

# Disability and reasonable accommodation – case study

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# The case study

- *What is the material scope of the Directive – volunteers? Unpaid internships? What is “access to employment” in the Directive? Can UNCPRD make any difference? What is vocational training under the Directive?*
- *What is the scope of the concept of a disabled person? Domestic law interprets “long term” as requiring a very long period before an impairment can be seen as a disability (Chacon Navas approach) Does this exclude some matters which might be disabilities?*
- *Must the court identify some impact on ability to participate in professional life?*

# Case Study

- *Can the UNCRPD duties relating to accessibility make a difference to the duties under the Directive? For example can it make a difference to whether a court would view indirect discrimination as having taken place?*
- *Can the charter apply in a situation in which the directive does not but the activity falls generally within a field of activity to which EU law applies? If so what effect does the charter have?*

# UNCRPD

Article 1 - the aims of the UNCRPD - to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

**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.

Article 2 provides **definitions of discrimination**. "Discrimination on the basis of disability" means 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 in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

**"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.

# Charter

- Article 21(1) of the Charter will be of assistance in many contexts governed by EU law (for example refugee assessment cases, work, free movement, data protection etc). According to it '[a]ny discrimination based on any ground such as ... disability ... shall be prohibited'.

# Charter

- Article 6(1) of The Lisbon Treaty provides that:  
"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 ... which shall have the same value as the Treaties."
- **Åklagaren v Åkerberg Fransson** (Case C-617/10)
- ECHR rights are "general principles of the Union's law" and form an integral part of the general principles of law, whose observance the ECJ ensures (**Connolly v Commission** C-274/99)
- Equal Treatment is another general principle.
- If interpreting a directive and the Charter CJEU will answer in terms of the interpretation of the directive (**Mario Vital Pérez v Ayuntamiento de Oviedo** C416/13 ).
- there may be direct enforcement of some of the Charter rights where the EU law has direct effect (developed from **Kamino International Logistics (Advocate General's Opinion)** [2014] EUECJ the Advocate General Opinion)).
- **Association de mediation sociale v Union locale des syndicats CGT** (C-176/12) If national law conflicts with the Charter it must be disapplied in a claim litigated between private individuals
- How does the UNCRPD and Charter influence the interpretation of the Directive 2000/78 in relation to disability?

# Directive 2000/78

- The concept of disability
- Chacon Navas, Jett Ring etc.
- *Must the court identify some impact on ability to participate in professional life? Question of disability is contextual see ([Z v A Government Department and the Board of Management of a Community School \[2013\] EUECJ C-363/12](#)), [Glatzel \(Advocate General's Opinion\) \[2013\] EUECJ C-356/12 O \(18 July 2013\)](#) and [Glatzel \(Judgment of the Court\) \[2014\] EUECJ C-356/12 \(22 May 2014\)](#) which examined UNCRPD also.*

# Directive 2000/78

- Scope: how far back along the road to employment can you litigate? Volunteers? Unpaid interns? See article 3 Directive.
- Is there a duty to make reasonable adjustments?
- Who does it apply to?
- Can national law go further?



# What does article 5 do?

See recital 17, 16, 20, and 21 which suggest that reasonable accommodation is an obligation on employers (see article 5).

For other organisations (see article 2) it is left to the member states to determine whether any steps of reasonable accommodation will be required.

If national law requires them of a particular organisation then it is not necessary to consider the justification of indirect discrimination even if the requirements of article 2.2(b) before (i) and (ii) are satisfied.

The existence of a national law duty to make reasonable adjustments precludes reliance on indirect discrimination.

# Article 5

Member states can “gold plate” the legislation to permit both indirect discrimination arguments and reasonable accommodation arguments to be available.

Equally the MS may choose to have a law exempting non-employer organisations from the duty to make reasonable adjustments either wholly or in part (e.g. when a qualification body uses competence standards).

Article 5 defines the reasonable accommodations that must be provided (i.e. that “shall be provided”). The first sentence states the aim of reasonable accommodations. It is to guarantee compliance with the principle of equal treatment. However the article goes on immediately to state that “This means that employers shall ...”. The concept of reasonable accommodations is therefore mandatory for employers (an potentially directly applicable from article 5) but not for other organisations.

This argument may perhaps lead to CJEU references in an appropriate case.

For example a vocational training organisation is not an employer – does it have a duty to make reasonable accommodations? On the wording of article 5, no, but in the light of the UNCRPD perhaps the CJEU would take a different view.

# Questions for the CJEU

- What questions could you refer from the case study?
- How, if at all, could you use the UNCRPD or the Charter in this?
- Is there a material mismatch between the scope of the Convention and that of the Directive 2000/78?