

**Approaches to Equality and
Non-Discrimination inside and
outside the EU**

Workshop 6

Reasonable

Accommodation

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Reasonable Accommodation under EU Law: Concept, Limits and Possible Extension

- I.** Basic Notions
- II.** Reasonable Accommodation under EU Law: 2 Limitations
- III.** Extending the RA duty to other fields? The question of access to and supply of goods and services
- IV.** Extending the RA duty to other grounds? The question of religion

I. Basic Notions

- ◆ Article 5 Employment Equality Directive (Directive 2000/78):

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 measures would impose a **disproportionate burden** on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.”

I. Basic Notions

- ◆ Recital 20 of the Preamble => examples of reasonable accommodation: “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 of the provision of training or integration resources.”
- ◆ Recital 21 => To determine whether such measure gives rise to a disproportionate burden, account should be taken of, i.a. :
 - ◆ financial and other costs entailed,
 - ◆ scale and financial resources of the organisation
 - ◆ possibility of obtaining public funding or any other assistance

Underlying Idea of the RA duty

The problem lies with the environment rather than with the person who has a disability:

“...disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment.” (L. Waddington & A. Lawson, *Disability and non-discrimination in the European Union*, 2009, at 16)

Characteristics of the RA duty

- ◆ It requires the employment to take the protected ground into account rather than to ignore it
- ◆ It requires individualized solutions, adapted to the particular situation of the individual who ask for it

II. Limitations of the RA Duty under EU Law

1. Field of application: employment

1. Protected ground: disability

≠ US and Canada law:

- RA duty also applies outside the employment field
- RA duty also concerns the ground of religion (and other grounds in the case of Canada law)

III. Extending the RA duty to other fields? The question of access to goods and services

- ◆ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (2008)
- ◆ UN Convention on the Rights of Persons with Disabilities
- ◆ Member States legislations

2008 Proposal for a new Council directive

Article 4(1)

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:

- a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.
- b) Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.

UN Convention on the Rights of Persons with Disabilities

Article 2

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 5(3)

In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable is provided.

UN Convention on the Rights of Persons with Disabilities

Article 4(1)(e)

States undertake to ... Take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.

IV. Extending the RA Duty to Other Grounds? The Question of Religion

- ◆ The example of US and Canada law
- ◆ The possibility to derive a duty to provide RA from the prohibition of indirect discrimination
- ◆ The case-law of the ECtHR

ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000

- « The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. » (para. 44)
- « In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so **by failing to introduce appropriate exceptions to the rule** barring persons convicted of a serious crime from the profession of chartered accountants. » (para. 48)

ECtHR, *Jakobski v. Poland*, 7 December 2010

« According to the applicant's religion he was supposed to have a simple meat-free diet. He merely asked to be granted a vegetarian diet, excluding meat products ... The Court notes that his meals did not have to be prepared, cooked and served in a prescribed manner, nor did he require any special products ... The Court is not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners. » (para. 52)

=> Breach of Article 9 (freedom of religion)

Difficulties associated with the application of the RA duty to religion

- ◆ Notion of religion or religious requirement
 - ◆ Cases in which the religious nature of a belief is contested
 - ◆ Cases in which the religious requirement invoked is contested within the religious community at stake: objective (official dogma) v. subjective (sincere belief of the individual believer) approach

Difficulties: Notion of religion or religious requirements

Eweida v. British Airways, UK Employment Appeal Tribunal, 20 November 2008:

« In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate impact on the group. » (§ 60)

Difficulties associated with the application of the RA duty to religion

- ◆ Conflicts between religious claims and other peoples' rights
 - ◆ Notion of 'reasonableness'

E.g.: Ladele v. Islington, UK Employment Appeal Tribunal, 19 December 2008

Ms. Ladele's desire to have her religious views accommodated could not be allowed to override local authorities' concern « to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community. »

Difficulties associated with the application of the RA duty to religion

Submission of the UK Equality and Human Rights Commission before the ECtHR in relation to the application lodged by Ms. Ladele:

« ...it will generally be proportionate to refuse to make an accommodation in cases where a public sector employee seeks to be exempted from providing a public service on discriminatory grounds. Very strong arguments and evidence are required to prove th employer has acted disproportionately in cases such as these. State services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal religious beliefs. » (para. 56)