

“From a given – into a task”

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*Aspects of labour market integration and employment strategies in relation to reasonable accommodation regulations and the individualized perspective of anti-discrimination legislation.*¹

Introduction

Since the introduction of disability anti-discrimination law, the legal and socio-political debates in the field has been circling the very idea of access to employment through equal treatment legislation.² The European Community adoption of this strategy is very obviously apparent in the directive 2000/78/EC.³ Since the disability part of the Directive already is, or is supposed to be, implemented, a number of national legislations or amendments to national legislation have been passed lately. This development represents an interesting and important shift in attitude to disability at work, from what could be argued to constitute a more paternalistic perspective of positive measures, subsidies and sheltered employment – to a more individualised perspective, where the disabled individual will be promoted to compete in a free labour market, regardless of irrelevant attitudes towards disability. Disability might, however, have significant impact on the ability to perform the employment tasks, and if the description of the current development is correct, the focus on competitiveness and equal treatment of “equals” might leave many disabled individuals outside the scope of the “equal” labour market. The individualised perspective could, with parallels to the words of Bauman, be described as resulting in the establishment of a “*de jure* autonomy (although not necessarily a *de facto* one)”.⁴ Disability discrimination law does, to some extent, react to this situation by stipulating an employer duty to make reasonable accommodations in order to make more disabled employees or applicants available for the “equality-test” of discrimination law.

¹ This article consists of aspects and perspectives developed among other things in my doctoral thesis at Lund University, Inghammar, *Funktionshindrad – med rätt till arbete*, Juristförlaget i Lund, 2007.

² I would say that this is particularly valid for the development in the UK, the European country most experienced with disability discrimination law.

³ The development of disability law within the European Community is described in Waddington, *From Rome to Nice in a Wheelchair, The development of a European Disability Policy*, Europa Law Publishing, Groningen 2006.

⁴ Baumann, in, Beck, Beck-Gernsheim (ed), *Individualization*, SAGE Publications, London 2002, p. XV.

Disability discrimination law as we have seen it develop in Europe over the past 10-15 years have been described as elitist,⁵ de facto focusing the most competitive disabled employees and job-applicants, leaving, I would say, a majority of persons with disabilities with no increased prospect of labour market integration. The very core idea of equal treatment has to do with a merit-based labour market selection, neither a means-tested nor a, for insufficient reasons, misguided selection based on irrelevant aspects like disability.⁶ Individual capacity and individual ambition seem to establish the individual employee or job-applicant at the heart of the labour market and the discrimination legislation provides incentives, in form of damages for violation of the legislation, for employees or applicants to take legal action.⁷ This market oriented perspective could be argued to relate very closely to a development into a more individualised – and flexible – notion of employment relations. But then again, disability discrimination law also includes a specific feature – the duty to make reasonable accommodations.

In this article it is argued that the duty to make reasonable accommodations constitutes the most fundamental opposition to an otherwise rather elitist perspective of non-discrimination law, but that this duty is still very much in line with the underlying individualisation of the labour market. The article pinpoints some differences in the duties to make reasonable accommodations under national anti-discrimination law, and discusses how these differences influences the possible outcome of the disability discrimination legislation.

Duty to make reasonable accommodations under EC-directive 2000/78/EC

Article 5 of Directive 2000/78/EC clearly stipulates that reasonable accommodations shall be provided or at least taken into account in order to guarantee the compliance of the equal treatment principle. Employers shall be obliged to take such appropriate measures as to enable persons with disabilities access to and participation in employment, as long as this does not result in a disproportionate burden for the employer. Support or subsidies provided as parts of the national disability strategy will influence the perception of the proportionality of the employer's duty. As argued in section 21 of the preamble to the directive, factors like financial resources and the scale of the organisation shall be taken into account, but at large, the very

⁵ See for instance Inghammar, *Discrimination of People with Disabilities*, in Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague 2001, p. 348.

⁶ As long as the disability is an "irrelevant" aspect and does not interfere with the performance of the duties under the employment contract.

⁷ This constitutes indeed a shift from earlier generations of disability labour market "rights" which were almost impossible for the individual disabled person to claim, I discuss this issue more in depth in, Inghammar (forthcoming) 2007.

definition of reasonableness and proportionality will be dependent on future EC, and national, case law.⁸

...in Sweden

The Swedish Disability Discrimination Act, (SFS 1999:132) includes a duty for employers to make reasonable accommodations.⁹ There is no statutory indication to tell what would be considered reasonable or unreasonable, and so far, since coming into force in May 1999, this aspect of the law has not been subject to any significant guidance by case law from the Swedish Labour Court.¹⁰ At a first glance the duty to make reasonable accommodations under the Swedish act from 1999 seemed to correspond rather well to the EC-directive. However, since the discrimination law was introduced to a legal environment where accommodations to the workplaces used to be handled under the Safety at Work legislation (SFS 1977:1160), any accommodation for employees under an existing employment contracts was kept out of the Disability Discrimination Act. The regulatory field of adjustments was divided, and accommodations in respect to disabled *job-applicants* and *employees applying for promotion* formed part of the discrimination perspective, while similar accommodations for already employed disabled persons fell under Safety at Work provisions. Only under the discrimination law the individual could take legal action and call for damages in terms of loss of income or injury to feelings under private (labour) law proceedings. Safety at Work issues were, and are still, a part of a public/administrative law area, where the individual employee are left with only indirect representation and administrative proceedings and no damages could be paid to the individual employee in these cases.¹¹ Voices were raised implying that since accommodation is already to some extent obligatory under Safety at Work legislation any similar duty under disability discrimination law would be overlapping.¹²

In December 2006, only days before the implementation of directive 2000/78/EC was overdue, the Swedish parliament changed this situation by including employees and not only job-applicants and employees seeking promotion under the reasonable accommodation section of the disability discrimination law.

⁸ See also Waddington, Hendriks, The Expanding Concept of Employment Discrimination in Europe: from Direct to Indirect Discrimination to Reasonable Accommodation Discrimination, in, *The International Journal of Comparative Labour Law and Industrial Relations*, Kluwer Law International, 2002, p. 403-427.

⁹ 6 § act law (1999:132) on disability discrimination.

¹⁰ As a matter of fact the Labour Court have only tried the disability discrimination law on five separate occasions. In three cases the Court found that the employer had discriminated against the employee or the job-applicant, these were cases where the plaintiff suffered from early stage Multiple Sclerosis, Diabetes or Allergic reactions to some food.

¹¹ The former Swedish government made a proposal to rearrange these matters in order to better comply with the EC-directive, but the proposal was postponed until after the Election in September 2006 and how, and when, the new majority in Parliament will react to this is still unclear.

¹² See further for instance Proposition 1997/98:179 p. 53.

I would argue that what we experience in the described legislative discussion is a collision between on one hand an individualised disability discrimination aspect and on the other a collectively oriented perspective expressed in the Safety at Work legislation. As we will see below, this collision is not a situation isolated to Sweden.

...in Germany

Since long, legislation on integration and labour market participation in German labour law has been focusing severely disabled.¹³ Regulations covering a variety of instruments, such as the Quota-system, are still actively promoting the integration of persons with (severe) disabilities.¹⁴ This legislation does, however, only to a minor extent generate specific individual rights for the (severely) disabled, rights under which the disabled person could bring charges against a neglecting employer.

In August 2006, German Bundestag finally passed new discrimination legislation, the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG).¹⁵ The legislation is supposed to implement the EC-directive 2000/78/EC and outlaw discrimination in relation to, among other things, disability in the labour market.¹⁶ To a large extent the definitions within the EC-directive are implemented, most importantly is the old German concept of special protection for severely disabled *not* adopted in the discrimination act but a broader, more inclusive, definition of disablement is used.¹⁷ Regardless of what is explicitly said, the German Act does not fully implement the EC-directive. The lack of a duty to make reasonable accommodations under the discrimination act is one of the most appalling examples of this.¹⁸

Despite article 5 of the directive 2000/78/EC, the German legislator shows reluctance to introduce any duty to make reasonable accommodations under the discrimination and equal treatment legislation and neither the AGG nor the former

¹³ In general, this perspective has influenced the field of law since 1923, the current legislation is since 2001 found in the Ninth Social Book of Law, *Sozialgesetzbuch IX* (SGB IX). For a thorough analysis of the legislation see, Welti, *Behinderung und Rehabilitation im sozialen Rechtsstaat*, Mohr Siebeck, Tübingen 2005.

¹⁴ SGB IX.

¹⁵ The legislation was announced in the *Bundesgesetzblatt* 17 August 2006 and the law came into force the day after that. For an early discussion about the AGG, see Bauer, Thüsing, Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?*, in, *Neue Zeitschrift für Arbeitsrecht*, 2006, Heft 14, p. 774-778.

¹⁶ § 1 AGG, the second part of the Act focuses relations on the labour market.

¹⁷ There is no legal definition of disability under the Act, but disability is explicitly covered, see, § 1 AGG. (“Ziel des Gesetzes ist, Benachteiligungen aus Gründen [...] einer Behinderung [...] zu verhindern oder zu beseitigen”).

¹⁸ The other important example is the exemption of dismissal cases from the discrimination legislation, see further, § 2 Abs. 4 AGG. This exemption does not cover disability alone, but all other ground for discrimination. The legislator obviously relies heavily on general employment protection legislation on unfair dismissal, see, *Kündigungsschutzgesetz*.

disability equal treatment regulations in § 81 Abs. 2 SGB IX correlates to such duties.¹⁹

However, this is not the full picture of employer duties to accommodate disabled individuals. A separate regulation already in the SGB IX generates a somewhat similar duty for the employer to actively try to adjust the workplaces to severely disabled employees.²⁰ To some extent, this statute might regulate the same or similar situations, but in some vital aspects this would not be the case. First of all would the duties under § 81 Abs. 4 SGB IX only relate to persons with severe disabilities. This definition will exclude a great number of people with less than severe disabilities, individuals with even better opportunities (than severely disabled) to compete under discrimination law in the open labour market. Secondly, the definition will comprise employees only, leaving job-applicants without opportunity to raise the question of workplace adjustments. Thirdly, an employee bringing charges against his employers in this regard will not be able to follow the discrimination “route to justice”, with the concept of shared burden of proof, but will have to argue in the private law concept under § 823 Bürgerliches Gesetzbuch (BGB).²¹ At least the two first arguments, and possibly even the third, could undermine the implementation of the Directive in German labour law.

...in Great Britain

The British Disability Discrimination Act 1995 already from the beginning established the idea of reasonable accommodations and turned out to be a role model for at least the Swedish legislative process in 1999. A significant number of cases from Tribunals, and recently even from Court of Appeal and House of Lords, has monitored the importance of this duty and the potential progression of disability law lying embedded in this very idea.²² The British concept of the duty to make reasonable accommodations is, in my opinion, the only of the three national concepts that from the very beginning corresponded to article 5 of directive 2000/78/EC.²³ There are no limitations in regard to the disabled individual’s status as job-applicant or

¹⁹ Prior to the introduction of the AGG in August 2006, a discrimination statute was attached to the legislation on severely disabled in § 81 Abs. 2 SGB IX between year 2001 and August 2006. The structure of that legislation, with the focus on severely disabled, was subject to legitimate criticism, see Schiek, *Gleichbehandlungsrichtlinien der EU – umsetzung im deutschen Arbeitsrecht*, in: *Neue Zeitschrift für Arbeitsrecht* 2004, p. 873-884.

²⁰ § 81 Abs. 4 SGB IX, see Kossens, von der Heide, Maas, *Praxiskommentar zum Behindertenrecht (SGB IX)*, C.H. Beck, München 2002, p. 367-368.

²¹ See BAG 10.7.1991 AP Nr 1 zu SchwBG 1986, as well as Neumann, Pahlen, Majerski-Pahlen, *Sozialgesetzbuch IX. Rehabilitation und Teilhabe behinderter Menschen*, 14. Aufl. C.H. Beck, München 2005, p. 211 f. and Palandt, *Bürgerliches Gesetzbuch*, 62. Aufl. C.H. Beck, München 2003, p. 1245 ff.

²² British employment cases are brought through Employment Tribunals and Employment Appeal Tribunal, with possibilities for appeal in the Court of Appeal and eventually House of Lords.

²³ Whether the DDA 1995 definition of disability – with the “normal day-to-day activities” parameter – is sufficient or not is really another story.

employee, and no separate disability definition applied to this duty.²⁴ Nevertheless, or maybe for that reason, have the questions of reasonableness and potency of the duty been subject to discussions in case law and the duty's "element of more favourable treatment", has, indeed, been recognised.²⁵

Accommodating the individual

If disability discrimination law can be described to be a part of an ongoing individualisation of employment legislation, providing legal rights for the achievement of equal treatment, how would that correspond to the *reasonable accommodation* perspective? When discrimination law, as described above, focuses the equality of opportunity and in fact the rights for persons with disabilities to compete without regards to irrelevant attitudes to their disablement, what role is there for reasonable accommodations to play? In respect to that role, do the national standards for reasonable accommodation fulfil these purposes?

The reasonable accommodation duty is obviously something different from a fundamentalist definition of equal treatment. The employers might need to take into consideration and even make expensive adjustments in order to accommodate the disabled individual, resulting in some sort of more favourable treatment.²⁶ In relation to the variety of positive measures for labour market integration, this more favourable treatment represents, I would say, a somewhat different perception of people with disabilities. Where most positive measures regulate favourable treatment for disabled persons as a group, that could be quota-system, extraordinary employment protection, sheltered or supported employment, the rights for persons with disabilities developed under the duty to make reasonable accommodations focus the individual, providing an opportunity for the individual disabled job-applicant or employee to state his or her special, individualised, requirements, leaving to the employers – and in the end to the courts or tribunals – to examine the reasonableness and proportionality of the adjustments. From my perspective this is something different from other regulations. The legal construction will, as discussed above, even if it does not perfectly relate to the equal treatment paradigm, most certainly form a good alliance with the concept of individualisation – which is strongly advocated through discrimination law.

²⁴ For a detailed description on the reasonable accommodation section, see for instance Doyle, *Disability Discrimination. Law and Practice*, 4th edition, Jordans, Bristol 2003.

²⁵ *Archibald v Fife Council* [2004] IRLR 651 HL (House of Lords), citation by Baroness Hale of Richmond, p. 657. See also *Northampton County Council v Meikle* [2004] IRLR 703 CA (Court of Appeal).

²⁶ See *Archibald v Fife Council* [2004] IRLR 651 HL, especially p. 657.

Finally

The Swedish and German disability discrimination legislations both, in the own individual ways, though, showed reluctance to implement a general and consequent duty to make reasonable accommodations all over the labour market. Only after some debate and in under the threat of not properly implementing the EC-directive Swedish legislation was given a wider target in December 2006. The German legislation is however still not changed in this regard. The ambiguous applications of the duty in these two countries could be said to maintain a more absolute idea of equality of treatment or at least keeping more favourable treatments, such as accommodation of the workplace, separated from discrimination law, which is especially true about the German legislation. To what extent this will be in accordance to EC-law will be a question for future decisions by the ECJ, but it certainly would turn out a little surprising if this explicit part of the discrimination directive could be more or less voluntary for the Member States to implement. The duty to make reasonable accommodations also relates perfectly well to an individualised concept of employment expressed in discrimination law, even though any accommodating strategies might challenge the overall competitive perspective of equal treatment. Herein lies a deep and contradiction in the legislation. As part of the individualised concept the reasonable accommodation regulation could be argued to contribute to a strategy were employment for disabled persons are turn from “a given – into a task”, with the notion that individual disabled will have to take on that “task” and be competitive enough to see the changes come through.

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