

Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination

DISCUSSION PAPER REASONABLE ACCOMMODATION

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People with disabilities face numerous barriers, which are not caused only by direct or indirect discrimination or harassment. For instance, a wheelchair user who had the necessary qualifications and applied for a particular job, is invited to an interview and the interviewer has the genuine intention to offer that person a fair chance during the interview – however, if there are stairs at the entrance of the building where the interview is taking place and there is no other alternative, the person with the disability will not be able to take part in the interview. The stairs is the barrier.

From a disability rights perspective, the most significant provision of the Employment Framework Directive is the provision relating to reasonable accommodation. According to Article 5 of Directive 2000/78/EC, employers should bear the cost of any special facilities or treatments for people with disabilities, who are able and qualified to perform the essential functions of the job duties if provided reasonable accommodation, in order for them to have access to, participate in, or advance in employment, or to undergo training.¹

Under which circumstances is the accommodation reasonable?

The Preamble provides some guidance on the measures that are considered appropriate and the burden that would be disproportionate for the employer (Recitals 10 and 21): accommodation is considered reasonable when its realisation does not impose a disproportionate burden on the employer. This depends, aside from the nature of accommodation requested, upon the size of the enterprise, the financial costs entailed, the possibility of obtaining public funds etc. Therefore, the Directive approaches reasonable accommodation as a positive right that individuals who can perform the essential functions of a job if afforded reasonable accommodation, are *entitled to claim* under national law, always under certain conditions.

A person with a disability can ask for reasonable accommodation at any time during the application process and at any time during his/her employment if the need arises, even if s/he did not ask for it when s/he applied for the job or received the job offer. An employee may also request reasonable accommodation if there are new tasks that make it necessary.

¹ For a profound analysis of the concept of reasonable accommodation, please refer to L. Waddington, E.U. NETWORK OF EXPERTS ON DISABILITY DISCRIMINATION, "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice", 2004.



Although this is not set out expressly in Article 5, we assume that the employers may choose different types of reasonable accommodation as long as the chosen one is effective. When two possible ways of accommodating an employee are available, and one costs more or is more difficult to provide, the employer may choose the one which is the least expensive or burdensome.

Moreover, Article 5 does not require the employer to provide reasonable accommodation to the employee in respect of disabilities that are not apparent to the employer. The burden falls on the employee to inform the employer if he needs such accommodation.

This provision of the Employment Framework Directive paves the way for people with disabilities to be entitled to demand the adjustment they need and therefore, participate equally in employment. Reasonable accommodation marks a clear shift away from considering people with disabilities as in need of protection, to people with equal rights.

Who is entitled to reasonable accommodation?

As the Preamble of the Directive states (Recital 17), the right to reasonable accommodation does not require the recruitment of an individual who is not capable, qualified or available to perform the essential duties of a particular job or to undertake the relevant training. The Directive approaches reasonable accommodation as a positive right that individuals who can perform the essential functions of a job if afforded reasonable accommodation, are *entitled to claim* under national law. It prohibits discrimination against qualified persons with disabilities, i.e. the persons with disabilities who can perform the essential functions of the job without any kind of accommodation, and the persons whose disability prevents them from performing the essential duties of the job, but with some particular adjustments would be able as any other person without impairment.

Accommodation comprises any modification or adjustment to a job or work environment that will permit an employee or a prospective employee with a disability to participate in the job application process, to perform the essential duties of the job and to enjoy equal benefits of employment as are enjoyed by employees without disabilities (advertising, recruitment, upgrading, transfer, layoff, rights of return from layoff, demotion, termination of contract, compensation, sick leave, pension, selection for training, attendance of professional meetings and conferences etc.)

Therefore, the employer and the person with disability should identify the essential duties of the particular job and then discuss, and if necessary request for experts' advice, the accommodation that would facilitate the, otherwise capable, individual to perform the job in question.

Reasonable accommodation and individual adjustment are rights granted to individuals: as its purpose is to match a particular person to a specific job, the type of accommodation required depends on the specific work situation and disability of the person who is employed.



Reasonable accommodation: what form of discrimination?

According to Hendriks and Waddington, it seems indispensable to perceive “reasonable accommodation” discrimination as a form of discrimination *sui generis*.² Even if we consider as intent the fact that the employer refuses to make reasonable accommodation, once he is informed of the employee’s impairment, it should be proved that the person with disability who requires the accommodation is in a “comparable situation” to those who do not require it; but the right to reasonable accommodation is provided in order to remove the barriers for an individual with a disability to be placed in a comparable situation.³ A discrimination claim based on the failure to provide reasonable accommodation does not require that the employer’s action should be motivated by a discriminatory animus directed at the person with the disability. Regardless of intention, if the employer knows that the person with the disability is capable of performing the essential functions of the post if provided accommodation and does not do it, s/he violates art. 5.

In addition, indirect discrimination will not necessarily disappear, as a result of a reasonable accommodation (Art.2 (2) (b) (ii)). To begin with, it is important to realise that indirect discrimination is a notion related to a group of persons (for instance, a practise that would put persons with disabilities in general at a particular disadvantage), while reasonable accommodation is a personal measure that targets an identified person with impairment. Secondly, even when a measure of reasonable accommodation is adopted, indirect discrimination will not automatically be remedied. Taking as an example a building with three different entrances: with the appropriate adjustments, one of them could become accessible for a wheelchair user. This person with the disability will still not be able to use the other two entrances and still experience indirect discrimination: however, people with disabilities could not claim that they experience indirect discrimination, as they have the benefit of a personalised reasonable accommodation.

What kind of questions regarding disability should the employer be allowed to ask?

When an applicant voluntarily informs a potential employer about his/her disability, or if the disability is otherwise obvious, the employer should ask questions only regarding the ability of the person to perform the essential job-related duties and the suggested reasonable accommodation, if this is necessary. Employers should not ask, at the pre-offer stage of the job, questions such as to what extent a person has a disability, if s/he takes medication, if s/he has ever been hospitalized in an institution or if s/he receives psychiatric treatment. In addition, the employer should not require any additional medical information from an employee with a disability, should the employee suddenly develop performance problems. Poor job performance may well be unrelated to disability and should generally be dealt with according to the employer’s existing policy. Medical information could be required only when the employer has a justified suspicion, based on actual facts and evidence, that a medical problem is the cause for the employee’s performance problems.

² Lisa Waddington and Aart Hendriks, ‘The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to ‘reasonable accommodation’ Discrimination’, *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 18, Issue 4, 2002, 403.

³ L. Waddington, E.U. NETWORK OF EXPERTS ON DISABILITY DISCRIMINATION, “Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice”, 2004, p. 81.



To what extent can the above principles be applied outside the field of disability?

Accommodation comprises any modification or adjustment to a job or work environment that will permit an employee or a prospective employee with a particular characteristic (based on religion, ethnic origin, sex, age or other) to participate in the job application process, to perform the essential duties of the job, while having individual circumstances taken into account. Employers should be able to refuse such accommodation where it imposes an unreasonable burden.

Questions:

- *How is the obligation to provide reasonable accommodation legislated in your country? As a different form of discrimination or as direct/indirect one?*
- *What sanctions are foreseen, in case of failure?*
- *Has the burden of proof, when claiming the right of reasonable accommodation been covered by your national legislation or interpreted by the domestic courts?*
- *Do you consider that the positive duty to reasonable accommodation should be extended to other grounds of discrimination apart from disability?*
- *Are you aware of any relevant examples/cases?*