

CAN REASONABLE ACCOMODATION SAFEGUARD THE EMPLOYMENT OF PEOPLE WITH DISABILITIES?

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ABSTRACT

The duty to provide reasonable accommodation is one of the most important measures to achieve equal opportunities of people with disabilities. Reasonable

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accommodation recognises the relevance of 'impairment', and it is designed to, *inter alia*, increase the employment of people with disabilities. The importance of this duty was such that it was configured in Article 5 Directive 2000/78 and as a key measure in the Convention on the Rights of Persons with Disabilities (CRPD). Thus, the duty to provide reasonable accommodation has become both a European and an international norm. In light of this, this contribution aims to analyse the European configuration of the duty to provide reasonable accommodation in the workplace for people with disabilities, and its role in the extinction of an employment contract. Specifically, this contribution seeks to assess the current configuration and effectiveness of reasonable accommodation, in light of the legal framework (Directive 2000/78) and its interpretation by the Court of Justice of the European Union (CJEU). Therefore, it will examine, at a European level, the possibilities offered by the configuration of reasonable accommodation, as a mechanism for the maintenance of employment and an obstacle to termination of employment contracts of people with disabilities.

1. INTRODUCTION

Improving the employability of people with disabilities has been an objective over the last few years, partly because of the rise in the social-contextual model of disability.¹ In general terms, this paradigm rejects the individual model of disability, and views disability as a result of the difficulty of society in adapting to the needs of people with impairments. This paradigm refuses the individual assumption of the responsibility of disability, and stresses it as a difficulty of societies to provide accessible spaces for people. The social model of disability rejects the existence of individual limitations. The origin of the problem lies in society, conceived as a limiting entity that is incapable of responding to the needs demanded by people with disabilities. In this regard, the social model characterises disability as a situational phenomenon, resulting from the interaction between an impairment and a non-adapted environment, and proposes the promotion of autonomy and independence as a solution, abandoning the idea of normality and adopting accessibility and universal design as the main characteristics for achieving equal opportunities. By contrast, the individual model of disability focus on medical interventions of people with disabilities. It tries to highlight the limitation of the person in

¹ For further discussion of the social-contextual model of disability see A. PALACIOS, *El modelo social de la discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad*, Cinca and Madrid 2008; M.A. STEIN, 'Disability Human Rights', (2007) 95 *California Law Review*, pp. 87–91; J. BICKENBACH et al., 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps', (1999) 48 *Social Science & Medicine*, pp. 1173–1187.

relation to the result or the process of activities developed by other people without disabilities, and advocates the integration of the individual by means of medical interventions that involve the healing of the disability. The medical model recognises disability as an individual circumstance, and therefore, society is not responsible for removing systemic barriers, negative attitudes and individual exclusion. So, the solution proposed by the medical model is the medical rehabilitation of people with disabilities.

But, the theoretical approach to the inclusion of people with disabilities has gone a step further with the progressive consolidation of the human rights model of disability. This model is presented as an evolution of the social model, and it assumes the same assumption from which the social model starts, that is, society continues to maintain a very prominent role in limiting people's capabilities. However, the human rights model recognises and emphasises the intrinsic value of people with disabilities, avoiding an approach based on human capabilities,² and strengthens the recognition of the autonomy of people with disabilities in their own development.³ So, human dignity acts as a core concept of this model,⁴ as well as the human right to personal development,⁵ in order to design a social construction of disability based on a society that categorises people and creates obstacles to the full exercise of rights and freedoms.

Nevertheless, where this theoretical approach to disability stands out positively is in how it designs change towards an inclusive society. The main element to achieve the objectives of the human rights model is based on the need to introduce a legal approximation in the theoretical model design. Consequently, it focuses on the recognition of people with disabilities as rights subjects,⁶ which translates into legal institutionalisation – not provided for by the social model⁷ – and enables people with disabilities to have real and effective access to human rights. This way of understanding disability based on a human rights approach was implemented globally by the

² M.A. STEIN (2007), 'Disability Human Rights', *supra* note 1, p. 107, who uses the concept 'talent', and avoids references to capacity.

³ M. NUSSBAUM, *Women and Human Development: The Capabilities Approach*, Cambridge University Press, Edinburgh 2001.

⁴ G. QUINN and T. DEGENER, 'The Application of Moral Authority: The Shift to the Human Rights Perspective on Disability through United Nations "Soft" Law', in G. QUINN, T. DEGENER, A. BRUCE et al. (eds.), 'The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability', United Nations, New York and Geneva 2002, p. 23, available at <https://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>, last accessed 04.06.2019.

⁵ M.A. STEIN (2007), 'Disability Human Rights', *supra* note 1, p. 93.

⁶ G. QUINN and T. DEGENER (2002), 'The Application of Moral Authority', *supra* note 4, p. 13.

⁷ M.A. STEIN (2007), 'Disability Human Rights', *supra* note 1, p. 86, who stated that human rights disability model recognizes and instrumentalizes social, economic and cultural rights of people with disabilities.

United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),⁸ adopted on 13 December 2006, although there have been some previous legal instruments at European level adopting this approach. In this regard, the European reception of the social-contextual model of disability happened very gradually, through the approbation of some non-binding resolutions soft law, i.e. the Communication from the Commission to the Council of 4 November 1981 about the social integration of disabled people; Council Resolution of the representatives of the Governments of the Member States of the European Communities meeting within the Council of 21 December 1981 on the social integration of handicapped people; and the Communication of the Commission of 30 July 1996 on equality of opportunity for people with disabilities – A New European Community Disability Strategy. However, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, was one of the most important legal instruments due to its introduction of protection from discrimination to people with disabilities at the European level.⁹ This Directive will be discussed further in this contribution.

At the international level, the CRPD evidences a special preoccupation for the maintenance and safeguarding of the right to work, even in those cases in which the disability appears or is detected during the employment relationship. The CRPD recognises the right of persons with disabilities to work, on an equal basis with others,¹⁰ and provides protection for the maintenance of employment, including measures to ensure reasonable accommodation for persons with disabilities in the workplace.¹¹ The CRPD protects those workers who acquire a disability during the employment relationship. This clarification, although it appears minor, has an indisputable importance: it establishes indirect protection against dismissal of the worker due to disability-related incapacity.

Thus, the treatment of people with disabilities has come increasingly closer to an inclusive approach, focusing its attention on the elimination of

⁸ For an in-depth exploration of this topic, see T. DEGENER, 'A New Human Rights of Model of Disability', in V. DELLA FINA, R. CERA, R. and G. PALMISANO (eds.), *The United Nations Convention on the Rights of People with Disabilities. A commentary*, Springer, Cham 2017, pp. 41–59.

⁹ Although Directive 2000/78 represents a step forward in EU-antidiscrimination law, there is a equality hierarchy as a product of political pragmatism, as L. WADDINGTON and M. BELL, pointed out in L. WADDINGTON and M. BELL, 'More Equal than Others: Distinguishing European Union Equality Directives', (2001) 38 *Common Market Law Review*, p. 610. In particular, the primary position is occupied by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁰ The clearest indicator of this argument is found in the provision of services in open, inclusive and accessible environments, *ex Article 27(1)-(i) CRPD*.

¹¹ Article 27(1)(i) CRPD.

social barriers that hinder their full and effective participation in society as subjects with rights. And the duty to provide reasonable accommodation in the workplace appears as a measure to combat discrimination on the ground of disability. In this regard, this anti-discriminatory measure is the materialisation of the principle of equal treatment in relation to persons with disabilities,¹² and its aim is to establish an employer's duty to accommodate the workplace of people with disabilities. The adaptation of workplace is defined as the adoption of the 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, and is included in Article 2 CRPD. Its breach or denial is considered as a form of discrimination on the basis of disability, *ex Article 2 CRPD*.

However, the Convention does not specify how the duty to provide reasonable accommodation applies in cases in which the employer intends to terminate the employment contract. The conceptualisation of this obligation as a measure that seeks to safeguard the right to work raises the need to reflect on the role played by the aforementioned obligation in the termination of the contract of employment of persons with disabilities. Extinction of employment contracts of people with disabilities has been one of the most frequent moment when discrimination on the basis of disability appears, because workers with disability are the first ones to be fired. Therefore, the extinction of employment contracts of people with disabilities exacerbates the employment of people with disabilities, due to its special difficulties to access to ordinary employment. Given this scenario, the hypothesis of this contribution is to explore the possibility of the duty to provide reasonable accommodation to act as a measure to prevent discrimination in the extinction of work contracts of people with disability. Thus, can the duty to provide reasonable accommodation be claimed as a preventive actuation before the extinction of the employment contract? It is at this point that the purpose of this contribution arises: the contribution aims to provide an assessment from a European point of view of the relevance of the duty to provide reasonable accommodation to the termination of work contracts of persons with disabilities and to consider how the duty can function as a mechanism to safeguard employment and prevent discrimination of people with disabilities.

The contribution will begin by examining the content of the CRPD and defining the international characterisation of the duty to provide reasonable accommodation. It will then proceed to discuss the legal configuration of the obligation at European level and the most important judgments of the CJEU

¹² In this regard, see Committee on Economic, Social and Cultural Rights General Comment No. 5 (1994) on persons with disabilities, para. 15 and General Comment No. 6 (2018) on equality and non-discrimination, para. 23.

that have influenced its characterisation and interpretation. After examining the international and European framework, the contribution will conclude with a discussion of the impact of the duty to provide reasonable accommodation in the context of terminations of work contracts. In other words, I want to analyse if the obligation to provide reasonable accommodation can act as a check to the termination of work contracts of persons with disabilities.

2. THE INTERNATIONAL CHARACTERISATION OF THE DUTY TO PROVIDE REASONABLE ACCOMMODATION IN THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES

The CRPD was the first legally binding instrument on the rights of people with disabilities, and its negotiation was a difficult process.¹³ Taking the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities as a reference point, the CRPD signified a change in the way that disability was treated as, up to that point, this had been addressed only by soft law.¹⁴ This shifted the regulatory structure from principles and goals to rights,¹⁵ and implemented an American perspective on the treatment of disability.¹⁶

¹³ For an examination of the CRPD negotiation, see R. KAYESS and P. FRENCH, 'Out of Darkness into Light? Introducing the Convention of Persons with Disabilities', (2008) *Human Rights Law Review*, p. 1; G. QUINN, 'A Short Guide to the United Nations Convention on the Right of Persons with Disabilities', in G. QUINN and L. WADDINGTON (eds.), *European Yearbook of Disability Law*, Vol. 1, Intersentia, Oxford 2009, pp. 89–114; S. TRÖMEL, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities', *ibid.*, G. QUINN and L. WADDINGTON (2009), pp. 115–136; G. DE BURCA, 'The EU in the Negotiation of the UN Disability Convention', (2010) 35(2) *European Law Review*.

¹⁴ *Ibid.*, R. KAYESS and P. FRENCH (2008), p. 14.

¹⁵ This position was defended by C. COURTIS, 'Los derechos de las personas con discapacidad en el Sistema de Naciones Unidas', in R. DE LORENZO and L.C. PÉREZ BUENO (eds.), *Tratado sobre discapacidad*, Aranzadi, Navarra 2007, p. 306; P. CUENCA GÓMEZ, *Los derechos fundamentales de las personas con discapacidad. Un análisis a la luz de la Convención de la ONU*, Servicio de publicaciones de la Universidad de Alcalá, Alcalá de Henares 2012, p. 26; and R. DE LORENZO, 'Los contornos del Derecho de la Discapacidad', in L.C. PÉREZ BUENO (ed.), *Hacia un derecho de la discapacidad. Estudios en homenaje al profesor Rafael de Lorenzo*, Aranzadi, Navarra 2009, p. 71. Also, this view has been integrated by the UNCRPD. Specifically, the General Comment No. 6 (2018) on equality and non-discrimination p. 3 holds the idea of equality and non-discrimination as principles as well as rights, embodied in Articles 3 (principles) and 5 (rights) CRPD.

¹⁶ In this respect, see G. QUINN and E. FLYNN, 'Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability', (2012) 60 *The American Journal of Comparative Law*, pp. 34–39. For a discussion of this, see L. WADDINGTON, 'Legislating to Employ People with Disabilities: the European and American Way', (1994) 367(1) *Maastricht Journal*, p. 368; L. WADDINGTON and M. DILLER,

The overall goal of the Convention is promoting full and effective participation of people with disabilities in the economic, social, cultural and political life of their societies, and the 50 articles of the CRPD support that idea. Therefore, it lays emphasis on a multidisciplinary perspective, in such a way that it covers a wide variety of areas, for example access to justice (Article 13), education (Article 24), health (Article 25), work and employment (Article 27) or social protection (Article 28), *inter alia*.¹⁷

However, the CRPD shines especially for its content. Although several authors have pointed out that some of its most important innovations are the transfer of protection of people with disabilities to the human rights level,¹⁸ increasing visibility of disability or requiring the establishment of systems to fully monitor exercise of rights,¹⁹ it is submitted that the most outstanding virtue of the CRPD is the formulation of its content through a code of rights without abandoning the language of principles and objectives.²⁰

The CRPD is based on a rights structure linked with the principle of non-discrimination,²¹ in such a way that this principle is integrated into each one of the individual rights. This connection was a step forward in the field of equal opportunities for people with disabilities, because the CRPD is not just a non-discrimination treaty, but a supplementary legal instrument to implement

¹⁷ 'Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law', in M.L. BRESLIN, and S. YEE (eds.), *Disability Rights and Policy. International and National Perspectives*, Transnational Publishers, Ardsley 2002; G. DE BURCA, 'The Trajectories of European and American Antidiscrimination Law', (2012) 60(1) *American Journal of Comparative Law*, pp. 1–22.

¹⁸ For an in-depth examination of the content of the CRPD, see M. SCHULZE, *Understanding the UN Convention on the Rights of Persons with Disabilities. A Handbook on the Human Rights of Persons with Disabilities*, Handicap International, New York 2010, available at http://www.hiproweb.org/uploads/tx_hidrtdocs/HICRPDManual2010.pdf, last accessed 04.06.2019.

¹⁹ A. PALACIOS and F. BARIFFI, *La discapacidad como una cuestión de derechos humanos. Una aproximación a la Convención Internacional sobre los derechos de las personas con discapacidad*, Cinca, Colección telefónica accesible, Madrid 2007; R. DE ASSIS ROIG, 'Derechos Humanos y Discapacidad', in E. JIMÉNEZ (ed.), *Igualdad, no discriminación y discapacidad*, Dykinson, Buenos Aires 2006; S. TRÖMEL, 'Hacia un derecho internacional de la discapacidad', in L.C. PÉREZ BUENO (ed.), *Hacia un derecho de la discapacidad. Estudios en homenaje al profesor Rafael de Lorenzo*, Aranzadi, Navarra 2009, p. 1063; R. KAYESS and P. FRENCH (2008), 'Out of Darkness into Light?', *supra* note 13, pp. 2–3.

²⁰ R. DE LORENZO (2009), 'Los contornos del Derecho de la Discapacidad', *supra* note 15, p. 74.

²¹ C. COURTIS (2007), 'Los derechos de las personas con discapacidad en el Sistema de Naciones Unidas', *supra* note 15, p. 306; P. CUENCA GÓMEZ (2012), 'Los derechos fundamentales de las personas con discapacidad', *supra* note 15, p. 26; R. DE LORENZO (2009), 'Los contornos del Derecho de la Discapacidad', *supra* note 15, p. 71; M. KETT, R. LANG and J.-F. TRANI, 'Disability, Development and the Dawning of a New Convention: A Cause for Optimism?', (2009) 21 *Journal of International Development*, p. 658.

²² A. PALACIOS, 'La progresiva recepción del modelo social de la discapacidad en la legislación española', in L.C. PÉREZ BUENO (ed.), *Hacia un derecho de la discapacidad. Estudios en homenaje al profesor Rafael de Lorenzo*, Aranzadi, Navarra 2009, p. 173.

affirmative action policies. This produces a real universalisation of human rights, focused on people with disabilities. For the first time, rights configurations are adapted to people with disabilities, in order to guarantee an effective enforcement of those rights.

Regarding the content of the CRPD, the Convention takes as its starting point the rights of Universal Declaration of Human Rights (UDHR), and goes further by creating specific rights for people with disabilities.²² This approach aims to bring a special protection to fields which have been traditionally ignored by other international standards or have not been designed considering the needs of people with disabilities. Consequently, the Convention has created a catalogue of new rights in such a way that the CRPD has adapted the configuration of the rights and the principle of non-discrimination is integrated into each one of the individual rights.

To this end, the CRPD promotes integration through transforming social infrastructures. Clearly, the Convention states that the integration of people with disabilities requires focusing the debate on the shortcomings presented by society, and is mainly committed to the transformation of environments, facilities, goods and services that are exclusive and inaccessible. Consequently, accessibility is introduced as a key principle of the CRPD to enable persons with disabilities to live independently and participate fully in all aspects of life.²³ Another of the most important innovations of the CRPD is the duty to adapt the environment to achieve full participation of persons with disabilities. Under the heading of reasonable accommodation (Article 5 CRPD), the

²² Clear examples of the adaptation of the UDHR rights to people with disabilities can be found in: (a) Article 15 CRPD (Freedom from torture or cruel, inhuman or degrading treatment or punishment) which includes the content of Article 5 UDHR and adds that nobody shall be subjected to medical or scientific experimentation without their free consent and a mandate on States Parties to protect people with disabilities; (b) Article 18 CRPD (Liberty of movement and nationality), which includes the content of Articles 13 and 15 UDHR and adds some guarantees in order to enforce this right; (c) Article 21 CRPD (Freedom of expression and opinion, and access to information) which extends the scope of Article 19 UDHR by introducing the equal treatment principle to the configuration of the right; (d) Article 24 CRPD (Education) which seeks to translate the content of Article 26 UDHR and adapt it to the specific problems encountered by people with disabilities; (e) Article 27 CRPD (Work and employment) which goes beyond Article 23 UDHR and introduces a prohibition of discrimination on the basis of disability, protects the rights of persons with disabilities, on an equal basis with others, ensures that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others and ensures that reasonable accommodation is provided to persons with disabilities in the workplace, among others; (f) Article 28 CRPD (Adequate standard of living and social protection) which broadens the limited scope of Article 22 UDHR, adding provisions to specify state social protection assistance and ensure access by persons with disabilities to public housing programmes, among others.

²³ In this regard, para. 4 of General Comment No. 2 (2014) Article 9: Accessibility, p. 2, defines accessibility as a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities.

Convention defines a reasonable accommodation as a ‘[...] 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’. The references to the application of this duty to different areas underpins the entire content of the CRPD.²⁴ To date, the presence of the duty to provide reasonable accommodation was rather timid,²⁵ but the emergence of the social-contextual model of disability as a paradigm for the treatment of disability has changed this trend at a regulatory level. Thus, States Parties have established reasonable accommodation as a universal requirement around which the exercise of all rights revolves.

At this point, it is also necessary to further clarify the differences between reasonable accommodation and accessibility, as these two concepts are not equivalent. Reasonable accommodation is a tool to adapt the environment to the individual needs of people with disabilities in a specific field, and raise awareness of the need to make accommodation to achieve equal opportunities.²⁶ The provision of reasonable accommodation complies with one of the objectives of the Convention, consisting of the implementation of universal accessibility, and emerges as a guarantee during the social transition towards full accessibility. But there are some differences between the duty to provide reasonable accommodation (Articles 2 and 5(3) CRPD) and accessibility (Article 9 CRPD). The main one is the scope of action; while reasonable accommodation focus on individuals as an *ex post* duty, accessibility is a collective precondition which wants to enable a full and equally participation in society of people with disabilities.²⁷ So, reasonable accommodation is conceived as an individual right, expected to be claimed by the person with disability, whose compliance depends on the employer; and accessibility is an *ex ante* obligation designed to be fully implemented by CRPD’s States Parties, which entails to take not only appropriate measures in order to prevent new

²⁴ For example, Article 14 CRPD includes a non-discrimination provision regarding reasonable accommodation which specifies the scope of the right to liberty and security of the person, prohibiting all discrimination based on disability in its exercise, and Article 24 CRPD includes this duty in the educational field as well.

²⁵ Reasonable accommodation can be seen for the first time in the Standard Rules, but its effectiveness does not allow us to assert that we are faced with a strict obligation. Certainly, there were conceptually close references in previous resolutions, such as the obligation to accommodate the formative process of the Resolution 1386, the right to professional readjustment of Resolution 3447 or the application of ergonomic principles to carry out the adaptation *ex* Resolution 37/52, and even ILO Conventions No. 159 and Recommendations Nos. 99 and 150. However, their presence has been extremely limited, and has lacked a solid conceptualization as assumed by the CRPD.

²⁶ A. HENDRIKS, ‘UN Convention on the Rights of Persons with Disabilities’, (2007) 14 *European Journal of Health Law*, p. 277.

²⁷ Para. 25 of General Comment No. 2 (2014). Article 9: Accessibility, pp. 7–8.

barriers from being raised, but to remove existing obstacles to achieve Article 9 CRPD objectives. Furthermore, the duty to provide reasonable accommodation admits an exception clause,²⁸ as opposed to accessibility. Disproportionate burden wants to offer flexibility taking into account individual circumstances of the situation (e.g. employer's dimension, cost of the accommodation, etc.), but its existence reinforces the unconditional and mandatory nature of accessibility, because this exception cannot be claimed to defend the failure to provide accessibility.²⁹ However, reasonable accommodation and accessibility are complementary duties and share a common objective: to play a decisive role in the legal implementation of social-contextual model of disability, as they constitute the materialisation of this normative trend in each area. The legal implementation of the social-contextual model was very important for States Parties, as can be seen from two facts: (a) the application of the duty to provide reasonable accommodation in all fields; and (b) the failure to provide reasonable accommodation is considered as discrimination. Consequently, we find ourselves facing the emergence of a new paradigm in the treatment of disability, that seeks to overcome the inherent limitations to traditional approaches based on the rehabilitation of people with disabilities by introducing two complementary duties:³⁰ accessibility and reasonable accommodation.

The scope of the duty to provide reasonable accommodation is especially significant in the implementation of the right to work. Article 27 of the Convention introduces a significant innovation to achieve equal opportunities in employment: the duty to provide reasonable accommodation in the workplace.³¹ In my opinion, this is a clear manifestation of the principle of universal accessibility, especially in a field where the usual measures focus exclusively on the provision of employment incentives. A closer examination of Article 9 CRPD (Accessibility) and Article 2 CRPD (Definition of Reasonable Accommodation) reveals that they share quite similar objectives: to ensure a full participation in society. That expression clearly includes the

²⁸ The exceptionality of this duty is related to disproportionate burden, because the adjective 'reasonable' of the expression 'reasonable accommodation' should not act as a distinct qualifier or modifier to the duty, as para. 25.a of General Comment No. 6 (2018) on equality and non-discrimination, p. 7, pointed out. In this regard, a clarification about how to deal with when assessing the reasonableness and proportionality of accommodation measures can be found in UNCRPD, M. LOCKREY, UN Doc. CRPD/C/15/D/13/2013, 30.05.2016, para. 8.4, p. 15.

²⁹ An interesting judicial view of the differences between reasonable accommodation and accessibility can be found in the dissenting opinion of Judge Lemmens in ECtHR, *Enver Şahin v Turkey*, no 23065/12, 30.01.2018.

³⁰ Regarding to the complementary relationship between reasonable accommodation and accessibility, see General Comment No. 4 (2016) on the right to inclusive education, para. 29, which states that: 'An individual can legitimately request reasonable accommodation measures even if the State party has fulfilled its accessibility duty.'

³¹ Article 27(1)(i) CRPD.

enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. But the most important point is the interdependence between accessibility and the duty to provide reasonable accommodation. In this regard, accessibility needs reasonable accommodation in order to achieve its main purpose, namely *enable persons with disabilities to live independently and participate fully in all aspects of life*.³² Therefore, the duty to provide reasonable accommodation in the workplace plays a fundamental role in achieving a full participation in all aspects of life of people with disabilities.

Unfortunately, the configuration of the duty to provide reasonable accommodation in employment is limited, since the CRPD provides a general definition, not contextualised to the workplace.³³ In fact, the guiding criteria for its application in employment are not specified in the CRPD, and this is the main defect that can be attributed to the way the CRPD addresses reasonable accommodation in the context of employment.³⁴

3. THE EUROPEAN CONFIGURATION OF THE DUTY TO PROVIDE REASONABLE ACCOMMODATION

3.1. THE LEGAL FRAMEWORK: COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000 ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter, Directive 2000/78) resulted from the need to harmonise the scope, content and legal effectiveness of the prohibition of discrimination in employment, since application of this principle varied significantly between Member States prior to the adoption of the Directive.

As has already been pointed out, one of the main features of this Directive is its material scope of application, which focuses its full attention on establishing a legal framework for achieving equal opportunities and

³² Article 9 CRPD.

³³ Article 2 CRPD defines reasonable accommodation as a '[...] 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'.

³⁴ For example, the term 'disproportionate or undue burden' is not defined, while Article 5 of Directive 2000/78 does do so. There was probably no consensus on its meaning, but this hinders homogeneous application of reasonable accommodation.

eradicating discrimination in the field of employment,³⁵ but with the goal to encourage a horizontal expansion.³⁶ To this end, it covers most of the grounds for discrimination already provided for in Article 13 of the Treaty establishing the European Community (Amsterdam consolidated version),³⁷ without there being any hierarchy or classification between them.³⁸ In fact, it includes provisions covering all types of anti-discrimination actions: ranging from the classification of harassment as discriminatory behaviour and the provision of positive action measures to the reversal of the burden of proof before the courts.³⁹

However, the inclusion of disability as an explicit non-discrimination ground is one of the most important points of Directive 2000/78. The Council, aware of the importance of achieving full equality of opportunities in the field of Labour Law,⁴⁰ focuses on the prevention and elimination of obstacles

³⁵ The Directive focuses on the following areas: Access to employment and occupation, vocational promotion and training, conditions of employment and work, and membership of certain organizations. However, the application of Directive 2000/78 is not intended to cover *payments of any kind made by public or similar schemes, including public social security or social protection schemes* (Article 3(3)), which means, as indicated by R. WHITTLE, 'The Framework Directive for Equal Treatment in Employment and Occupation: Analysis from a Disability Rights Perspective', (2002) 27(3) *European Law Review*, p. 12, the exclusion of their application in sheltered employment, due to the perceptions of public aid for the development of the activity.

³⁶ Ibid., p. 2, who states that the Directive encourages Member States to extend the application of the principle of equal treatment to other areas than employment.

³⁷ The only cause not shared by Directive 2000/78 and Article 13 of the Constitutive Treaty is sex. The initial text, which is part of the proposal for a Council Directive on the establishment of a general framework for equal treatment in employment and occupation (COM/99/0565 final), justifies its exclusion in the omnipresence of combating inequalities linked to sex deriving from Articles 2 and 3 of the Treaty, and recognizes the different effects envisaged on men and women of the causes of discrimination.

³⁸ Section 3.2 of the Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (COM/99/0565 final) notes the importance of the absence of a qualitative hierarchy among the causes of discrimination in those cases in which there is multiple discrimination. For an analysis of the relationship between the various grounds of discrimination and intersectionality, see P. NEUVONEN, 'Inequality in Equality in European Union Equality Directives: A Friend or Foe of More Systematized Relationships between the Protected Grounds', (2015) 15(4) *International Journal of Discrimination and the Law*, p. 222; M.V. ONUFRIO, 'Intersectional Discrimination in the European Legal Systems: Towards a Common Solution?', (2014) 14(2) *International Journal of Discrimination and the Law*, pp. 126–140.

³⁹ These measures have been described as common provisions applying the principle of equality to all causes of discrimination, although the Directive also designs a second level of protection for specific areas. In this respect, see L. WADDINGTON, 'Implementing the Disability provisions of the Framework Employment Directive: Room for Exercising National Discretion', in A. LAWSON and C. GOODING (eds.), *Disability Rights in Europe. From Theory to Practice*, Hart Publishing, Oxford 2003, p. 109.

⁴⁰ Good examples are the references included in section 2 of the explanatory memorandum of the Proposal for a Council Directive on the establishment of a general framework for equal treatment in employment and occupation (COM/99/0565 final), which stresses

to employment. To this effect, the Directive introduces a mechanism which is, by far, the most important measure at European level from the disability perspective: the duty to provide reasonable accommodation in the workplace. Its main significance relates to the materialisation of the principle of equal treatment in relation to persons with disabilities, and specifically because it is the only measure established regarding one of the discrimination causes prohibited in Article 1 Directive 2000/78. If we examine the other causes stated in Article 1 Directive 2000/78, we can see that there are no liability measures to ensure no discrimination and equal opportunities except on disability discrimination. But the importance of the duty to provide reasonable accommodation means more than strengthen the anti-discrimination protection. Reasonable accommodation is an instrument which is a key element of the exercise of all the rights of people with disabilities. The legal integration of this mechanism of equal opportunities appears as an essential guarantee during the transition towards full accessibility. It meant a revolution in the achievement of equal opportunities and non-discrimination on the grounds of disability, since it forced the Member States to transpose the duty to provide reasonable accommodation. Thus, a uniform protection, which was not harmonised, was introduced in the field of work and employment of people with disabilities at a European level.

Article 5 of Directive 2000/78 defines the duty to provide reasonable accommodation as an anti-discrimination measure, but not as a positive action measure.⁴¹ It establishes an obligation aimed at employers according to which reasonable accommodation must be made to guarantee compliance with the principle of equal treatment. Reasonable accommodation are defined

the high probability of people with disabilities being unemployed and the existence of discrimination based on *the existence of inadequately adapted workplaces, workstations and work organization design*.

⁴¹ The confusion of reasonable accommodation as a measure of positive action has occurred, as pointed out by L. WADDINGTON and M. BELL, 'Exploring the Boundaries of Positive Action under EU: A Search for Conceptual Clarity', (2011) 48 *Common Market Law Review*, pp. 1516–1517, at European legislative and judicial levels (Belgium and Portugal). These authors argue that the ideal characterization of this obligation should be included as a particular type of anti-discrimination measure, since it is a mandatory provision – unlike some positive action measures – and is of an individual nature, which makes it unique. A further explanation of this discussion can be found in L. WADDINGTON and A. HENDRIKS, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations*, pp. 403–428. This discussion has also been addressed by Committee on the Rights of Persons with Disabilities in the para. 25 (c) of the General Comment No. 6 (2018) on equality and non-discrimination, p. 7, which recognizes that reasonable accommodation could not be included into the specific measures category, because [...] reasonable accommodation is a non-discrimination duty, whereas specific measures imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights.

as the adoption of appropriate measures to enable a person with a disability to have access to, participate in, advance in employment or undergo training.⁴² The employer shall, however, be exempted from compliance in cases where imposition of the measures constitutes a disproportionate burden, which shall not occur where the business activity is adequately mitigated by measures existing in the Member State.⁴³

As can be observed, we are faced with an individual solution that seeks to remove the barriers that prevent full and effective participation of people with disabilities and reflects the paradigm of formal equality.⁴⁴ It is, therefore, an autonomous obligation, with its own entity, included within the scope of anti-discrimination law, that has been defined as an individualised reactive duty that is applicable from the moment a request for accommodation is received.⁴⁵

3.2. THE MAIN JUDGMENT OF THE CJEU REGARDING REASONABLE ACCOMMODATION: *HK DANMARK* JUDGMENT⁴⁶

The number of judgments of the CJEU about the duty to provide reasonable accommodation has not been particularly high. The reasons for this are attributed to the relatively recent incorporation of disability as a non-discrimination ground in EU law. However, in recent years there has been a growing tendency to examine the concept of disability, and to a lesser degree, the characterisation of the duty to provide reasonable accommodation. It should be noted that, for reasons of space, an analysis of all existing judgments on this subject will not be undertaken,⁴⁷ but only those

⁴² Recital 20 Directive 2000/78 gives some examples of the type of adaptations that may be included in this obligation, such as adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

⁴³ Mention of existing measures in the Member State is another aspect that shows the willingness to integrate the European model of protection of health and safety into a foreign duty imported from the American legal system. In this regard, the European legislator, aware that Member States have ratified international instruments that guarantee human rights with economic and social content, decided to include this provision to make it difficult to describe the existence of a disproportionate burden.

⁴⁴ D. HOSKING, 'Great Expectations: Protection from Discrimination because of Disability in Community Law', (2006) 31(5) *European Law Review*, p. 12.

⁴⁵ In this regard, see para. 24 of General Comment No. 6 (2018) on equality and non-discrimination, p. 6.

⁴⁶ CJEU (ECJ), *HK Danmark v Dansk almennyttigt Boligselskab*, C-335/11, 11.04.2013, ECLI:EU:C:2013:222.

⁴⁷ The cases that have examined or are related to disability are CJEU (ECJ), *Sonia Chacón Navas v Eurest Colectividades SA*, C-13/05, 11.07.2006, ECLI:EU:C:2006:456; CJEU (ECJ), *S. Coleman Attridge Law and Steve Law*, C-303/06, 17.07.2008, ECLI:EU:C:2008:415; CJEU (ECJ), *Johann Odar v Baxter Deutschland GmbH*, C-152/11, 06.12.2012, ECLI:EU:C:2012:772;

judgments that deal with aspects related to the duty to provide reasonable accommodation. Consequently, the examination of the case-law of CJEU is limited to *HK Danmark*.

The *HK Danmark* judgment plays an essential role in characterising the duty to provide reasonable accommodation, not only because it is the first judgment handed down following the ratification of the CRPD by the European Union (EU),⁴⁸ but because it is the only judicial decision on this matter.

The Court examined the situation of two workers from different companies, who were dismissed because of multiple absences from their job for reasons of poor health. Both women workers claimed that their dismissal was discriminatory in the context of the national judicial procedure, because their health status prevented them from carrying out their duties and, consequently, they had to be considered as people with disabilities. In fact, the workers added that the company had to offer them the opportunity to reduce their working hours under the duty to provide reasonable accommodation, *ex Article 5 Directive 2000/78*. The employers of both workers maintained that the medical situation of employees did not allow them to be considered as persons with disabilities, since their state of health only prevented them from working full-time. Furthermore, they considered that the reduction of working time was not one of the measures covered by Article 5 Directive 2000/78, and therefore there was no need to adapt working conditions.

This case has been one of the most important on disability issues, since it establishes a paradigm shift in the CJEU doctrine on disability, fully embracing the social-contextual model of disability treatment.⁴⁹ To this end, the CJEU

CJEU (ECJ), *Commission v Italy*, C-312/11, 04.07.2013, EU:C:2013:446; CJEU (ECJ), *HK Danmark*, *supra* note 46; CJEU (ECJ), *Z. v A Government department, The Board of management of a community school*, C-363/12, 18.03.2014, EU:C:2014:159; CJEU (ECJ), *Wolfgang Glatzel v Freistaat Bayern*, C-356/12, 22.05.2014, EU:C:2014:350; CJEU (ECJ), *Fag og Arbejde (FOA) v Kommunerne Landsforening (KL)*, C-354/13, 18.12.2014, EU:C:2014:2463; CJEU (ECJ), *Mohamed Daoudi v Bootes Plus SL and Others*, C-395/15, 01.12.2016, EU:C:2016:917; CJEU (ECJ), *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, C-406/15, 09.03.2017, EU:C:2017:198 and CJEU (ECJ), *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA*, C-270/16, 18.01.2018, ECLI:EU:C:2018:17.

⁴⁸ The ratification was carried out by Council Decision 2010/48/EC of 26 November 2009 on the conclusion by the European Community of the United Nations Convention on the Rights of Persons with Disabilities.

⁴⁹ The *HK Danmark* judgment modifies the doctrine contained in *Chacón Navas*, which departed from the inclusive approach institutionally defended by Parliament, the Commission and the Council since the Commission's Communication on the Equalization of Opportunities of Persons with Disabilities of 30 July 1996, entitled 'A new Community Strategy on Disability' (COM (96) 406 final) and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Equal opportunities for people with disabilities: A European Action Plan (COM/2003/0650 final).

established a connection between the concept of disability and the CRPD, because of its conclusion by the EU in 2009.⁵⁰ On this point, it should be noted that the *HK Danmark* Judgment clarifies the interpretative value of the CRPD for European Law (EU) law,⁵¹ pointing out that '[...]Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention'.⁵² Given that international agreements concluded by the EU require the interpretation of provisions of secondary legislation, as far as possible, in accordance with those agreements,⁵³ we can draw the conclusion that the CRPD is at a higher level than secondary EU law. This means that the CRPD will play a key role in the interpretation of the provisions of Directive 2000/78, especially in the light of Article 216(2) Treaty on the Functioning of the EU, and will require reinterpretation of certain provisions of that Directive.⁵⁴ In practical terms, the EU's ratification of the CRPD means that CRPD has been integrated into the international legal instruments stated in Preamble 4 of Directive 2000/78,⁵⁵ so it has to be considered in the interpretation of Directive 2000/78 by CJEU. And it has a huge impact on the application of Article 5 Directive 2000/78, as we will see later.⁵⁶ In other words, CRPD improves the protection with regard to disability discrimination, because Directive 2000/78 has to be interpreted in the light of CRPD, and highlight an interesting question: Does the EU need to adopt a new Directive that includes a disability protection beyond employment according to CRPD?⁵⁷ However, this fact raises some other unsolved questions, such as who should

⁵⁰ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (Ref. 2010/48/CE).

⁵¹ L. WADDINGTON, 'The European Union and the United Nations Convention on the Rights of People with Disabilities: A Story of Exclusive and Shared Competences', (2011) 18(4) *Maastricht Journal of European and Comparative Law*, p. 431, who has identified areas of overlapping of exclusive and shared competences of the European Union on which the CRPD is based. See also G. DE BURCA (2010), 'The EU in the Negotiation of the UN Disability Convention', *supra* note 13, pp. 1–23.

⁵² CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 32.

⁵³ CJEU (ECJ), *Commission v Germany*, C-61/94, 10.09.1996, EU:C:1996:313, para. 52; CJEU, *HK Danmark*, *supra* note 46, para. 29, CJEU (ECJ), *Z*, *supra* note 47, para. 72.

⁵⁴ L. WADDINGTON, 'HK Danmark (Ring and SkouboeWerge): Interpreting the EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', (2013) 17 *European Anti-Discrimination Law Review*, p. 20.

⁵⁵ J. CLIFFORD, 'The UN Disability Convention and its Impact on European Equality Law', (2011) 6 *The Equal Rights Review*, p. 14.

⁵⁶ See below at section 4.2.

⁵⁷ In this regard, see L. WADDINGTON (2011), 'The European Union', *supra* note 51, pp. 47–48, who states that there is no legal obligation on the EU under the Convention to adopt a new directive addressing discrimination on the ground of disability beyond employment, due to the shared nature of competences. So, 'it is the Member States that have the responsibility to comply with the Convention, as long as the EU has not acted'.

assume the implementation of provisions provided for in the CRPD, as some of them are part of EU shared competences.⁵⁸

Thus, in this judgment the Court recognised the social-contextual model of disability and conceptualises disability as a ‘[...] limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.⁵⁹ The introduction of an impact on participation in professional life crystallises the concept of disability, thereby expanding the possibility that a disease can be assimilated to an impairment. It also means that the impairment’s origin is irrelevant to its determination.⁶⁰ In paras. 41 and 42 of *HK Danmark*, the Court clarifies that only those diseases which entail a professional limitation may be included in the concept of disability within the scope of the meaning of Directive 2000/78. Consequently, the Court does not add disease as a new cause of discrimination of Directive 2000/78, but permits its assimilation to disability only ‘[...] if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one [...].’⁶¹ In other words, in those cases in which the disease meets the requirements of Article 1 CRPD.

Therefore, the Court holds that the limitation of professional life constitutes a key element of the definition of disability,⁶² a circumstance which must be added to the particularity that physical, mental, intellectual or sensorial impairments must be long term, because of Article 1 CRPD. This definition, which was formulated by the CJEU for the first time, constitutes a symbol of the integration of the social-contextual model of disability into the interpretation of Directive 2000/78. The judgment in *HK Danmark* includes sickness as a manifestation of disability, a circumstance that had been refused previously,⁶³ and this means a new openness perspective of the CJEU, which internalises the human rights model of disability in its jurisprudence. However, the

⁵⁸ The more problematic provisions are those of control and follow-up of the implementation of the CRPD (Articles 31 to 33). To a greater extent, see L. WADDINGTON (2011), ‘The European Union’, *supra* note 51, pp. 431–453, which states that the majority of Member States bear responsibility, since there is no provision requiring the European Union to act on matters whose competence is shared, even though it would be desirable for it to be carried out by the EU in order to harmonise the legal framework.

⁵⁹ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 38.

⁶⁰ N. BETSCH, ‘The Ring and Skouboe Werge Case: A Reluctance Acceptance of the Social Approach of Disability’, (2013) 4 *European Labour Law Journal*, p. 140.

⁶¹ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 32.

⁶² *Ibid.*, para. 38.

⁶³ CJEU (ECJ), *Chacón Navas*, *supra* note 47.

HK Danmark judgment leaves two questions unanswered: the meaning of 'long-term', which has recently been discussed in the *Daouidi* judgment,⁶⁴ and the required limitation of professional capacity in countries using a percentage to determine the grade of disability.⁶⁵

One point to note is the content of para. 43 of *HK Danmark*. This specifies that disability does not imply a total exclusion from work, but is rather an obstacle that hinders its development, or in other words, that limits the participation of the worker in his or her professional life, including partial limitations.⁶⁶ In this way, *the circumstance that the person concerned can work only to a limited extent is not an obstacle to that person's state of health being covered by the concept of 'disability'*. The Court, thus, wants to extend Directive 2000/78 protection to situations in which services can be provided but with limitations, encouraging greater work participation and accessibility of people with disabilities.

Regarding reasonable accommodation, para. 45 of *HK Danmark* sets out that the existence of a disability does not depend on the nature of the adjustments or the use of special equipment, since this would exclude physical and mental illnesses from its definition.⁶⁷ With this statement, the CJEU tries to indicate that the determination of a disability is a step to be taken prior to establishing the need to make reasonable accommodation. Therefore, the existence of a disability cannot take into account the need to provide reasonable accommodation in the workplace, because 'they are the consequence, not the constituent element, of the concept of disability'.⁶⁸

The third question in the preliminary ruling addressed in the *HK Danmark* judgment also focuses specifically on the duty to provide

⁶⁴ CJEU (ECJ), *Daouidi*, *supra* note 47, paras. 49 and 58 clarify that the expression 'long term' must be analysed by the national court with regard to the state of the person concerned on the date when the allegedly discriminatory act is adopted against him/her, since it is a factual question. In this respect, CJEU establishes, as evidence, that, on the date of the allegedly discriminatory event, '[...] the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or [...] the fact that that incapacity is likely to be significantly prolonged before that person has recovered' (para. 56). For an in-depth study of the scope of this Judgment, see L. WADDINGTON, 'EHRC 2017/29 HvJ EU, 01-12-2016, C-395/15 Non-discriminatie, Handicap, Definitie van de grondhandicap, Begriplangdurigebeperkingen', (2017) *European Human Rights Cases (EHRC)*, p. 29; E. DESDENTADO-DAROCA, 'El despido del enfermo y la STJUE de 1 de diciembre de 2016 dictada en el caso Daouidi. Algunas reflexiones críticas', (2017) 3 *Revista de información laboral*, p. 119; and I. RODRÍGUEZ CARDO, 'Despido de un trabajador en incapacidad temporal: ¿improcedencia o nulidad por discriminación?', (2016) 43 *La Ley Unión Europea*, p. 1, available at <https://dialnet.unirioja.es/servlet/articulo?codigo=5777443>, last accessed 04.06.2019.

⁶⁵ L. WADDINGTON (2013), 'HK Danmark (Ring and Skouboe Werge)', *supra* note 55, p. 21.

⁶⁶ CJEU (ECJ), *HK Danmark (Ring and Skouboe Werge)*, Opinion of Advocate General Kokott in joined cases C-335/11 and C-337/11 EU:C:2012:775, para. 44.

⁶⁷ *Ibid.*, para. 42.

⁶⁸ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 46.

reasonable accommodation. It seeks to clarify whether a reduction in working time may constitute an adjustment measure *ex Article 5 Directive 2000/78*. This issue is not trivial, not only because a reduction in working time is not explicitly provided for in recital 20 of Directive 2000/78,⁶⁹ but because the Directive does not specify if reasonable accommodation can take the form of part-time work, especially when Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, European Centre of Employers and Enterprises providing Public Services (CEEP) and the European Trade Union Confederation (ETUC) is the European standard responsible for regulating aspects of part-time work.

The solution proposed by CJEU, which accepts a reduction of the working time as an accommodation,⁷⁰ favours the inclusion of the reduction of working time within the concept of 'working patterns' provided for in recital 20, as an organisational measure *ex Article 5 Directive 2000/78*. For that reason, the *HK Danmark* judgment holds an expansive interpretation of reasonable accommodation, on the grounds that the *voluntas legislatoris* did not intend to impose any restrictions on the inclusion of specific measures,⁷¹ giving priority to promoting the employment of people with disabilities *ex Article 2(4) CRPD*.⁷²

4. THE DUTY TO PROVIDE REASONABLE ACCOMMODATION AS A PRIOR CONTROL IN EXTINCTIONS OF EMPLOYMENT CONTRACTS OF PEOPLE WITH DISABILITIES

4.1. THE DISTINCTION OF REASONABLE ACCOMMODATION CONCEPT BETWEEN ARTICLE 2 CRPD AND ARTICLE 5 DIRECTIVE 2000/78

The European configuration of the duty to provide reasonable accommodation offers protection for the maintenance of employment of persons with disabilities.

⁶⁹ This recital provides for adapting premises and equipment, patterns of working time, the distribution of tasks and the provision of training or integration resources as examples of possible measures.

⁷⁰ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 55.

⁷¹ The key manifestation to this conclusion can be found in recital 20 Directive 2000/78, which uses the expression 'i.e.' to indicate measures that can be considered reasonable accommodation. However, the *HK Danmark* judgment, para. 54 calls for the removal of barriers to achieve full and effective participation of people with disabilities in working life, as an essential factor in justifying an expansive interpretation of the concept of 'reasonable accommodation'.

⁷² CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 53, which states: 'In accordance with the second paragraph of Article 2 of the UN Convention, "reasonable accommodation" is

By providing for reasonable accommodation, CRPD and Directive 2000/78 require employers to customise the workplace to adapt to subjective differences; the essential core of the principle of equal treatment is, thus, materialised, and it means a national activity in order to achieve it.⁷³ On this point this point, is the Directive 2000/78 reasonable accommodation equal to its CRPD definition? This issue is a very important topic, not only because CRPD's definition and its interpretation by the Committee on the Rights of Persons with Disabilities (UNCRPD) jurisprudence may differ from Directive 2000/78 and CJEU jurisprudence, but because of the relation between the CRPD and Directive 2000/78, clarified by *HK Danmark*.⁷⁴ So, a comparison of the legal definition of reasonable accommodation contained in Article 5 Directive 2000/78 and Article 2 CRPD is required.

As a starting point, the reasonable accommodation definition included in both articles are essentially identical. The main elements that define the duty to provide reasonable accommodation can be found in Article 2 CRPD as well as in Article 5 Directive 2000/78. So, for example, the contextualisation to a particular case – as a consequence of the individual nature of this right – and the appropriate characterisation of measures or modifications and references to the exception clause (disproportionate burden) exists in both articles. Where differences are clear is in the scope of the duty: while Article 2 CRPD focus on a general enjoyment or exercise of all human rights and fundamental freedoms, Article 5 Directive 2000/78 refers to different stages of the employment relationship. Thus, Article 5 Directive 2000/78 is a concretion in employment of the reasonable accommodation concept included in Article 2 CRPD. This means that both articles are connected by a *genus-specie* relation, in which Directive 2000/78 acts as a specie – because of employment focus – and CRPD acts as a genus – because its general nature. In other words, Article 2 CRPD acts as the reasonable accommodation general framework and

⁷³ “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”. It follows that that provision prescribes a broad definition of the concept of “reasonable accommodation”.

⁷⁴ See paras. 17 and 22 of General Comment No. 6 (2018) on equality and non-discrimination, pp. 4 and 6, which states: ‘The obligation to guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds is far-reaching and imposes positive duties of protection on States parties’, and ‘[...] means that States parties have positive obligations to protect persons with disabilities from discrimination, with an obligation to enact specific and comprehensive anti-discrimination legislation.’ In this regard, see also UNCRPD, *Bacher v Austria*, UN Doc. CRPD/C/19/D/26/2014, 06.04.2018, para. 9.3, p. 13, which holds the duty to State Parties to respect and protect CRPD’s rights by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of those rights.

⁷⁴ See CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 32.

Article 5 Directive 2000/78 serves as a concrete or particular expression in the employment context.

However, in *HK Danmark* the CJEU held that ‘[...] Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention’. Consequently, is this *genus-specie* relationship coherent with the interpretative value of the CRPD for EU law in the light of the CJEU jurisprudence? In my opinion, yes, because the *genus-specie* relation keeps the hierarchy between Directive 2000/78 and CRPD unaltered. That means that the interpretation of Directive 2000/78 has to be modelled taking into account the CRPD but only regarding the overlapping aspects between Directive 2000/78 and the CRPD. The specific scope of Directive 2000/78, based on employment and occupation, together with the fact that the CRPD establishes nothing about the configuration of workplace reasonable accommodations are the two basic arguments to defend this position. So, the *genus-specie* relation between the CRPD and Directive 2000/78 means an interpretation of the Directive 2000/78 in the light of CRPD, but not regarding the configuration of Article 5 of Directive 2000/78, because of the lack of the configuration of workplace reasonable accommodation. In fact, it impedes, in my opinion, the application of the UNCRPD documents and jurisprudence regarding the configuration of reasonable accommodation in the workplace (Article 5 Directive 2000/78).

In other words, the UNCRPD case law and comments does not bind the CJEU’s interpretation of Article 5 Directive 2000/78 because of the *genus-specie* relation between the CRPD and Directive 2000/78, but it can be applied to general concepts included in both CRPD and Directive 2000/78. Accordingly, the *ex nunc* nature of the duty to provide reasonable accommodation,⁷⁵ the need to establish a dialogue with the individual with a disability in order to include him or her in the process of finding solutions for better realising his or her rights and building his or her capacities,⁷⁶ or how to interpret the disproportionate burden,⁷⁷ can be applied to the interpretation of Article 5 Directive 2000/78.

4.2. REASONABLE ACCOMMODATION AS A PREVENTIVE MEASURE TO MAINTAIN EMPLOYMENT OF PEOPLE WITH DISABILITIES

This issue is a very important question regarding to the protection of the CRPD and Directive 2000/78, because the limits of the duty to provide reasonable

⁷⁵ See UNCRPD, *V.F.C. v Spain*, UN Doc. CRPD/C/21/D/34/2015, 29.04.2019, para. 8.5, p. 10.

⁷⁶ Ibid., para. 8.5, p. 11 and para. 8.7, p. 11; and General Comment No. 6 (2018) on equality and non-discrimination, para. 67, a, b and h.

⁷⁷ See UNCRPD (2019), *V.F.C.*, *supra* note 75, para. 8.6 *in fine* and General Comment No. 6 (2018) on equality and non-discrimination, para. 26.

accommodation are not clearly defined. From a domestic law perspective, it is an important discussion too, because some European countries, such as Spain,⁷⁸ have not integrated effectively the duty to provide reasonable accommodation, due to a literal transposition of Article 5 Directive 2000/78. In fact, the relevance of the duty to provide reasonable accommodation in the termination of the employment contracts is a key element to guarantee the compliance with the principle of equal treatment in relation to persons with disabilities. Workers with disability are often selected first to be fired, as a result of the impact of their impairments in their professional development. The aim of the duty to provide reasonable accommodation deals with this issue during the employment contract, but an effective approach to its purpose requires an interpretative expansion to employment contract extinctions, in order to maintain the employment of people with disabilities and assure that extinctions are not based on the disability of the worker. If we examine the CRPD and Directive 2000/78, it can be argued that the duty to provide reasonable accommodation should be a requirement prior to the extinction of employment contracts of people with disabilities.

The CRPD promotes, protects and secures the right to work on an equal basis with others.⁷⁹ The safeguarding of the right to work remains with the States Parties, through continuance and maintenance in employment, both of which are provided for in Article 27(1)(a) and (e). This, together with the central role of reasonable accommodation established by the CRPD, supports the use of reasonable accommodation as a mechanism to maintain employment, not only because of the existence of barriers that make it difficult to find a job, but also because this duty ensures to people with disabilities the right to work on an equal basis with other members of society. Therefore, the Convention integrates this measure as part of the right to work of people

⁷⁸ The most paradigmatic case is Article 49.1.e of *Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* (TRLET), as forewarned by D. GUTIÉRREZ COLOMINAS, 'Es discriminatoria por razón de discapacidad la configuración española de la extinción por el reconocimiento de gran invalidez, incapacidad permanente total o absoluta del trabajador (Article 49.1.E TRLET)?: una lectura integradora a la luz de la Convención Internacional sobre los Derechos de las Personas con Discapacidad', in J.M. MIRANDA BOTO (ed.), *El Derecho del Trabajo español ante el Tribunal de Justicia: problemas y soluciones*, Editorial Cinca, Madrid 2018, pp. 273–294; J.L. GOÑI SEIN and B. RODRIGUEZ SANZ DE GALDEANO, *Adaptación y reubicación laboral de trabajadores con limitaciones psicofísicas*, Editorial Aranzadi, Navarra 2015, pp. 264–282, and A. PASTOR MARTINEZ, 'El deber de adaptación de las condiciones de trabajo en materia de discapacidad como límite a las facultades extintivas del contrato de Trabajo', Ediciones Cinca, *Los derechos fundamentales inespecíficos en la relación laboral y en materia de protección social. XXIV Congreso Nacional de Derecho del Trabajo y de la Seguridad Social*, Madrid 2014, pp. 1–15, available at <https://www.upf.edu/documents/3885005/214133705/4.Rodriguez.pdf/8da83ed5-aba5-e5e2-a2b9-8777c37b6f78>, last accessed 04.06.2019.

⁷⁹ Articles 1 and 27 CRPD.

with disabilities, configuring an *ex ante* protection in those cases in which it is decided to terminate the employment contract of a person with a disability, under the penalty of considering the decision discriminatory.⁸⁰

However, reasonable accommodation is characterised in Directive 2000/78 as adequate measure to have access to or participate in employment, *inter alia*. Thus, the objective scope of this duty does not include references to the possibility of applying this measure in the context of extinctions and/or maintenance of employment. This could be considered an obstacle to the requirement to provide reasonable accommodation prior to the extinction of an employment contract. Nevertheless, there are two arguments to overcome this barrier: (a) the complementary relationship between Articles 3 and 5 Directive 2000/78; and (b) the expansive characterisation of the reasonable accommodation duty, reflected by the CJEU jurisprudence.

First, Article 5 of Directive 2000/78 does not include extinctions in the material scope in which reasonable accommodation can be made. It can be seen as a weakness, but if we examine Article 3 of Directive 2000/78, we can see that it includes areas which Article 5 of Directive 2000/78 does not address explicitly, and among them, dismissals.⁸¹ Hence, what is the relationship between Articles 3 and 5 of Directive 2000/78? As a starting point, it should be noted that Article 5 of Directive 2000/78 defines the duty to provide reasonable accommodation and, *a priori* it would appear that Article 3 of Directive 2000/78 does not play an important role here. However, Article 3 defines the material scope of Directive 2000/78 and, in fact, goes beyond Article 5 by providing, for example, references to the public and private sectors, self-employment, selection criteria and recruitment conditions, among others. Thereupon, the material scope of the duty to provide reasonable accommodation cannot be interpreted only in light of Article 5 of Directive 2000/78, since Article 3 of Directive 2000/78 extends its effects to aspects which, *a priori*, do not explicitly appear in Article 5 of Directive 2000/78.

There is, therefore, a complementary relationship between both provisions, which expands the scope of the principle of equal treatment to different areas. In this regard, the duty to examine the need for a reasonable accommodation prior to the extinction of employment contracts of persons with disabilities is

⁸⁰ Although the CRPD does not explicitly state that the absence of reasonable accommodation is a discriminatory behaviour, Article 5(3) requires for the implementation of this measure to be ensured in order to eliminate discrimination. In this regard, the jurisprudence of the UNCRPD clarified that the Convention prohibits all forms of discrimination against persons with disabilities, including the denial of reasonable accommodation as a prohibited form of discrimination (UNCRPD (2018), *V.F.C.*, *supra* note 75, para. 8.5). Consequently, the Convention associates discrimination with the failure to provide reasonable accommodation.

⁸¹ Article 3(1)(c) Directive 2000/78 provides the application of the Directive regarding employment and working conditions, including dismissals and pay.

covered by the material scope of Article 3 of Directive 2000/78,⁸² which extends the scope of action provided by Article 5 of Directive 2000/78.

To this first legal argument, a second interpretative reasoning must be added, based on the expansive characterisation of the reasonable accommodation duty developed by the CJEU. The *HK Danmark* judgment made clear that Directive 2000/78 must be interpreted in the light of the CRPD,⁸³ and it translates into protection of the right to work of people with disabilities. The importance of the CRPD strengthens this right, which since its ratification by the EU, necessarily requires the effectiveness of the reasonable accommodation duty. In addition, the broad view of reasonable accommodation held by the CJEU in *HK Danmark* reaffirms the duty as a prior control to the extinction of the employment contracts of people with disabilities,⁸⁴ notwithstanding the content of recital 17 of Directive 2000/78. Recital 17 of the Directive precludes the maintenance of employment of a person not competent or qualified to do a job, but the *HK Danmark* judgment and its conclusions recognises that a reasonable accommodation should be made to maintain employment, since, like recital 20 in the preamble to Directive 2000/78, Article 5 of Directive 2000/78 cannot be interpreted restrictively.

The fulfilment of the European *voluntas legislatoris* requires an expansive interpretation of the reasonable accommodation duty to guarantee the right to work of people with disabilities,⁸⁵ including the maintenance of employment. In my opinion, an interpretation that does not include the maintenance of employment as the purpose of reasonable accommodation, partially obliterates the content of this duty, since its main objective is to integrate people with disabilities in professional life. As a consequence, every employer has to provide reasonable accommodation as a previous step before the extinction of the employment contract of an individual with disability, by carrying out the necessary guarantees to fulfil effectively this duty, that are not included in Article 5 Directive 2000/78.⁸⁶

⁸² Specifically, Article 3(1)(c) Directive 2000/78 states: 'employment and working conditions, including dismissals and pay.'

⁸³ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 32.

⁸⁴ CJEU (ECJ), *HK Danmark*, *supra* note 46, para. 53.

⁸⁵ CJEU (ECJ), *HK Danmark (Ring and Skouboe Werge)*, *supra* note 66, para. 49, holds that the objective of Article 5 Directive 2000/78 '[...] is to enforce not only the equal treatment but also the equal status of a disabled person and thus to enable him to participate in employment'. Para. 58 of CJEU (ECJ), *HK Danmark (Ring and Skouboe Werge)*, *supra* note 66 is even more explicit, arguing that 'the decisive factor must therefore be whether a particular measure is capable of enabling a person with a disability to take up a profession or to continue to exercise his profession. From that point of view, a measure to ensure that disabled employees who are able to work at least part-time are not entirely excluded from the labour market but are afforded the possibility of adequately participating in professional life by being offered part-time work is eminently consistent with the meaning and purpose of the directive'.

⁸⁶ The main guidelines to not fail to provide reasonable accommodation in the workplace can be found in para. 26 of General Comment No. 6 (2018) on equality and non-discrimination,

4.3. WHAT CAN EMPLOYERS DO REGARDING REASONABLE ACCOMMODATION DUTY?

As far as we have seen, reasonable accommodation has high potential to maintain employment of people with disabilities. In practical terms, it means that employer shall prove the compliance of this duty before the termination of the employment contract of a worker with disability, in order to guarantee compliance with the principle of equal treatment and avoid taking a discriminatory decision. That said, what are the employer's possibilities in this scenario? In other words, is there any legal argument for assessing the non-obligatory nature of this duty as a prior control in extinctions? The main one is disproportionate burden, stated in Article 2 CRPD and further developed in Article 5 and para. 21 of the preamble of Directive 2000/78, which could be a compelling reason to avoid the compliance of the duty. Its application does not present so many problems in the conception of the duty to provide reasonable accommodation, because disproportionate burden is a legal exception. Consequently, employers shall not be required to provide reasonable accommodation if it imposes a disproportionate burden. However, paragraph 17 of Directive 2000/78 includes an interesting reference regarding this issue: employers are not required to maintain the employment, *inter alia*, of an individual who is not competent, capable and available to perform the essential functions of the workplace, without prejudice to the obligation to provide reasonable accommodation for people with disabilities. This statement, even it is not included in the articles of the Directive, has to be taken into account in the application of Article 5 Directive 2000/78, because it delineates its enforcement. Paragraph 17 Directive 2000/78 embodies the employer's freedom to organise its human resources and enables the extinction of the employment contracts if the individuals cannot perform the essential functions of the workplace, avoiding its calcification as a discriminatory decision. Nevertheless, paragraph 17 Directive 2000/78 does not allow avoidance of the fulfilment of the duty stated in Article 5 Directive 2000/78, because of the expression 'without prejudice to the obligation to provide reasonable accommodation for people with disabilities'. Thus, in my opinion, paragraph 17 Directive 2000/78 enables the extinction of employment contracts of workers with disabilities only if the performance of the core tasks of the workplace are not guaranteed by reasonable accommodation.

pp. 7–8 which establishes 7 key elements that guide the implementation of the duty to provide reasonable accommodation. This paragraph can be applied in the interpretation of Article 5 Directive 2000/78, because the European standard does not include the regulation of how to fulfil the duty to provide reasonable accommodation, so without the relation genus-specie between CRPD and Directive 2000/78 being an obstacle.

But, is there another legal possibility, not included in CRPD and Directive 2000/78, to avoid the fulfilment of the duty to provide reasonable accommodation when it acts as a prior control in extinctions? At first sight, the Charter of Fundamental Rights of the European Union (CFREU) could introduce new variables into the CRPD-Directive 2000/78 equation. Article 16 CFREU (Freedom to conduct a business) could be considered as a point to counterbalance the duty to provide reasonable accommodation, avoiding further references to Articles 21(1) and 26 CFREU (Non-discrimination based on disability and integration of people with disabilities) because the protection provided by them is already covered in CRPD and Directive 2000/78. However, the relevant CFREU articles cannot modify the interpretation of Article 5 Directive 2000/78, because of the limited scope of application *ex Article 51 CFREU*. The CFREU fields of application are strictly limited *to the Member States only when they are implementing Union law, inter alia*. In practical terms, it means that CFREU can be applied by the Member States when they act in the scope of Union law, so is not directly applicable between particulars. It could be argued that the implementation of Union law could open the debate of the modulation of the duty to provide reasonable accommodation in the workplace *ex article 16 CFREU*. But, in my opinion, it is a domestic law discussion, and furthermore not a possibility because of the casuistic scheme of Article 5 Directive 2000/78. The mentioned duty has an individual reactive nature,⁸⁷ and taking into account that the scope of the duty to provide reasonable accommodation is focused on employers and workers, it means a strictly limitation to apply the CFREU content. As a consequence, these facts severely restrict the idea that freedom to conduct a business can act as a counterbalance to the compliance of the duty to provide reasonable accommodation in the workplace as a prior control in extinctions of employment contracts of people with disabilities.

5. CONCLUSION

Disability is an issue that has become increasingly important in the legal field, in order to ensure the effective enjoyment of the rights of people with disabilities. The evolution between the different treatment models of disability has been one of the most important facts that shows the rising importance of this topic. In fact, the migration between models of disability has not been a theoretical issue. The treatment of people with disabilities has come increasingly closer to an inclusive approach, focusing its attention on the elimination of social barriers that hinder their full and effective participation

⁸⁷ Para. 24(b) of General Comment No. 6 (2018) on equality and non-discrimination p. 6 and para. 25 of General Comment No. 2 (2014) Article 9: Accessibility, p. 7.

in society as subjects with rights. The key element of this fact is based on a perspective carried out under the prism of human rights, which uses the starting points of dignity, autonomy, equality and solidarity as basic values, and is the result of the approval of the CRPD and Directive 2000/78, which have assumed the task of abandoning the medical or rehabilitation paradigm and the progressive implementation of the human rights model of disability.

Hence, it is in the face of this scenario of transition between theoretical models of disability and its legal embodiment that the duty to provide reasonable accommodation in the workplace for people with disabilities emerged. This anti-discrimination measure, which aims to materialise the principle of equal treatment in relation to persons with disabilities, is conceptualised as a business obligation to adopt the appropriate measures for each particular situation, in order to allow access to employment, take part in it or progress professionally, unless these measures entail a disproportionate burden to the employer. Its incorporation took place initially at the European level, specifically in Article 5 of Directive 2000/78, and it was extended to the international level through the CRPD, which incorporated the realisation of the duty to provide reasonable accommodation as the main measure to promote equality and eliminate discrimination (Article 5(3) of the CRPD).

Taking into account the difficulties to access to employment of people with disabilities and the fact that workers with disabilities are more exposed to the risk of being dismissed under than other workers, a more expansive interpretation of the duty to provide reasonable accommodation is required. The objective scope of Article 5 of Directive 2000/78 operates along with the need to interpret Directive 2000/78 as far as possible in accordance with the CRPD, as a consequence of the principle of primacy of international agreements set out in para. 32 of the *HK Danmark* judgment, which makes it possible to affirm the importance of the duty to provide reasonable accommodation in the workplace for people with disabilities as a protective measure to maintain employment. In this regard, Article 27 of the CRPD is the point of reference, because it promotes, protects and ensures the right to work under equal conditions, including continuity and maintenance in employment, *ex* Articles 27(1)(a) and 27(1)(e) of the CRPD.

This specification, added to the central role granted by the CRPD to reasonable accommodation, makes it possible to sustain the use of reasonable accommodation as a mechanism for maintaining employment, because this obligation guarantees the enjoyment of the right to work under equal conditions. Thus, the aforementioned duty constitutes an *ex ante* control in the extinction of the employment contracts of people with disabilities.

