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ARTICLE

Reasonable accommodation in EU equality law in a broader perspective*

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Abstract The Framework Directive on equal treatment in employment and occupation of 2000 introduces the obligation to provide reasonable accommodations to people with disabilities. The author deals with the impact and meaning of this obligation from a human rights perspective. Adopting a substantive approach to equality, it has been recognised that States Parties have positive obligations to bring about equality, which may entail that duties are imposed on third parties. Although thus far there is little case law of the European Court of Justice on the implications of the Framework Directive, the judgments of other international bodies on human rights law provide relevant points for interpretation.

Keywords Discrimination · disability · reasonable accommodation · human rights law

1. Introduction

The EU Directive establishing a general framework for equal treatment in employment and occupation of 2000[1] (hereafter: the Framework Directive) contains in Article 5 a provision, which obliges employers to take appropriate measures to enable

[1)] Directive 2000/78/EC; OJ L 303, 2. 12. 2000, p. 16.

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a person with disabilities to participate in employment or training, unless such measures would impose a disproportionate burden on the employer.

This explicit obligation to provide a reasonable accommodation is seen as a new element in the anti-discrimination law of the EU. In this contribution it will be analysed whether it is really a unique provision, how it is related to the principle of equality, to other international legal instruments and what the possible implications are. Finally some attention will be paid to relevant case law of the European Court and some national institutions.

2. Substantive equality and positive obligations

2.1 Positive human rights obligations and substantive equality

Generally speaking 'equality' can be conceived in a formal and in a more substantive way. The formal approach of equality reflects the first part of Aristoteles' definition, that equal cases should be treated equally, the substantive approach refers to the second part that different cases have to be treated differently in proportion to the difference.[2]

While a formal approach emphasises the irrelevance of differences and the importance of equal treatment, the second approach acknowledges the possible relevance of differences and aims at promoting equality and focuses on the realisation of equal results.

The two approaches can be in tension with each other. It may also depend on the circumstances of the case, whether a formal or a substantive approach is to be chosen. In most equal pay cases, for example, it can be held that it is not relevant whether an employee is of either sex, has a disability or not, when the work done by a disabled employee is the same work as done by others.

A complication of the formal approach is that it still has to be determined whether two cases are equal: equality depends also on the perspective of the actor. When I am only looking for a place to sit 'any chair is a chair', but when I want to buy a chair that can be combined with my table, differences in height, colour and size are relevant. And when it comes to the question whether the colour is compatible with the colour of the table, the answer to this question may vary according to fashion or culture and these preferences may change in the course of time.

So, even in a formal equality approach it seems inevitable that the way a 'difference' is justified is coloured by personal circumstances of the observer.

A substantive approach is important to make underlying preferences more explicit: when equal treatment brings about (increase of) inequality, it has to be questioned whether differences oblige a difference in treatment. This compels us to challenge the neutrality of regular dominant views.

Substantive equality not only demands abstention from discrimination, but implies an obligation to take differences into account and to take positive measures to bring about equality.

[2] See also: *Waddington/Hendriks* [9], par. 2.1.

This 'obligations approach' has been developed in the implementation of human rights instruments.[3] In first instance it might have been assumed that civil and political rights contain mostly negative obligations, forbidding the state authorities to interfere with individual freedoms, such as freedom of expression or privacy, and that social and economic rights entail positive obligations to promote, ensure and fulfil these rights, such as the right to work, or to housing. Such a rigid dichotomy is not followed any longer in the interpretation of human rights law by national and international courts and other bodies. In the General Recommendations of the UN Treaty bodies and the case law of the European Court of Human Rights and other supervisory bodies, it has been established that *all* human rights entail both positive and negative obligations.

This is seen as a consequence of the acceptance of the indivisibility and interdependence of human rights, which has been reaffirmed at the declaration adopted at the Vienna World Conference on Human Rights in 1993.[4]

The types of obligations are generally described as the obligations to respect, protect and fulfil, the first being a negative obligation and the two latter positive.[5]

Applied to the principle of equality, positive obligations entail that states may have to take measures to bring about, or at least promote, equality and this obligation includes measures that bind third parties.[6] The measures to be taken may also have financial consequences.

The European Court of Human Rights already established firmly in 1979 that the European Convention entails positive obligations. In the *Airey* case the Court held that the right to access to court of Article 6 of the ECHR means that under certain circumstances free legal aid should be made available. The Court rejected the Irish Government's view that, as there was no obstacle for the plaintiff's right to access to court, there could not be a contravention of the right to access. The Court emphasises that the right to access must be an *effective* right, and thus investigates in this particular case whether there can be an effective right without free legal aid. The Court states that

> "… fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive" and "there is … no room to distinguish between acts and omissions".[7]

In this case the Court explicitly rejects the idea that several categories of human rights imply different kinds of obligations:

> "The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against

[3] See a.o., *Sepúlveda* [7].
[4] A/CONF.157/23, Vienna Declaration and Programme of Action.
[5] *Nowak* [5], par. 3.2.1.
[6] *Arnadóttir* [1], par. 5.1.3
[7] ECHR, 9 October 1979, *Airey vs. Ireland,* par. 25.

> such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention".[8]

In the *Marckx* case, dealing with the question of whether the difference made under Belgian law between 'illegitimate' and legitimate children constitutes a violation of their right to family life, the Court held that this difference in treatment was not only a violation of Article 8 of the ECHR (right to family life) but also of Article 14 (providing a subsidiary prohibition of discrimination), thereby referring to positive obligations of the State:

> "It does not exclude that a judgment finding a breach of the Convention on one of those aspects might render desirable or necessary a reform of the law on other matters not submitted for examination in the present proceedings. It is for the respondent State, and the respondent State alone, to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent."[9]

In the interpretation of Article 14 ECHR the Court has developed an approach in its case law that the prohibition of discrimination prohibits not only a difference in treatment of persons in analogous situations without providing an objective and reasonable justification,[10] but that there is also a violation of the non-discrimination provision when States fail to treat differently persons whose situations are significantly different without an objective and reasonable justification, as was the case in *Thlimmenos vs. Greece*.[11] The Greek government in this case refused to appoint Mr. Thlimmenos to a post of chartered accountant on account of his criminal conviction for disobeying, because of his religious beliefs, the order to wear the military uniform, which was a consequence of his conviction as a Jehovah's Witness.

The *Marckx* and *Thlimmenos* cases illustrate that a substantive equality approach is closely linked with the broader aim to guarantee universal human rights to all. The right to work or the right to family life or education often cannot be effectively guaranteed to people with disabilities when the conditions are not adapted to their specific needs.

The obligation to provide reasonable accommodations is in line with this. Therefore, it is most relevant to take the broader human rights context into account in the definition of the scope and meaning of this concept.

2.2 Obligations related to non-discrimination

The *Thlimmenos* case is one of the examples of the ECHR case law's application of obligations imposed on the states to guarantee substantive equality. The case law of the European Court of Justice on the earlier directives goes also in the direction of guaranteeing substantive equality. In a case on Directive 76/207/EEC on Equal Treatment of Men and Women, the Court clearly stated that:

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8) Ibid., par. 26.
9) ECHR, 13 June 1979, *Marckx vs. Belgium,* par. 41.
10) See *van Dijk/van Hoof/van Rijn/Zwaak* [8], Ch. 33, at p. 1042.
11) ECHR, 6 April 2000, *Thlimmenos vs. Greece,* par.44

> "The conferral of such rights, recognised by the Directive, is intended to ensure implementation of the principle of equal treatment for men and women regarding both access to employment (Article 3(1)) and working conditions (Article 5(1)). Therefore, the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality."[12]

In its first ruling on the Framework Directive, the *Mangold* case on age discrimination,[13] the European Court of Justice has repeated the fundamental character of the principle of non-discrimination, referring to international instruments and the constitutional traditions common to the Member States. The Directive merely lays down the framework for specific grounds in a specific area.

The reference to (other) international instruments is also made in the case of *K.B. vs. National Health Service Pensions Agency, Secretary of State for Health*.[14] In this case on survivors' pensions for partners of transsexuals, the Court based its conclusion that there was a contravention of Article 141 EC on the fact that the ECHR had already established that the underlying law violated the ECHR, as can be read in the following paragraphs:

> **'34. Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.**
> 35. Since it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation – as the European Court of Human Rights has accepted (*Goodwin* vs. *United Kingdom*, § 103) – it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.
> **36. It follows from the foregoing that Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. It is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.'**

[12] Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) vs. Thibault* [1998] ECR I-2011, par.26.
[13] Case C-144/04 *Mangold* [2005] I-9981, par. 74.
[14] Case C-117/01 *K.B.* [2001] I-541.

The principle of non-discrimination as incorporated in Community Law is thus seen as Community implementation of the fundamental principle of equality, which includes the obligation to bring relevant national legislation in conformity with international human rights law.

This is also valid before the period prescribed for transposition of a Directive, as the Court ruled in the abovementioned *Mangold* case.

Looking into national law, the Dutch Equal Treatment Commission' Opinions on other grounds than disability provide several examples of concrete obligations imposed on employers to accommodate to equal treatment, such as the obligation to have separate hygiene facilities for both men and women (Opinion 1996-112 and 2006-161).

Summarising, we can say that the obligation to provide a reasonable accommodation is, as such, not revolutionary, but very much in line with two interrelated doctrines of substantive equality and positive obligations.

This is important because the national courts are required to apply the national law in conformity with international obligations, which means that the international standards provide the framework for interpretation of the national law, and the same holds, as we have seen, for the European Court of Justice. The relevant international law and its interpretation by the competent institutions such as treaty bodies and the EctHR play a role in the development of the concept of reasonable accommodation of the Framework Directive. As Mark Bell states 'It is not enough for EU states to rely only on EU Directives as solely response to discrimination.'[15]

Therefore, it is relevant to consider the contents of the cases of the EctHR in this field and pay attention to the UN Convention on the Rights of Persons with Disabilities, recently adopted by the United Nations.[16] Even though this Convention is still to enter into force (see Article 45: 20 ratifications are required), it can be seen as an important framework for reference.

3 Positive obligations and Disability

3.1 The Disability Convention

The Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, together with the optional protocol, which opens the possibility for individual complaints, provides a very interesting framework. It is not only important because of the extensive elaboration of the rights of people with disabilities, but also, and perhaps even more, because it makes very clear what are the essential aspects of disability discrimination, and because it can be seen as a firm step towards a rights-based approach to disability, as endorsed by the European Union.[17] As can be read in the Communication of the Commission the rights-based approach is based on the equal-

[15] *Bell* [2], at p. 70.

[16] The text is available at http://www.un.org/disabilities/convention/conventionfull.shtml.

[17] See the Communication to the Council and the European Parliament: Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM (2003) 16 final.

ity principle. Disability rights are no longer placed in a medical care model, but in the perspective of full participation.[18]

This is very clearly formulated in paragraph c(bis) of the Preamble: 'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

Disability discrimination is caused by both individual discrimination of people with impairments and by the fact that they are faced with structural barriers that prevent their participation: when all people use sign language, as was the case during a period from the 17th to early 20th century in the community of Martha's Vineyard, where a substantial percentage of the inhabitants was deaf, deaf people cannot be distinguished from others.[19] In the same way, people with bad sight are not disabled when glasses can give adequate compensation.

Article 1 of the Convention (from which article no reservations are allowed) establishes the Purpose of the Convention in the same line:

> 'The purpose of the present Convention is 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.'

The definitions provision in Article 2 of the Convention includes the obligation of providing a reasonable accommodation in the concept of discrimination on the basis of disability and defines reasonable accommodation as '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'.

This seems to be very much in line with the provisions of the Framework Directive.

Article 27 of the Convention provides an elaborate provision on the right of persons with disabilities to work and employment, repeating the obligation of the States Parties to ensure that reasonable accommodations are provided (under 1(i)). The fact that the States must *ensure* this, means that it is a very strict obligation.

Also relevant is that the text of Article 27 makes clear that a reasonable accommodation is not a form of affirmative action: this is mentioned under 1(h) of Article 27, which imposes on States Parties the obligation to 'Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures'.

[18] On the Concepts of disability see also: *Pooran/Wilkie* [6], at pp. 2, 3.
[19] This example is given by *Minow* [6], p. 85.

It is not possible here to go deeper into the concept of affirmative action but is must be emphasised that Article 27 of the Convention reaffirms that a reasonable accommodation is not the same as a temporary special measure like affirmative action. Distinct from affirmative action, reasonable accommodations constitute no temporarily allowed exceptions to the rule of equal treatment, but are part of the general obligation of non-discrimination and equal treatment. The same distinction is made in the Framework Directive in Articles 5 and 7.

3.2 ECHR and ESC Cases

The European Court of Human Rights has given several judgments that are relevant to determine the rights to accommodation of people with disabilities. Even when, in these cases, applicants were not admitted, the Court recognises explicitly the obligation of the states to take effective measures for disabled citizens, holding that by refraining to do so, the states may violate the rights of the ECHR. The fact that the applicants in these cases were not admitted, was due to the fact that the particular circumstances of the cases concerned were not sufficiently directly linked to the substantial relevant rights of the Convention (the right to privacy and family life).[20]

In 2004, the European Committee of Social Rights, referring to the abovementioned *Thlimmenos* judgment of the ECHR, held, that the right to education as embodied in Articles 15 and 17 of the European Social Charter, obliged the state to take adequate steps to ensure this right to all. In this case France had failed to meet this obligation because it did not achieve sufficient progress in advancing the provision of education for persons with autism, and a chronic shortage continued to exist.[21] This case underlines that financial implications are not seen as a justification not to take positive measures. This is in accordance with the exception, included in Article 5 of the Framework Directive, which allows only exceptions on the obligation to provide a reasonable accommodation in case of a *disproportionate* burden.

The regular tests as applied by these human rights institutions to achieve a fair balance between the different interests at stake will be relevant to considering whether in a particular case the accommodation required is 'reasonable'. This will depend on the circumstances of the case, such as the size of the company, the length of the contract, the costs involved, the availability of grants or allowances (see also the last sentence of Article 5 Framework Directive).

4. Reasonable accommodation

4.1 European Court of Justice

The first case on disability discrimination considered by the European Court thus far does not provide much more insight into the interpretation of the concept of reasonable discrimination. The most important question in the case of *Sonia Chacón Na-*

[20] ECHR, 24 February 1998, *Botta vs. Italy* and ECHR, 14 May 2002, *Zehnalova and Zehnal v. The Czech Republic*.
[21] ESC, 14 March 2004, *Autism-Europe vs. France,* Case 13/2002.

vas vs. Eurest Colectividades[22] focused on the concept of disability, in particular the relation between disability and sickness. The European Court ruled that a dismissal solely because of sickness is not protected as being disability discrimination by the Framework Directive. But the Court added that 'the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post'.

This reemphasises that only the absolute incompetence of the employee can justify dismissal of a person with disability.

In a pending case the European Court will have to determine whether the prohibition of discrimination persons with disabilities also covers persons 'associated with disabled persons'.[23]

4.2 The Netherlands' Equal Treatment Commission and other national cases

The Dutch Equal Treatment Commission[24] has given more than 80 opinions on disability discrimination. The opinions show a wide variety of possible reasonable accommodations.

The Commission established discrimination when a computer screen was refused to a employee with bad sight, and this finally caused dismissal. In another case a sign language interpreter was seen as a reasonable accommodation for a deaf applicant for a job. The University that billed a disabled student for the rent of the room to give him the extended exam he needed was acting in a discriminatory way by not providing a reasonable accommodation.

Not all accommodations required are accepted as reasonable by the Commission: the student who demanded the assistance of personnel of an educational institute to suction mucus out of the mouth and/or trachea, was told that this demand went beyond what was considered to be a reasonable accommodation (Opinion 2006-59).

Most relevant are the cases where the Equal Treatment Commission gives the employer suggestions as to how to provide a reasonable accommodation to defendants that refused to employ a disabled person. In several cases the Commission advised a test to see how relevant the disability was in practice and whether accommodations were possible or not: in one case this suggestion was that the employer may reduce the risk by offering the possibility of a probationary period (Opinion 2006-77 on a manic depressive travel guide).

Before refusing a disabled applicant, the employer is obliged to obtain adequate medical information and he cannot not simply follow 'assumptions' which may be very stereotyped (Opinion 2006-3).

Not all complaints on disability discrimination are awarded, or lead to the imposition of duties to accommodate, e.g. a dyslexic student who received negative advice on the continuation of management studies alleged that the low results were caused

[22] Case C-13/05 *Chacón Navas*, judgment of 11 July 2006, not yet reported.
[23] Pending Case C-303/06 *Coleman*.
[24] See www.cgb.nl with small section in English.

by denial of accommodations, but the Commission was convinced that even if not all adjustments had been awarded, the general results were so bad that the dismissal was sufficiently well founded.

We can also give some examples of reasonable accommodations from the UK, which are described by Pauline Hughes[25]. In the first case Mrs A was dismissed instead of offered a slightly higher-grade job after she became unable to walk due to a surgical procedure. The House of Lords ruled that such an offer would *not* have been more favourable treatment but reasonable adjustment. In the second case Mrs M. did not get requested reasonable adjustments after eye strain, as a consequence of which she went on sick leave and finally resigned. Here too the Court of Appeal ruled that there was a failure to take appropriate steps.

5. To be continued …

The foregoing gives a bird's eye view of the development of the concepts of disability discrimination and reasonable accommodation, with particular reference to the Framework Directive. It may be clear that in terms of the Disability Rights Convention, these evolving and dynamic concepts introduced in Community Law by the Framework Directive still have to be fully developed in the case law of the European Court and the national courts. However, international human rights law gives us some assistance in the interpretation and the needs to be taken into account. Moreover, it is most opportune to compare national cases, both from the so-called 'specialised bodies' and from the national courts. A fundamental and comparative approach can help us to bring about substantive equality.

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[25] *Hughes* [3].