the interactional element of its own definition of disability. This resulted in the worker in question falling within the Court's definition

Establishing Disability at EU Level

Kaltoft. Case C-354/13



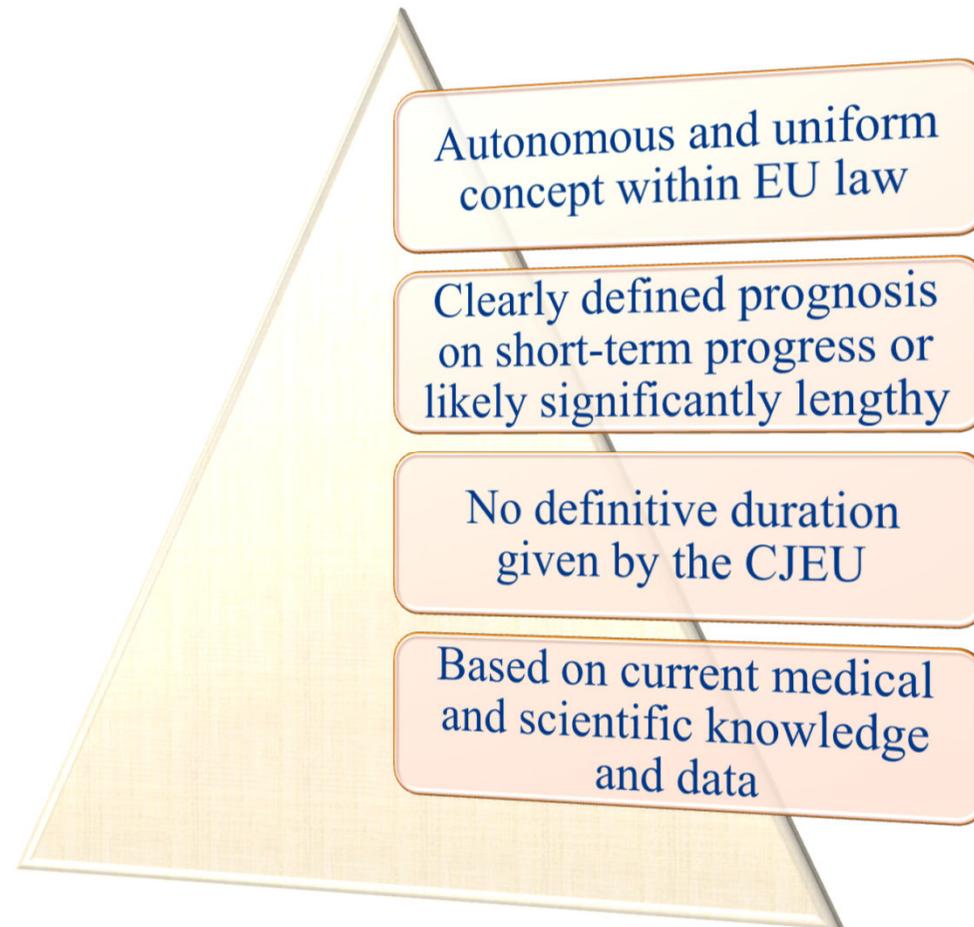
*DW v Nobel
Plastiques
Ibérica SA,
Case C-397/18*



*Z. v A
Government
Department,
Case C-363/12 Z*

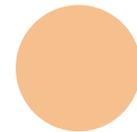
While some Court of Justice judgments on the definition of disability concerned individuals officially assessed as having disabilities, there is nothing to indicate in the CJEU's case law that such an assessment is required

EU Law: The Meaning of a Long-term Limitation

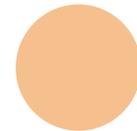


Member State Courts Defining the Interactional Elements of Disability (1)

Jurisprudence interpreting the concept of 'disability' exists in several Member States



Czechia, Latvia, Poland and Romania: scant case law



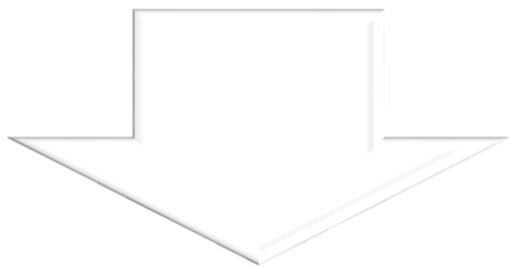
Ireland and Denmark: a large body of case law

Member State Courts Defining the Interactional Elements of Disability (2)



Individual Model of Disability/Out of Step with the CJEU: Ireland and Denmark

Ignoring barriers: The Netherlands



In a few jurisdictions, courts take a broader approach than the CJEU:

1. Austria: Supreme Court Decision 9ObA45/21i, 2021
2. Czechia: Public Defender of Rights. Report 157/2012/DIS, 2013
3. Germany: Federal Labour Court, Decision No. 6 AZR 190/12, 2013

Types of Impairments amounting to a Disability in the Member States

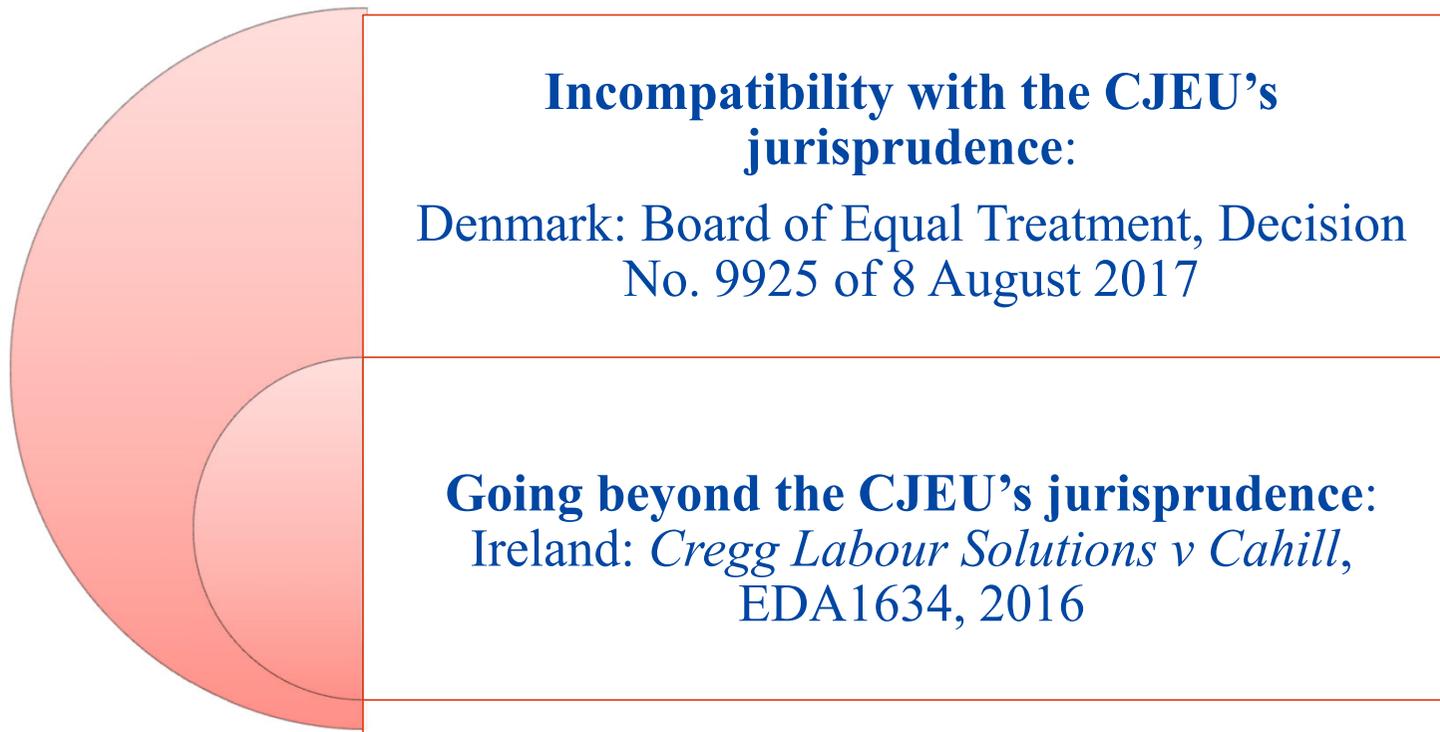
Danish/Irish courts stand out due to the broad range of conditions they have classified as disabilities

Irish courts apply a 'de minimis' rule: Labour Court, *A Government Department v A Worker*, EDA094, 2009

Establishing Disability at Member State Level



The Meaning of a Long-term Limitation at Member State Level



***PART 2: REASONABLE
ACCOMMODATION, THE
EMPLOYMENT EQUALITY
DIRECTIVE AND THE
SITUATION AT THE
NATIONAL LEVEL***

Interpretation by the CJEU of the Disability Provisions of the Directive – Reasonable Accommodation (1)

- The Employment Equality Directive establishes a reasonable accommodation obligation in Article 5:

... 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 provide training for such a person, unless such measure would impose a disproportionate burden on the employer

Interpretation by the CJEU of the Disability Provisions of the Directive – Reasonable Accommodation (2)

Recital 17 of the Employment Equality Directive

This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not *competent, capable and available to perform the essential functions of the post concerned* or to undergo the relevant training, *without prejudice to the obligation to provide reasonable accommodation for people with disabilities*

Interpretation by the CJEU of the Disability Provisions of the Directive – Reasonable Accommodation (3)

Prominent themes in the jurisprudence:

- ❖ Measures which amount to a reasonable accommodation
- ❖ The ability to do a job and reasonable accommodation / consequences of a failure to make a reasonable accommodation
- ❖ The understanding of the notion of disproportionate burden
- ❖ The failure to make a reasonable accommodation and the link with discrimination

Measures Recognised as Amounting to a Reasonable Accommodation

- Reduction in working time - *HK Danmark (Ring and Skouboe Werge)*
- Reassignment of tasks – *DW v. Nobel Plastiques* and *Komisia za zashtita ot diskriminatsia, VA*
- Appointment to a completely new position - *HR Rail*
- Use of assistive devices - *Tartu Vangla* and *VA*
- Personal assistance - *VA*

The Ability to do a Job and Reasonable Accommodation / Consequences of a Failure to Make an Accommodation (1)

When assessing whether a worker with a disability is “competent, capable and available to perform the essential functions of the post concerned”, account must be taken of what the worker is able to achieve when a reasonable accommodation has been put in place

HK Danmark, DW v. Nobel Plastiques, Cases C-335/11 and C-337/11

The Ability to do a Job and Reasonable Accommodation / Consequences of a Failure to Make an Accommodation (2)

*HK Danmark,
Tartu Vanga, VA*

- An employer is obliged to carry out an individualised investigation to determine whether an employee is able to carry out the tasks associated with the position, if necessary following the provision of a reasonable accommodation, before dismissing a worker on the ground that they are unable to do the job

The Ability to do a Job and Reasonable Accommodation / Consequences of a Failure to Make an Accommodation (3)

- National legislation which allows for dismissals without requiring the employer to consider whether a worker could perform the work if a reasonable accommodation were made breaches the Directive

*HK Danmark, Tartu
Vangla*

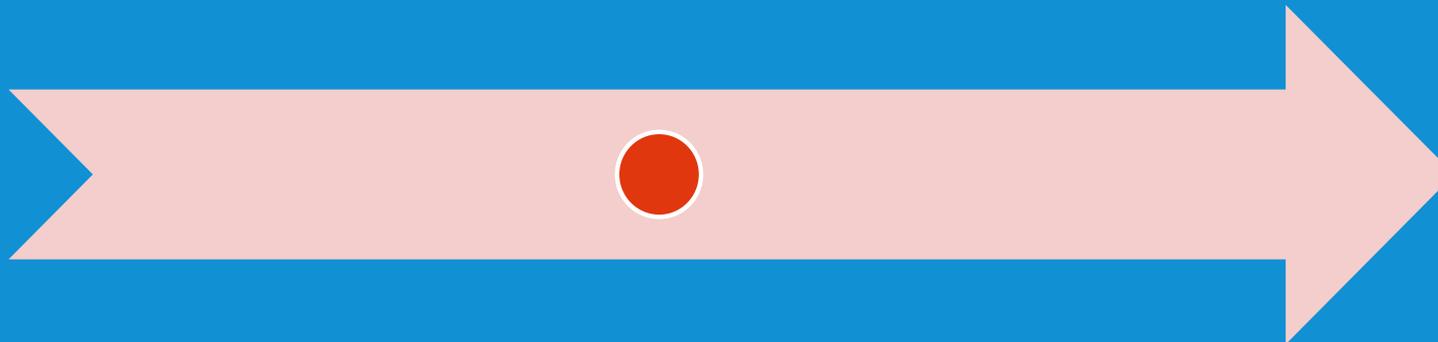
The Ability to do a Job and Reasonable Accommodation / Consequences of a Failure to Make an Accommodation (4)

*HR Rail, Case
C-485/20*

The accommodation duty extends to appointing a person to a new position which they are “competent, capable and available to perform” as long as at least one such vacancy exists

Disproportionate Burden

An accommodation which amounts to a disproportionate burden on the employer is unreasonable - *HK Danmark* Cases C-335/11 and C-337/11



National Case law on Reasonable Accommodation

- Case law exists in almost all Member States on reasonable accommodation and employment – exceptions are LUX and SLOVA
- In some Member States there was only a limited amount of case law – ES, LAT, BU, HU
- In other Member States there was a great deal of case law or quasi-judicial decisions – DE, IRL, NL
- In some Member States most, or all, of the relevant decisions came from quasi-judicial bodies e.g. ombudspersons or equality bodies, rather than courts – CYP, EL, NL, RO

National Case Law on Measures Amounting to a Reasonable Accommodation

- ❖ National disability non-discrimination law generally recognises both material and organisational measures as forms of reasonable accommodation
- ❖ The Lithuanian Supreme Court drew on the EED to expand the kind of measures recognised as reasonable accommodations under the Law on Equal Treatment to include organisational measures, as well as material measures
- ❖ A-162-602/2020, *I.D. v. Office of the Equal Opportunities Ombudsperson*

More Case Law on Organisational Accommodations than on Material Accommodations / Personal Assistance

- ❑ Case law on organisational accommodations is much more common than case law on material accommodations, even though national legislation requires both kinds of accommodations to be made
- ❑ The provision of personal assistance as a form of reasonable accommodation was only recognised in a handful of cases from IRE and NLs

Different Approaches of Courts with regard to Income Retention and Reasonable Accommodation

- The Irish Labour Court has held that the reasonable accommodation duty does not extend to maintaining the previous level of pay when a worker is assigned new tasks / work as a reasonable accommodation
- Labour Court, *Noonan Services v A Worker*, EDA 1126, 5 July 2011
- The French Council of State held that a worker is entitled to retain the previous higher level of pay when transferred to another position: Conseil d'Etat, *Volot-Pfiser*, No. 347703, 11 July 2012

Disproportionate Burden / Deferring to the View of the Employer

The Danish Supreme Court (13 April 2016) allowed employer a fairly wide discretion when deciding on how to organise operations in the context of reasonable accommodation (request to work part-time)



In contrast, the German Federal Labour Court was willing to require a fairly far reaching reasonable accommodation, involving a redistribution of tasks, even though this resulted in disruptions to the working practice. 9 AZR 411/05, 14 March 2006

Different Approaches Regarding Appointment to a New Position (1)

“The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee. It is, therefore, the duty of the deciding tribunal to decide, in any given case, whether what is required to allow a person employment is reasonable accommodation *in the job*, or whether, in reality, what is sought is an entirely different”

Irish Supreme Court, *Nano Nagle School v Daly* (2019)

Different Approaches Regarding Appointment to a New Position (2)

- ❑ In several subsequent judgments, Irish courts found that accommodating workers would involve creating completely new jobs, and therefore went beyond the reasonable accommodation duty
- ❑ However, in *Nowak v Moriarty's Food Markets Ltd T/A Moriarty's Supervalu Skerries* (ADJ-00032391, 4 January 2023) the Workplace Relations Commission recognised that appointment to another position could be a form of reasonable accommodation, but found that was not possible on the facts

Different Approaches Regarding Appointment to a New Position (3)

- ❖ In the NLs and Poland there is case law pre *HR Rail* which held that the obligation to provide a reasonable accommodation did not extend to appointing a worker to a completely new job
- ❖ In Austria and Denmark courts have held that the creation of a completely new job which only consists of tasks which the worker can do goes beyond the reasonable accommodation duty

The Ability to do a Job and Reasonable Accommodation / Consequences of a Failure to Make an Accommodation

- Broadly speaking, national courts / quasi-judicial bodies do not breach the CJEU's case law

- Two different approaches can be identified from the case law:
 - i. Courts consider whether a specific reasonable accommodation would allow the individual to do the work
 - ii. Courts consider whether the employer has complied with the reasonable accommodation obligation in general, without investigating whether a specific accommodation would allow the individual to do the work

Conclusion

- ❖ There is a surprising amount of national case law on disability discrimination
- ❖ CJEU case law is being cited by Member State courts and quasi-judicial bodies
- ❖ There is a large degree of compliance between decisions of Member State courts and quasi-judicial bodies and the CJEU's case law in all the areas examined – particularly with regard to the reasonable accommodation duty
- ❖ However, there is incompatibility with the CJEU's case law in some Member States regarding the definition of disability – particularly where courts / legislation require a formal assessment of disability

List of Cases Examined in the Report

- Case C-303/06 *Coleman v. Attridge Law* ECLI:EU:C:2008:415
- Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*, ECLI:EU:C:2006:456
- Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, ECLI:EU:C:2013:222
- Case C-363/12 *Z. v A Government Department and The Board of management of a community school* EU:C:2014:159
- Case C-354/13, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL) (Kaltoft)*, ECLI:EU:C:2014:2463.
- Case C-395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, EU:C:2016:917
- Case C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, ECLI:EU:C:2017:198

List of Cases Examined in the Report

- Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, ECLI:EU:C:2018:17
- Case C-397/18, *DW v Nobel Plastiques Ibérica SA*, ECLI:EU:C:2019:703
- Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* ECLI:EU:C:2021:64
- Case C-795/19 *XX v Tartu Vangla*, ECLI:EU:C:2020:961
- Case C-824/19, *TC, UB v Komisja za zashtita ot diskriminatsia, VA*, ECLI:EU:C:2021:862
- Case C-485/20, *XXXX v HR Rail SA*, ECLI:EU:C:2022:85