



Legal Seminar 4 October 2011
Approaches to Equality and Non-discrimination Legislation
inside and outside the EU

DISCUSSION PAPER - WORKSHOP 6
Reasonable Accommodation

Legislative background

Article 5 of the Employment Equality Directive, which prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, provides that:

“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.”

Recital 20 expands on the kinds of measure that could amount to reasonable accommodation:

“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.”

According to Recital 21:

“To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.”

The UN Convention on the Rights of Persons with Disabilities (CRPD) also imposes a specific reasonable accommodation obligation on employers (in Article 27). In addition, it imposes a general obligation on States Parties to require that reasonable accommodation is provided to persons with disabilities as part of non-discrimination law.

Article 2 defines 'discrimination on the basis of disability' as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms' and as 'including denial of reasonable accommodation'. The obligation imposed on States Parties by Article 5(2) of the CRPD to 'prohibit all discrimination on the basis of disability' thus carries with it a requirement to impose reasonable accommodation duties on employers, educators, transport providers and others.

The Americans with Disabilities Act (ADA) of 1990 also imposes an obligation on employers to provide reasonable accommodation for disabled people. It is submitted that the term "reasonable accommodation", first used in the context of the US Rehabilitation Act of 1973 and later incorporated in the ADA was determinant of the terminology used in Article 5. But in both the United States and Canada, the concept of reasonable accommodation first emerged with regard to religion. It was then applied to other grounds of discrimination, including disability.

The European approach followed a different path, as reasonable accommodation exists for disability only, and does not apply to the other grounds of discrimination protected at the EU level. The 2008 proposal for a framework directive to expand protection from discrimination on grounds of religion or belief, disability, age or sexual orientation beyond employment does not expand the notion of reasonable accommodation beyond disability either.

The concept of reasonable accommodation

At first sight the concept of reasonable accommodation may not seem particularly controversial. However, closer analysis reveals that the term is capable of conveying a number of different meanings. The intention in the Employment Equality Directive seems to have been that any accommodation must be effective in allowing an individual with a disability to participate in employment-related activities, whilst not resulting in an excessive burden for the employer.

a) Accommodation

Accommodation could be considered an adaptation of normal procedures, processes or infrastructure. The goal of any accommodation, under Article 5 of the Directive, is to enable a person with a disability "to have access to, participate in, or advance in employment". Assessing what kind of accommodation will achieve this goal, and therefore what kind of accommodation is required, involves individual analysis, taking into account the situation of the individual and the employment or training at issue. Not all Member States use the terminology of the Directive and some instead have chosen to use "adjustments" (United Kingdom), "steps" (Finland) or "appropriate measures" (Ireland, France, Lithuania and Slovakia). Nevertheless, such alternatives have no legal significance, as they all convey the same meaning as 'accommodation'.

b) Reasonable

There are three different ways in which the term “reasonable” has been understood in the Member State legislation which transposes Article 5 of the Directive. In the first approach, an accommodation will only be regarded as “reasonable” if it does not impose excessive difficulties or costs on the employer or other covered party. Generally this requirement exists alongside the separate defence that making an accommodation would result in a disproportionate burden or undue hardship.

According to the second approach, an accommodation will be regarded as “reasonable” if it is effective in allowing the individual in question to carry out the necessary (employment-related) tasks. Dutch legislation makes no reference to a “reasonable” accommodation but instead explicitly uses the term “effective” accommodation, whilst in Ireland and France “appropriate measures” is preferred.

The last way in which the term “reasonable” is used combines the facts that accommodation must be effective and that it must not impose significant inconvenience or cost on the employer or covered party. This is the approach adopted in the United Kingdom, which has the longest standing reasonable accommodation requirement within the EU.

c) Disproportionate burden on the employer

With regard to the disproportionate burden limitation, the Directive and national (disability) non-discrimination law make it clear that the cost of any accommodation is a key factor in determining the scope of the obligation to accommodate. According to most national (disability) non-discrimination legislation, the availability of public funding or support to offset the cost of making any accommodation must be factored into the equation when determining whether the cost amounts to a disproportionate burden. In addition to cost, some jurisdictions provide for additional limitations or requirements which have to be met for an accommodation to be regarded as amounting to a disproportionate burden.

Discussion questions

- 1) How could reasonable accommodation apply to disabled persons in other areas beyond employment (e.g. education and access to and supply of goods and services)?
- 2) Looking at the European trends, could the notion of reasonable accommodation as developed for disability be applied to the other grounds of discrimination?
- 3) What can we learn from or get inspired by in the US and Canadian experiences?