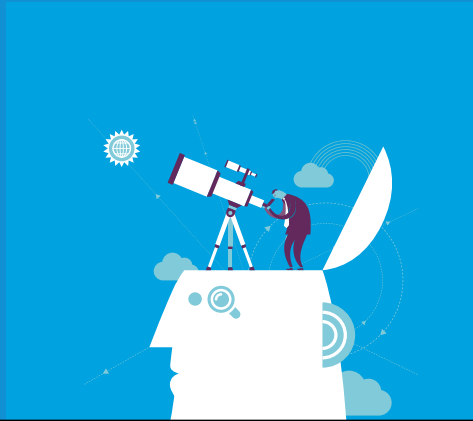


Reflections on the CJEU case law on reasonable accommodation, with a focus on Case C-38/24 *Bervidi*

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Structure of Presentation

- Overview of the Reasonable Accommodation obligation in the Employment Equality Directive (EED).
- CJEU case law, with a focus on what that reveals about different kinds of accommodations and consequences of a failure to make an accommodation.
- *Bervidi* – Facts and Legal Background of *Bervidi*; Preliminary Reference (Questions); Judgment; Analysis.

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The Reasonable Accommodation Obligation in Article 5 EED

- 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 provide training for such a person, unless such measure 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.

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Recital 20 'Appropriate measures'

- 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.

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Recital 17 'Competent, Capable and Available'

- 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.

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CJEU Case Law – Measures which amount to a reasonable accommodation

- Reduction in Working Time - *HK Danmark (Ring and Skouboe Werge)*
- Reassignment of Tasks - *DW/ Nobel Plastiques* and *Komisia za zashtita ot diskriminatsia, VA*
- Appointment to a new position - *HR Rail*
- Transfer to a new location - *Zirvatta*
- Allowing a worker to use assistive devices - *Tartu Vangla* and *Komisia za zashtita ot diskriminatsia, VA*
- Provision of 'personal assistance' - *Komisia za zashtita ot diskriminatsia, VA*

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CJEU Case Law - The ability to do a job and reasonable accommodation / consequences of a failure to make an accommodation (1)

- Account must be taken of what the worker is able to achieve when a reasonable accommodation has been put in place – *HK Danmark and DW/ Nobel Plastiques*
- There is an obligation to carry out an individualised investigation before dismissing a worker on the ground that they are unable to do the job – *HK Danmark, Tartu Vangla* and *Komisija za zashtita ot diskriminatsia, VA*
- The employer cannot rely on its own failure to provide an accommodation to justify a dismissal – *HK Danmark*



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CJEU Case Law - The ability to do a job and reasonable accommodation / consequences of a failure to make an accommodation (2)

- 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 EED - *HK Danmark, Tartu Vangla*
- An employer's obligation to a worker does not necessarily cease if the worker is unable to do the job which they were initially appointed to, even with a reasonable accommodation – *HR Rail*



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Introduction to the *Bervidi* Judgment

- A worker who provides 'the assistance which enables [their] child to receive the primary care required by virtue of his or her condition' is entitled to be protected from 'indirect disability discrimination by association', and to benefit from a reasonable accommodation, within the meaning of Article 5 of the Directive, in order to enable them to provide the necessary care.

The Factual Background to *Bervidi*

- GL is the mother of a child with a disability who needs to follow a care programme at a fixed time in the afternoon.
- GL requested that her employer grant her fixed working hours to enable her to provide the care on a permanent basis.
- The employer only granted GL such arrangements on a provisional basis.
- GL challenged this decision and claimed she was entitled to a reasonable accommodation.

The Preliminary Reference

- Whether a worker who is ‘family caregiver’ of a child with a severe disability is entitled to protection from indirect disability discrimination under EU law?
- If such protection does apply, whether the employer is obliged to provide the worker with a reasonable accommodation, modelled on the provisions found in Article 5 of the Employment Equality Directive?
- What is the definition of a ‘care giver’?
- All three questions referred to the interpretation of EU law ‘where applicable on the basis’ of the UN Convention on the Rights of Persons with Disabilities (CRPD).



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The Employment Equality Directive: Articles 2(2)(b) and 5

- Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation 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 the 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.



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The Judgment (1)

- The EED, and, in particular, Article 1 and Article 2(1) and 2(2)(b) read in light of Articles 21, 24 and 26 EUCFR and Articles 2, 5 and 7 CRPD,

must be interpreted as meaning that the prohibition of indirect discrimination on grounds of disability applies to an employee who does not himself or herself have a disability but who is subject to such discrimination because of the assistance that that person provides to his or her child who has a disability, which enables that child to receive the primary care required by virtue of his or her condition.

The Judgment (2)

- The EED, and in particular Article 5, read in light of Articles 24 and 26 EUCFR and Articles 2 and 7(1) CRPD,

must be interpreted as meaning that an employer is required, in order to ensure compliance with the principle of equal treatment of workers and the prohibition of indirect discrimination referred to in Article 2(2)(b) of that directive, to make reasonable accommodation, within the meaning of Article 5 of that directive, in respect of an employee who does not himself or herself have a disability but who provides, to his or her child who has a disability, the assistance which enables that child to receive the primary care required by virtue of his or her condition, provided that that accommodation does not impose an unreasonable burden on that employer.

A Judgment and Opinion that are Based on a Wide Variety of Sources

- The Judgment and the AG's Opinion are notable for the wide variety of legal sources drawn on, including not only EU law, but also international human rights law (the CRPD) and the ECHR.
- The Judgment and Opinion reveal the influence of a range of human rights instruments on the interpretation of an instrument of EU secondary legislation.

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A Judgment which fails to engage explicitly with the definition of Indirect Discrimination in Article 2(2)(b)

- The judgment is highly teleological.
- Neither the Court nor the AG considered that the prohibition of direct and indirect discrimination are framed in different ways in the Directive, or discussed the possible consequences of that.
- Direct discrimination under the Directive involves less favourable treatment 'on any of the grounds referred to in Article 1' which include disability.
- In contrast, the prohibition of indirect discrimination protects persons 'having ... a particular disability'.

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A judgment that fails to engage with the purpose of the Reasonable Accommodation obligation as set out in Article 5

- Article 5 requires employers to take ‘appropriate measures ... to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training’.
- This goal is not served by granting accommodations to ‘carers’.
- The prohibition of indirect discrimination by association is also important for the judgment.

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Extending the Reasonable Accommodation Duty to ‘Family Care Givers’ (1)

- The reasonable accommodation duty applies to employees who provide ‘assistance’ to their child who has a disability which enable ‘the child to receive the primary care required by virtue of their condition’.
- In C-303/06 *Coleman*, the Court indicated that this duty did not extend to people who did not have a disability themselves.
- Article 5 was a ‘specific measures that would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only.’
- The EU was not a party to the CRPD when the *Coleman* judgment was given.

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The Reasonable Accommodation Duty and 'Family Care Givers' (2)

- *Bervidi* involved a worker providing care for their child ('the assistance which enable that child to receive the primary care required by virtue of his or her condition').
- The need to provide care and support can arise for individuals with disabilities of many different ages.
- Many workers will experience the need to provide care and support to adult (elderly) relatives who have a disability at some point during this working life.
- The implications of the judgment could be considerable.

The Kind of Accommodations that must be provided to 'carers'

- The kind of accommodation at stake in *Bervidi* was a fixed work schedule.
- However, other accommodations could also be required by workers who provide care to a person with a disability, e.g. moving to part-time work, being assigned a less demanding set of tasks or being assigned a specific workplace.

The Reasonable Accommodation Duty in Comparison with the Right to Request Flexible Working Conditions under the W-L Balance Directive

- Workers who provide care to a person with a disability have the right to request flexible working arrangements under the W-L Balance Directive.
- *Bervidi* makes it clear that, in some circumstances, such workers also have the right to receive a reasonable accommodation under the EED.
- The right in the EED is much stronger than that found in the Work-Life Balance Directive.



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The Work-Life Balance Directive (1)

- The Directive establishes a right of workers to request flexible working arrangements in order to enable them to carry out caring tasks.
- There is a duty on employers to consider and respond to the request in a timely manner and to provide reasons for the refusal or postponement of such arrangements.
- The right covers employees with children up to at least the age of eight, as well as carers.



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The Work-Life Balance Directive (2)

- The Directive defines a carers as ‘a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State’.
- The right to request flexible working arrangements under the W-L Balance Directive is a procedural duty.
- The duty is primarily focused upon the steps that the employer needs to take in response to a request for flexible working arrangements.

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The Reasonable Accommodation Duty under the Employment Equality Directive

- The reasonable accommodation duty is a ‘substantive’ duty.
- It seeks to achieve a specific outcome: removing barriers that make it difficult or impossible to provide the assistance and care to an individual with a disability.

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What are the key differences regarding carers' rights under the EED and the W-L Balance Directive? (1)

- The W-L Balance Directive is broader but less deep.
- The right to request flexible working arrangements under the W-L Balance Directive applies to all carers of children under a certain age.
- The right to reasonable accommodation under the EED is narrower but deeper.
- The duty to provide a reasonable accommodation is a more onerous obligation for an employer.



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What are the key differences regarding carers' rights under the EED and the W-L Balance Directive? (2)

- The W-L Balance Directive law allows for the right to request flexible working arrangements to be conditional on a minimum period of work of not more than six months with the employer of whom the request is made.
- The Employment Equality Directive does not allow Member States to restrict the right to benefit from a reasonable accommodation to individuals with a minimum period of employment.



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What are the key differences regarding carers' rights under the EED and the W-L Balance Directive? (3)

- Article 3(1)(f) of the Directive defines flexible working arrangements as 'the possibility for workers to adjust their working patterns'; Recital 34 also mentions 'working schedules'.
- A broader set of accommodations are possible under the EED.

The Situation After *Bervidi* (1)

- Individuals who provide care to a person with a disability may have an enhanced set of rights compared to other carers, such as parents of non-disabled children.
- Carers of young children seem not to be able to rely on the reasonable accommodation duty under the EED because the link with disability is missing.
- Such carers may sometimes be able to claim a *de facto* accommodation under the EU law based on the prohibition of indirect discrimination, e.g. on grounds of sex, but this still needs to be tested.

The Situation After *Bervidi* (2)

- If a lot of accommodation claims are made by carers, the disproportionate burden limitation may become more relevant where the supply of the relevant accommodations e.g. working on a specific shift, are limited.
- However, the level of awareness of this right may be rather limited, with there being greater awareness of the more limited rights set out in national legislation transposing the W-L Balance Directive.

Conclusion

- *Bervidi* builds on previous judgments of the CJEU.
- *Bervidi* is a highly teleological judgment, which focuses on the perceived purpose of the EED as well as the EUCFR, CRPD and ECHR.
- *Bervidi* is potentially of great significance for workers who are seeking to combine care of a person with a disability with work.
- Where the possibility to provide accommodations is limited, the disproportionate burden limitation may become more important. Will there be a hierarchy of claimants?
- *Bervidi* is a judgment which appears simple but which in fact is rather complicated!