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Discrimination on the grounds of disability

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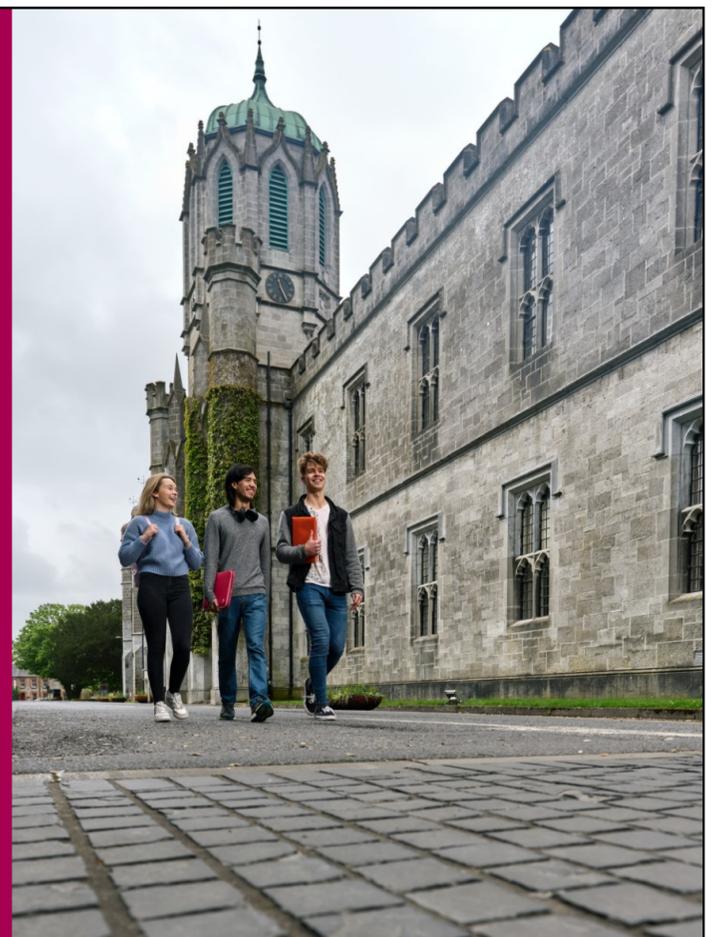
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Paper Structure

- Explore the relationship between EU law and the UNCRPD through the discussion on the concept of disability
- Reasonable Accommodation



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Models of Disability

Medical
model

Social
model

Human
rights model

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Directive 2000/78/EC does not define disability

CJEU - *Chácon Navas v. Euresit Colectividades SA*
(C-13/05).

persons “with serious functional limitations (disabilities)
due to physical, psychological or mental afflictions.”
(p76).

In order for the limitation to fall within the concept of
'disability', it must therefore be probable that it will last
for a long time. (p45).

Does not cover sickness (p47)



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UNCRPD does not define disability

- No fixed definition of disability
 - “a soft threshold definition in the form of guidance which is open-ended and inclusive” de Búrca
- Article 1:
 - Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.
- Social Model of Disability



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GC No.6: equality and non-discrimination

Definition of disability should include:

- Those who have long-term physical, psychosocial, intellectual or sensory impairment
- Should include, past, present, future and presumed disabilities
- As well as persons associated with persons with disabilities
- Should not have to prove you are “disabled enough” to come within the protection
- A broad impairment related definition of disability is in line with the Convention



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Cases C-335/11, C-337/11 *Ring & Skouboe Werge*

- Framework Employment Directive must be interpreted in light of the CRPD
 - “the **primacy of international agreements** concluded by the European Union over instruments of secondary law means that **those instruments must as far as possible be interpreted in a manner that is consistent with those agreements.**”
- The CRPD is “**an integral part of the EU legal order.**”

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Disability:

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 and the limitation is a long term one.

Cases C-335/11, C-337/11 Ring & Skouboe Werge

See also

C-354/13 *Karsten Kaltoft*

C-397/18 *Nobel Plastiques Ibérica*

C-363/12 *Z*

C-270/16 *Ruiz Conejero*

C-406/15 *Milkova*

C-395/15 *Daouidi*

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~~DISABILITY~~



Case C-395/15 Daouidi

- “The UN Convention does not define ‘long-term’ as regards a physical, mental, intellectual or sensory impairment. Directive 2000/78 does not define ‘disability’, nor does it clarify the concept of a ‘long-term’ limitation of a person’s capacity for the purposes of that concept.”
- In this instance six months was deemed to be long-term where the prognosis was unclear as to how long recovery would take.



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C-363/12 Z v A Government Department

- CJEU held that the concept of disability:
presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in **professional life** on an equal basis with other workers.
- Therefore, Z did not have a disability.

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AP Assistenzprofis, Case C-518/22

Directive 2000/78:

must be interpreted as not precluding the recruitment of a person providing personal assistance from being subject to an age requirement pursuant to national legislation under which account is to be taken of the individual wishes of persons who are entitled to personal assistance services as a result of their disability, if such a measure is necessary for the protection of the rights and freedoms of others.

Fredman

- Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.



CRPD and reasonable accommodation



- CRPD prohibits 'all forms of discrimination including denial of reasonable accommodation.'
- Duty to legislate
- RA must be recognised as a punishable form of discrimination
 - (Concluding Observations – Germany May 2015)
- Justiciable and immediately enforceable.

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Reasonable Accommodation some clarifications

- 1) Reasonable accommodation and positive action are two separate and distinct concepts
 - Article 5(3) CRPD provides for reasonable accommodation
 - Article 5(4) CRPD provides for positive or affirmative action
- 2) Directive 2000/78
 - Article 5 provides for reasonable accommodation
 - Article 7 provides for positive action
- 3) Reasonable accommodation versus Accessibility
 - Reasonable accommodation is an *ex nunc* duty – triggered from the moment it is requested, individualized and reactive.
 - Accessibility is an *ex ante* duty – group duty and requires proactive and systemic actions.



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Part one – positive legal obligation to provide a reasonable accommodation

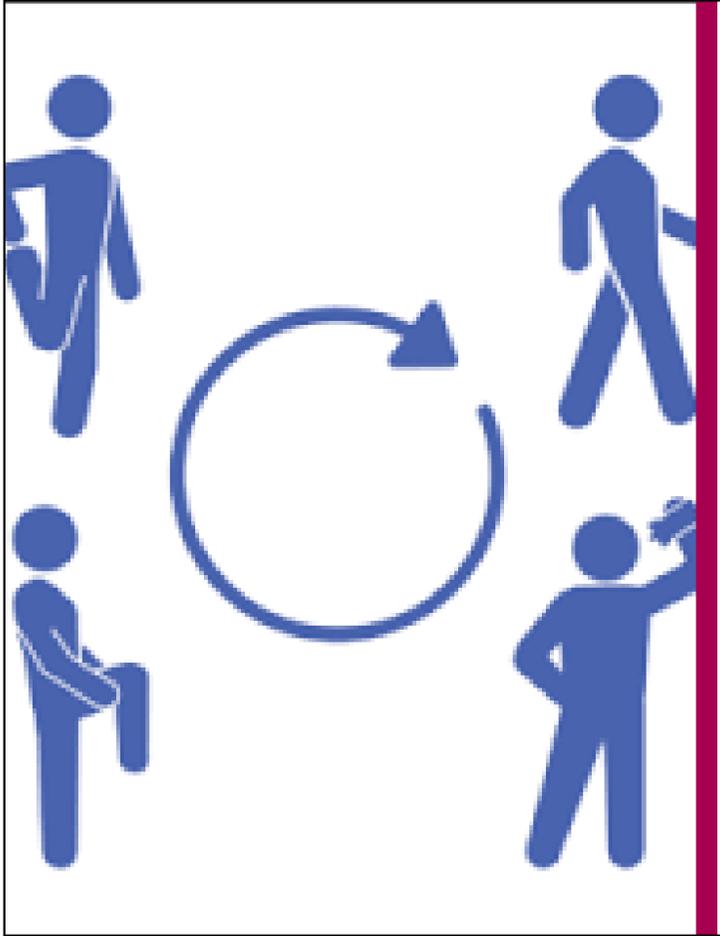
- “Reasonable” Accommodation – one term
 - Accommodation must address a barrier to participation of an individual – *HM v Sweden*
- No ‘one size fits all’
- Individualised and reactive duty
- Dialogue



Ring and Skoubue Werge

- The concept of reasonable accommodation encompasses not only “material but also organizational measures, and the ‘pattern’ of working time must be understood as the rhythm or speed at which the work is done” ...
- recital 20 in the preamble to Directive 2000/78 is not exhaustive and, consequently, even if it were not covered by the concept of ‘pattern of working time’, a reduction in working hours could be regarded as an accommodation measure





Case C-485/20 – *HR Rail*

- Trainee falls within the scope of the FED
- Where a worker becomes incapable of remaining in his or her job due to the onset of disability, reassignment to another job may constitute an appropriate measure:
 - Where there is at least one vacancy and the worker in question is capable of doing it, then it is not disproportionate.



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Case C-631/22 – *Ca Na Negreta*

Article 5 of Directive 2000/78/EC must be read in light of both the Charter of Fundamental Rights and the CRPD must be:

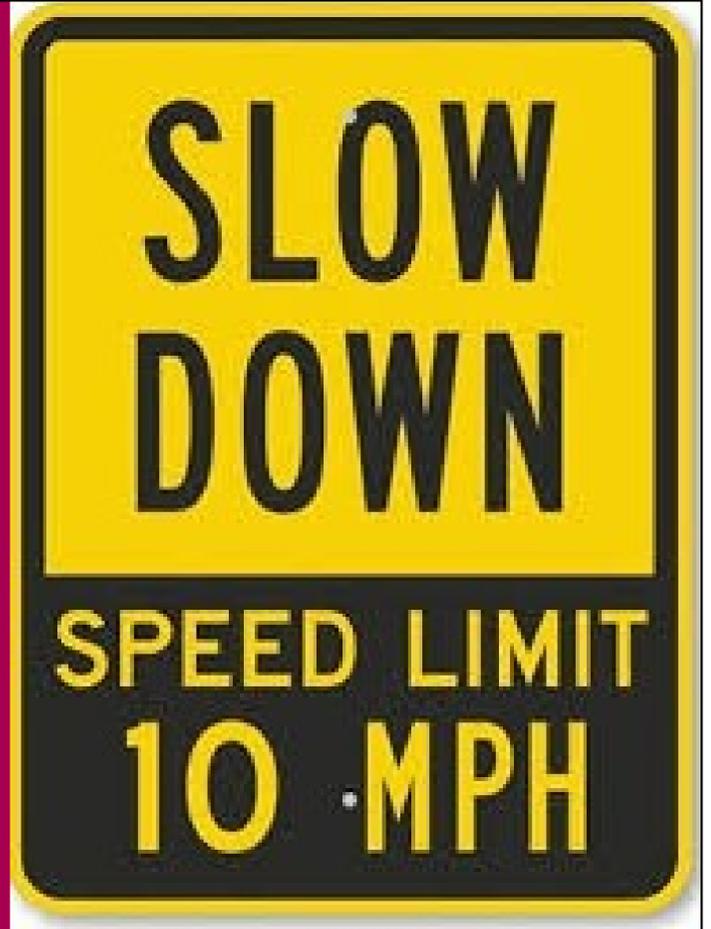
- Interpreted as **precluding national legislation** which provides that an employer may terminate the employment contract on the ground that the worker is permanently unable to perform the tasks ..., on account of a disability occurring during the employment relationship, **without the employer first being required to make or maintain reasonable accommodation in order to enable that worker to keep his or her job**, or to demonstrate, where appropriate, that such accommodation would constitute a disproportionate burden.

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Part two – limits to the duty

- Disproportionate and undue burden – one term, not two separate restrictions.
- Individualized and reactive
 - Cost, resources available (including grants) size of the party (in its entirety), effect of modification on institution, third party benefits, impact on others, reasonable health and safety requirements.
 - NB – look at whole entity
- Not valid – attitude of others



CJEU – Disproportionate burden

- *Ring & Skouboe Werge* - account must be taken of:
 - the financial and other costs;
 - the scale and financial resources of the undertaking,
 - the possibility of obtaining public funding or any other assistance.
- *HR Rail*
 - Where there is a vacancy
 - Should not deprive another of his or her job or force a job swap



Some concluding thoughts

- FED does not define reasonable accommodation as a form of discrimination.
- The issue of whether the term 'reasonable' is an independent modifier of the duty to accommodate must be reassessed throughout EU
- CRPD applies the principle of reasonable accommodation to ALL rights in the Convention. EU only applies it to employment.
- CJEU – caselaw on reasonable accommodation positive and at times expansive, but contrast that with the caselaw on the definition of disability.

