

"Fine-tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Different Treatment on the Ground of Disability"

Citation for published version (APA):

Waddington, L. B. (2015). "Fine-tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Different Treatment on the Ground of Disability". *International Journal of Discrimination and the Law*, 15(1-2), 11-37. <https://doi.org/10.1177/1358229114558546>

Document status and date:

Published: 01/01/2015

DOI:

[10.1177/1358229114558546](https://doi.org/10.1177/1358229114558546)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

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Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability

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International Journal of
Discrimination and the Law
2015, Vol. 15(1-2) 11-37
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sagepub.co.uk/journalsPermissions.nav
DOI: 10.1177/1358229114558546
jdi.sagepub.com



Abstract

This article explores the various exceptions to the non-discrimination principle and the justifications for different treatment that apply in the disability context. For the purposes of this article, exceptions are situations that are excluded from the scope of non-discrimination law and where different treatment is allowed, whilst justifications are situations in which non-discrimination law applies, and where de facto different treatment is either required or allowed, and the limits to such requirements. The article begins by briefly discussing the peculiarities of disability non-discrimination law, addressing the requirement to make a reasonable accommodation, the asymmetrical nature of disability non-discrimination law, and positive action obligations. The article then introduces the key non-discrimination requirements found in United Nations and European Union disability equality law, before proceeding to examine a number of exceptions to the non-discrimination principle and justifications for different treatment. The article concludes that exceptions and justifications can be a tool to fine-tune or target non-discrimination law, with the potential to both limit and extend protection, in the context of disability.

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Keywords

Disability, differential treatment, reasonable accommodation, positive action, exceptions to non-discrimination requirement, justifications for different treatment, EU Employment Equality Directive, United Nations Convention on the Rights of Persons with Disabilities

Introduction

Disability non-discrimination law provides a particularly interesting case study with regard to both exceptions to the non-discrimination principle and justifications for different treatment. The complexity of disability and, in particular, the recognition of the social model of disability and the fact that impairment can result in limitations, both present a number of challenges for equality law. The social model acknowledges that disability is not a direct consequence of an impairment, but results from an interaction between an individual with an impairment and the (inaccessible) environment in which individuals with impairments are located.¹ This model recognizes that disadvantage associated with disability results from both the inaccessible physical environment that hampers the participation of persons with disabilities and false assumptions and prejudices of employers and others who control access to social goods and benefits. However, on occasions, impairment itself can also bring with it limitations or disadvantages. Sometimes these limitations can be eliminated or reduced by appropriate accommodations or adjustments, such as through the installation of a ramp to allow a person who uses a wheelchair to move more freely through the environment. However, sometimes such limitations cannot be accommodated (in full) and can lead to disadvantage. As a result, an impairment itself may, on occasions, legitimately render an individual unable to carry out certain tasks and, where no facilitating accommodation can remedy this situation, this can justify the denial to such an individual of the relevant social good, such as an employment or educational opportunity. These factors, which are arguably peculiar to the situation of persons with disabilities, have required an appropriate response from non-discrimination law and have led to a particular set of exceptions to the non-discrimination principle as well as justifications for different treatment.

This article will attempt to explore the various exceptions and justifications that apply in the disability context. The article briefly discusses the peculiarities of disability non-discrimination law, including a consideration of the requirement to make a reasonable accommodation, the asymmetrical nature of disability non-discrimination law and positive action obligations with regard to disability. The article then introduces the key non-discrimination requirements found in United Nations (UN) and European Union (EU) disability equality law, before proceeding to examine a number of exceptions to the non-discrimination principle and justifications for different treatment.

The article will reveal that a wide range of exceptions and justifications apply in the context of disability non-discrimination law and that these serve a variety of purposes. Whilst some exceptions and justifications serve to restrict the duty not to discriminate

against persons with disabilities, other provisions serve to extend the duty not to discriminate and allow for different and positive treatment.

Peculiarities of disability non-discrimination law

The duty to make a reasonable accommodation

The obligation to make a reasonable accommodation is based on the recognition that, on occasions, the interaction between an individual's impairment and the environment can result in the inability to perform a particular function, task or job in the conventional manner.^{2,3} The impairment is therefore relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an opportunity that is open to others who do not share that characteristic. The resulting disadvantage is exclusion, or a restricted set of opportunities.

However, non-discrimination law is traditionally underpinned by the idea that the protected characteristic, such as race or gender, is rarely relevant, for example, to the employment decision and only in exceptional circumstances, such as the genuine occupational qualification situation, allows for unequal treatment. The protected characteristic should therefore be ignored – the race or gender of a job applicant should play no part, positive or negative, in the decision whether to award the individual the job or not. This is in fact the general position of EU equality law. However, ignoring the characteristic of impairment, by failing to accommodate it, can result in denying an individual an equal opportunity to gain access to a social good, such as employment. In this respect, Fredman (2005) has argued, 'Characterising disability as an irrelevant characteristic removes the underlying justification for detrimental treatment, but insisting on similar treatment simply reinforces a particular norm and perpetuates disadvantage'.⁴

A reasonable accommodation requirement in the employment context therefore prohibits an employer from denying an individual with a disability an employment opportunity by failing to take account of the characteristic, when taking account of it – in terms of changing tasks or the physical environment of the workplace – would enable the individual to do the work.⁵ Employers are required to recognize the characteristic and to consider what changes they could make to the work environment to allow an individual to carry out the work to the required standard. This implies that, '(i)nstead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change'.⁶

The asymmetrical nature of disability non-discrimination law

Non-discrimination law is, in general, symmetrical, meaning that it protects from discrimination both the majority or advantaged group and the minority or disadvantaged group. Consequently, EU gender equality law⁷ protects both men and women from discrimination, whilst EU racial equality law⁸ protects all individuals from discrimination on the grounds of ethnic origin. Disability non-discrimination law, in contrast, is generally asymmetrical in nature,⁹ meaning that it only protects persons with disabilities and persons who experience discrimination on the ground of disability from discrimination.

Non-disabled people who receive adverse treatment in comparison with a person a disability have no right, in general, to claim that they have experienced discrimination on the grounds of disability.

One can speculate on why disability non-discrimination law, in contrast to all other grounds covered by EU equality law, should provide for this one-sided protection. One reason is that the legislator may simply not foresee a situation when a non-disabled person could be discriminated in comparison with a person with a disability. However, more likely reasons may be the assumption that a person without a disability could not legitimately claim to be in a comparable position with a person with a disability and the need to protect the various measures which are targeted at people with disabilities¹⁰ from challenges that they discriminate against non-disabled people.

A broad scope for positive action in favour of persons with disabilities

The provision of positive action measures can be controversial. Positive action usually provides for a redistribution of social goods, such as employment or training opportunities, from members of an advantaged group to members of groups which have been traditionally excluded or otherwise disadvantaged. In this respect, positive action can be contrasted with reasonable accommodation measures, which provide tailored solutions for specific individuals in order to ensure equality of opportunity for that particular individual. Individuals who perceive that they have 'lost out' as a result of positive action measures may attempt to challenge those measures under non-discrimination law, arguing, for example, that they have been discriminated against because of their male gender.¹¹ For these reasons, positive action measures must be carefully formulated and justified. Moreover, such measures are generally only seen as temporary and only appropriate whilst a situation of inequality continues to exist. However, it is noticeable that positive action measures favouring persons with disabilities are not generally regarded in this light and seem to enjoy a higher degree of social acceptance than measures targeted at other groups, even when they provide for seemingly quite significant benefits, such as a reserved quota of jobs.¹² This may reflect a general acceptance among society of the need to provide such measures. Whatever the reason, both UN and EU law seem to allow more far-reaching positive action measures in favour of persons with disabilities than is the case for other groups, such as women.

Disability non-discrimination law in the United Nations Convention on the Rights of Persons with Disabilities and the European Union Employment Equality Directive

The United Nations Convention on the Rights of Persons with Disabilities

The principles of equality and non-discrimination run through the United Nations on the Rights of Persons with Disabilities (UN CRPD) Convention like a red thread.¹³ They find their anchor in Article 3, which Quinn (2007) has described as providing the 'moral compass for change'¹⁴ which the Convention embraces. This Article refers not only to non-discrimination and equality of opportunity but to a series of other principles which

‘animate’ the Convention, including dignity; individual autonomy; full and active participation and inclusion; respect for difference; and accessibility. The principles of non-discrimination and equality find repeated reference elsewhere in the Convention. In light of this, Article 2, which elaborates on key terms used in the Convention, contains a broad definition of ‘discrimination on the basis of disability’ as meaning:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.¹⁵

The Article goes on to define reasonable accommodation as meaning:

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 principles of equality and non-discrimination also receive specific attention in Article 5.¹⁶ This article embraces both a formal approach to equality (‘equal before and under the law’)¹⁷ and a more substantive approach (‘prohibit discrimination on the basis of disability’¹⁸; provision of ‘reasonable accommodation’¹⁹; and positive action measures²⁰ ‘shall not be considered discrimination’). States Parties are under an obligation to recognize and ensure protection of these rights. Elsewhere the Convention is ‘sprinkled’ liberally with references to non-discrimination, equality and reasonable accommodation.

The Convention, as is appropriate for a human rights instrument, strongly reflects the social model of disability. Explicit recognition is made of the fact that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers’.²¹ Whilst the concept of disability is not defined in the Convention, Article 1 does provide:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Lastly, one should note that the scope of the Convention is extremely broad.²² The Convention does not simply prohibit disability discrimination, nor does it only cover civil or political rights, or economic, cultural or social rights. Instead the principles of non-discrimination and equality underpin the Convention, and, as noted above, these are linked to a broad group of rights. These rights are both civil and political, such as the right to liberty,²³ as well as more substantive, such as the right to education.²⁴

The Employment Equality Directive

The Employment Equality Directive²⁵ prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation with regard to employment and vocational training. In contrast, the related Racial Equality Directive²⁶ prohibits discrimination on the ground of race and ethnic origin and covers not only employment and vocational training but also fields such as access to and supply of goods and services, social protection, social advantages and education. Additional Directives prohibit gender discrimination and have a similar material scope to the Racial Equality Directive.

All of the aforementioned equality directives contain definitions of discrimination. For all grounds, and in all areas, four forms of discrimination are prohibited, namely, direct discrimination, indirect discrimination, harassment and an instruction to discriminate.

Consequently, the Employment Equality Directive defines direct discrimination on the ground of disability as occurring:

where one person is treated less favourably than another is, has been, or would be treated in a comparable situation on [the ground of disability].²⁷

Direct discrimination, therefore, involves adverse treatment that is directly related to the covered ground, *in casu* disability. Comparison is at the heart of the definition of direct discrimination under EU law, and a person who alleges direct discrimination must be compared to someone who does not have that characteristic. This can either be someone without a disability or someone with a different form of disability. In addition, in order to establish direct discrimination, less favourable treatment must have occurred, and the reason for the less favourable treatment must be directly related to disability.

The Directive defines indirect discrimination on the ground of disability as occurring when:

an apparently neutral provision, criterion or practice would put persons having . . . a particular disability . . . at a particular disadvantage compared with other persons.²⁸

In the context of disability, the condition of neutrality would be met where the measure in question makes no explicit reference to disability. However, where that measure is more likely to lead to a disadvantage for persons with disabilities, or for persons with particular forms of disability, it will be *prima facie* discriminatory. For example, a requirement that all employees possess a driving licence will be more difficult, or impossible, for persons with certain disabilities, such as a significant visual impairment or uncontrolled epilepsy, to comply with, than for other persons. Such measures can nevertheless be permitted and therefore not amount to indirect discrimination, if they are 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.²⁹ These are cumulative requirements, involving an aim that is legitimate as well as a demonstration that the means of achieving the aim are both appropriate and necessary. Second, under the Directive, a measure that indirectly discriminates against a disabled person will also be justified if the employer or other covered

party provides the affected disabled persons with a reasonable accommodation and thereby removes the disadvantage for those individuals.³⁰

The third form of discrimination that is prohibited under the Employment Equality Directive is harassment. Harassment is defined as ‘unwanted conduct’ related to disability that ‘takes place with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’.³¹ The conduct in question can take many forms and include words, actions or pictures. Unlike direct and indirect discrimination, no comparator is needed to establish that harassment has occurred.

Lastly, the Employment Equality Directive prohibits an ‘instruction to discriminate against persons [on the ground of disability]’.³²

One point of note is that whilst direct discrimination and harassment are prohibited on ‘the ground of disability’, under the Directive only individuals who have ‘a particular disability’ are protected from indirect discrimination. This is significant because individuals who are not disabled themselves can nevertheless experience discrimination on the grounds of disability, and, by using this terminology in the context of direct discrimination and harassment, the Directive has allowed for a broader personal scope, in terms of protection. Consequently, individuals who experience direct discrimination or harassment because they associate with a disabled person are protected by the Directive.³³ The Employment Equality Directive also imposes a requirement on Member States to establish an obligation to make reasonable accommodations to meet the needs of disabled individuals, unless this would amount to a disproportionate burden. This obligation, which does not extend to the other grounds covered by EU equality law, is found in Article 5. The Article provides:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.

Disability-related exceptions to the non-discrimination requirement

The article will now proceed to explore disability-related exceptions to the non-discrimination requirement. In this respect, the article draws both on the UN CRPD and the Employment Equality Directive, as well as case law from EU Member States and the Court of Justice of the European Union. It is recalled that, for the purposes of this article, exceptions are regarded as situations that are excluded from the scope of non-discrimination law and where different treatment is therefore allowed.

A situation which falls outside the material or personal scope of non-discrimination law

It may seem completely obvious to state that a person or situation that is not covered by non-discrimination law receives no protection from discrimination, or different treatment, under that law. Given that the Employment Equality Directive does not cover, for example, access to goods and services, there is no protection under EU law with regard to disability discrimination in this field at present. However, the applicability or non-applicability of non-discrimination law is not always equally clear or uncontested.

Where disability non-discrimination law only protects people with disabilities, or people who are associated with a person with a disability, from discrimination, the understanding of what amounts to a disability can itself determine the limits of the protection of the law. Where courts interpret this notion restrictively, this will exclude individuals who perhaps have only a limited impairment from protection under the law. This dimension to exclusions under disability non-discrimination law can be illustrated by two cases from the United Kingdom and Denmark. The British case, *Chief Constable of Lothian and Borders Police v. Cumming*,³⁴ concerned a woman whose application to become a police constable was rejected on the ground that she had a slightly reduced vision in one eye, although this did not require correction through glasses or contact lenses. She claimed that this slight impairment amounted to a disability, since it substantially affected her participation in professional life, as it meant she was prevented from joining the police force. Whilst initially successful before an Employment Tribunal, the Employment Appeals Tribunal found the condition did not amount to a disability under the Disability Discrimination Act, as it did not substantially impact on her ability to carry out normal day-to-day activities.³⁵ The Tribunal held, 'the status of disability cannot be dependent on the decision of the employer as to how to react to the employee's impairment'.³⁶

The Danish case, *F (HK) v. Danish Crown (DI)*,³⁷ concerned a butcher who, following a work-related injury, was absent from work for a period of time and was subsequently only able to work part-time. When it became clear that the butcher could not work full-time in the foreseeable future, she was dismissed. She subsequently claimed that the dismissal was based on her disability. During the court case, a doctor submitted evidence to the effect that, in the long run, the butcher had a reasonably good prospect of making a full recovery, and the employer therefore argued that she was not disabled, but only had an illness, which was itself the reason for the dismissal. The Danish Western High Court held that since the applicant was expected to recover in the long term, she did not have a disability and was not protected from discrimination under the relevant act.

In both these cases, the job applicant or worker were not regarded as falling within the personal scope of disability non-discrimination law, since they were held not to have a disability. In such instances, different and less favourable treatment was therefore permitted since the individuals in question were excluded from the scope of the relevant disability non-discrimination law. However, it is worth noting that the subsequent judgment of the Court of Justice of the European Union in *Danmark HK (Ring and SkouboeWerge)*³⁸ has also reflected on the concept of disability for the purposes of the Employment Equality Directive. In that judgment, the Court took account of the UN

CRPD to which the EU is a party and held that for the purposes of the Directive, the concept of disability must be interpreted as:

including a condition caused by an illness medically diagnosed as curable or incurable where that 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 (Para. 47 of judgment).

Therefore, the European Court seems to have drawn the limits of the concept of disability more broadly than the Danish Western High Court in the case considered above.

Exclusions from the scope of non-discrimination law can also result from a limited interpretation of the material scope of the law. This can be illustrated by the Danish case *Revacenter Horsens v. A.*³⁹ Danish law, as is required under the Employment Equality Directive, prohibits disability discrimination with regard to employment. In September 2009, the Western High Court was required to rule on whether an individual with an intellectual disability who worked in sheltered employment was protected from disability discrimination. The case turned on whether the occupation within the sheltered workshop amounted to employment or not. The Court found that sheltered workshop was a social measure and did not amount to employment and so did not fall within the scope of the disability non-discrimination law or the Directive. Less favourable treatment of disabled individuals who ‘worked’ in sheltered employment was therefore permitted as, according to the Danish court, this was excluded from the material scope of non-discrimination law.

Less favourable treatment of people without disabilities

As noted above, disability non-discrimination law is generally asymmetrical in nature, meaning that it only protects individuals from discrimination on the grounds of disability. Individuals who experience less favourable treatment on the ground that they are not disabled are usually unable to bring a claim of disability discrimination. They are therefore excluded from the scope of protection of the law. This dimension to disability non-discrimination law can be illustrated by two cases from different jurisdictions. First, the Slovenian Supreme Court⁴⁰ found that an employer had not discriminated when, in a situation of economic difficulty, the employer dismissed a non-disabled employee and retained two other employees who both had a disability. The Court ruled that the fact the employer did not, as an alternative, dismiss one of the disabled employees, who enjoyed greater legal protection from dismissal because of their disabled status, did not constitute discrimination against the non-disabled employee. A different set of facts were at issue in the British case of *Chief Constable of South Yorkshire Police v. Jelic.*⁴¹ In this case, an Employment Appeals Tribunal ruled that it would have been reasonable for the police service to require a police officer to swap duties with the disabled claimant who, as a result of chronic anxiety, could no longer work directly with the public. The Tribunal held that the Chief Constable had the power to require the other police officer to swap duties, whether he/she wished to or not, so it would have been a reasonable adjustment

for the police force to make. The implication of this judgment is that the other police officer, who presumably did not have a disability, would not have been able to claim that the forced reassignment amounted to discrimination on the ground of disability, namely, discrimination on the ground that he did not have a disability.

In contrast stands a decision of the Austrian Administrative High Court in *K. v. Österreichische Post AG*,⁴² in which the Court held that the relevant disability non-discrimination law did not require an employer to dismiss a non-disabled person in order to create a suitable vacancy for another employee who was no longer able to perform his original job as a result of a disability. The Court held that such a dismissal would amount to discrimination on the ground of disability and therefore adopted a symmetric approach to the law. This difference in treatment therefore fell within the scope of the protection of the disability non-discrimination law.

Positive action in favour of persons with disabilities

A logical corollary of the exclusion of persons without disabilities from the personal scope of disability non-discrimination law is that positive action measures, which favour persons with disabilities, cannot be challenged on the grounds that they discriminate against non-disabled people. This is particularly important, given the wide-ranging nature of positive action measures aimed at persons with disabilities. Both the UN CRPD and the Employment Equality Directive address positive action in favour of persons with disabilities and establish that such measures are allowed.

The Employment Equality Directive specifies that ‘with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the covered grounds (Article 7(1)). However, with respect to disability, there are several sources that imply a broader scope for positive action than is the case for the other grounds or groups covered by EU equality law.⁴³ Article 7(2) in the Employment Equality Directive states that ‘the principle of equal treatment shall be without prejudice . . . to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their [disabled persons] integration into the working environment’. Article 26 of the EU Charter of Fundamental Rights also refers to ‘the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’. While both Article 7(2) and Article 26 are fairly open ended, they provide an endorsement of the legitimacy of targeted measures that aim to advance equality for disabled persons.

Similarly, the UN CRPD seems to allow for a broader scope of positive action measures than earlier human rights and non-discrimination Conventions addressing other grounds, such as the Convention on the Elimination of Discrimination Against Women⁴⁴ and the Convention of the Elimination of Racial Discrimination. A well-known characteristic of positive action measures under both of these conventions is their temporality.⁴⁵ However, the UN CRPD makes no reference to temporality in the context of positive action. Instead, it states that ‘[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention’.⁴⁶

Positive action measures can be regarded as an exception under non-discrimination law in as far as that law prevents challenges to the measures because the law is asymmetrical in nature and in as far as the law states that such measures do not amount to discrimination. Nevertheless, there are some instances in which positive measures have been successfully challenged before the courts on the grounds that they discriminate against one group of persons with disabilities, or their families, in comparison with other persons with disabilities. Examples of such cases come from Cyprus and Bulgaria.

A 2009 decision of the Cypriot equality body⁴⁷ found that a law which introduced an employment quota for blind telephonists,⁴⁸ but which did not cover people with other disabilities, amounted to discrimination against persons with disabilities who were not blind. The body recommended that the law be revised. In 2012, the Bulgarian Supreme Administrative Court⁴⁹ also considered a measure that provided benefits to, in this case, adoptive parents of children with a specific disability, but not to natural parents of such children. Whilst adoptive parents were entitled to receive remuneration for the time spent caring for their children, natural parents whose children had the same conditions received no such benefits. The Court ordered the relevant government minister to present legislative amendments to eliminate this difference in treatment, which amounted to discrimination against natural parents of children with certain permanent disabilities.

In brief, positive action in favour of persons with disabilities is excluded from the scope of disability non-discrimination law to the extent that such measures potentially disadvantage people without disabilities. However, in some jurisdictions at least, such positive action can be challenged as discriminatory by people with disabilities or their families who are not amongst the favoured beneficiaries of the measure. As a consequence, the exclusion is not complete.

Discrimination and the armed forces

Article 3(4) of the Employment Equality Directive allows Member States to provide that the Directive, ‘in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces’. Given the Directive’s broad genuine occupational requirement exception, it is questionable how necessary this additional exception is. Nevertheless, the EU and some Member States have regarded this additional exception as important enough to justify a reservation to the UN CRPD to the same effect.⁵⁰

Disability-related justifications for different treatment under non-discrimination law

Having considered disability-related exceptions to the non-discrimination requirement, the article now proceeds to consider disability-related justifications for different treatment under non-discrimination law. It is once again recalled that, for the purposes of this article, justifications are regarded as situations in which non-discrimination law applies and where de facto different treatment is either required or allowed.

Direct discrimination on grounds of disability – no justification for different treatment

The Employment Equality Directive prohibits direct discrimination on the ground of disability. Subject to the genuine occupational qualification requirement, which is considered below, no justifications for direct discrimination are allowed. Nevertheless, employers and others have occasionally sought to argue that they are justified in treating a person who has a disability differently from others, for example, by refusing to employ them and that the disability itself justifies this different treatment. In general, courts have been quick to classify such cases as direct discrimination and to strike down the decision of employers and other covered parties. This can be illustrated by three employment-related cases.

In *F(HK) v. Advokat A*,⁵¹ the Danish Maritime and Commercial Court ruled that an employer had discriminated against a secretary by dismissing her as soon as he discovered she had attention-deficit hyperactivity disorder (ADHD). The reason given by the employer for the dismissal was the secretary's 'special conditions'. In response, the secretary argued that she had developed strategies to cope with her condition and did not require any special considerations or treatment from her colleagues. The Court found that the secretary was a person with a disability who was protected by the Act on the Prohibition of Discrimination and that the employer had discriminated against her by referring to the assumed reduced possibilities to perform her job and by dismissing her on this ground. The employer's alleged justification was not accepted.

Two further cases have been decided by Swedish courts. In *Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlingsorganisation*,⁵² the Labour Court found that an employer had discriminated against a person with diabetes by refusing to employ him, after initially offering him the position of a systems operator at an oil refinery. The company doctor had advised the company to employ the plaintiff initially on a probationary period. This recommendation followed a physical examination and was related to the plaintiff's diabetes. However, the applicable collective bargaining agreement did not allow for period of probationary employment, and the company subsequently withdrew its employment offer. The Labour Court did not accept that the plaintiff's diabetes resulted in a significant security risk or that the work involved any particular risk to the plaintiff's health and found that the plaintiff was objectively qualified to do the job in question. The Court therefore concluded that by refusing to employ the plaintiff, the employer had directly discriminated against him. The Labour Court reached a similar conclusion in *SAC v. the Swedish Church*.⁵³ This case concerned a challenge to a decision of the Swedish Church not to employ a priest, who was allergic to certain foods, as a missionary to work in Brazil. A requirement of the applicable collective bargaining agreement was that employees had to be accepted by the insurance company used by the Swedish Church. The company had accepted the applicant but charged a higher insurance premium due to his allergy. The Church nevertheless decided not to appoint the priest because of his allergy and the higher risks this allegedly brought with it. The Court found that the allergy amounted to a disability under the 1999 Disability Discrimination Act and that the allergy was not a sufficient reason to deny the applicant the position in question.

In all three of these cases, the employer or prospective employer assumed that the worker's or job applicant's disability somehow impaired their ability to carry out the job in question or implied increased health risks for the job applicant. The courts have demonstrated that they have not been willing to accept such assumptions without further examination. Where the disability does not actually lead to an individual being unable to carry out the job, that is, where it is not related to a genuine occupational requirement, the adverse treatment amounts to direct discrimination, and cannot be justified.

Genuine occupational and genuine product/service-related requirement

In contrast to the cases examined above, in some limited circumstances disability may be relevant in terms of the capacity to carry out a particular job or enjoy a good or service. Whilst the UN CRPD does not elaborate on situations in which disability or impairment could amount to a relevant characteristic for the purposes of employment or the enjoyment of a good or service, EU law does address the former situation. Article 4 of the Employment Equality Directive addresses occupational requirements and provides that Member States may provide that a difference in treatment, which is based on a characteristic related to any of the covered grounds (religion or belief, disability, age or sexual orientation), shall not amount to discrimination where, 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' the characteristic 'constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.⁵⁴

Different treatment of a disabled individual, which would otherwise amount to direct discrimination, is therefore allowed in this limited situation, but is subject to the requirement that the disability renders the individual 'unqualified' in the sense that the person is unable to meet a 'genuine and determining occupational requirement'. It is also worth noting that it is possible that having a particular disability could in itself amount to a 'genuine and determining occupational requirement', in which cases individuals without that disability would be excluded legitimately from that position, although no relevant case law on this point has been identified.

An example of a case in which such a disability or chronic disease was found to be relevant, and to allow for adverse treatment, is found in Opinion 2007-26 of the Dutch Equal Treatment Commission of 12 February 2007.⁵⁵ The case concerned a trainee beautician who was not allowed to complete her training course on the grounds that she had narcolepsy. As a result of this condition, she was unable to concentrate and stay awake during the day. In principle, the dismissal from the training programme amounted to an unfavourable difference in treatment on the grounds of chronic disease, which was prohibited under Dutch disability non-discrimination law.⁵⁶ The Equal Treatment Commission nevertheless found the dismissal not to amount to discrimination on the ground of chronic illness *inter alia* because the applicant could pose a risk to the health of her customers, as she had to handle and use equipment which could prove to be dangerous if she was unable to concentrate or remain awake. The disability or chronic illness was therefore regarded as relevant in determining her suitability to complete the training safely and successfully, and the differential and adverse treatment was permitted.

It is also possible for non-discrimination law to provide for a disability-related justification for different treatment in the context of access to a product or service. Whilst EU disability non-discrimination law does not apply to the provision of goods and services, the UN CRPD does have this broad material scope but, as with employment, does not address this kind of justification. Nevertheless, disability may occasionally be relevant in such situations. One case in which disability was found to be relevant, in the context of insurance, was decided by the Norwegian Equality Ombud.⁵⁷ The case concerned standard terms in an insurance policy with limited coverage for some children with a disability. The insurance policy was designed to cover costs related to illness or accidents of the covered child as well as possible loss of income when the child reached adulthood resulting from childhood illness or accident. The standard terms of the insurance policy provided: 'Special rules for disease: Disability compensation does not include b) ADHD, ADD, Autism, Asperger's and Tourette's syndrome and the consequences of such'. The complainant, who was the mother of a child with attention-deficit disorder (ADD), complained that this provision discriminated against children who had been diagnosed with ADD, in comparison with those who had no such diagnosis. The Ombud, taking note of the preparatory work to the Norwegian disability non-discrimination law, found that there was no ground for concluding that the insurance company had acted in breach of the non-discrimination law by limiting its liability with regard to a known increased risk that was related to a disability. This different treatment was therefore justified under the Norwegian law.

In contrast to the decision of the Norwegian ombud are a number of cases in which courts have struck down disability-related exclusions or limitations relating to insurance policies. One such decision is that of the Slovenian Advocate of the Principle of Equality of 31 January 2011.⁵⁸ The applicant in this case was an individual who had a diagnosis of depression and who had been unable to obtain an accident insurance from an insurance company as a result. The General Conditions of the insurance policy in question excluded from coverage people who had a variety of disabilities or conditions, including epilepsy, schizophrenia, depression or an intellectual disability. The insurance company justified its decision on the grounds that people with such conditions constituted a greater risk. Nevertheless, the Advocate found that the insurance company did not provide any specific explanation as to the legitimate goal this policy pursued and that it amounted to direct discrimination on the grounds of disability and health status. A similar decision is that of the Vienna District Court, which decides commercial cases, of 16 October 2006.⁵⁹ The plaintiff, in this case, was a man who used a wheelchair and who had had travel insurance with a company for many years, during which he had received no payments on his policy. When he attempted to renew his policy, the insurance company refused, giving his disability as the reason for this decision. The insurance company ultimately acknowledged direct discrimination before the Court, and the case was decided in favour of the plaintiff.

In brief, it seems that there is the potential for disability to be regarded as a legitimate ground for refusing to employ, train or to provide access to a good or service in a very limited set of circumstances. In such instances, the existence of a disability can justify the non-application of the non-discrimination principle.

Indirect discrimination

A measure that potentially amounted to indirect discrimination was considered by the Court of Justice of the EU in Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*.⁶⁰ At issue was a Danish law that allowed employees to be dismissed with a shortened period of notice if the employee had been on sick leave for a period of 120 days over a 12-month period. The Court found that the relevant law applied in the same way to disabled and non-disabled workers and therefore did not amount to direct discrimination. However, the Court went on to hold that '[a] worker with a disability is more exposed to the risk of application of the shortened notice period . . . than a worker without a disability' as 'compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability'.⁶¹ For this reason, the Court found that national law potentially amounted to indirect discrimination based on disability within the meaning of the Employment Equality Directive,⁶² and it had to be considered whether the difference in treatment was 'objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve the aim pursued by the Danish legislature'.⁶³

The Danish government argued that the law aimed to encourage employers to recruit and employ workers who were likely to be repeatedly absent from work as a result of illness, by allowing them to dismiss them with a shortened period of notice if the absences were lengthy, as well as allowing such workers to retain employment during periods of illness.⁶⁴ The measure was in line with the Danish approach to labour market regulation, which combined flexibility and freedom of contract as well as protection of workers.⁶⁵ The Court found that these aims could, in principle, be regarded as objectively justifying a difference in treatment on the grounds of disability such as that provided for by the impugned law.⁶⁶

The second element of the justification test required that the means used to achieve the aim be appropriate.⁶⁷ The Danish government argued that the relevant provision was the most appropriate means for enabling the recruitment and maintenance in employment of people who have, or potentially have, a reduced work capacity as well as meeting 'the superior objective of a flexible, contractual and secure labour market'.⁶⁸ In response, the Court referred to the 'broad discretion' enjoyed by Member States in choosing aims in the fields of social and employment policy and in defining measures to achieve those aims and concluded that 'it does not appear unreasonable' to consider that the provision 'might be appropriate for achieving the aims mentioned'.⁶⁹

With regard to the last element of the justification test, namely, whether the provision went beyond what was necessary to achieve the aims pursued, the Court held that the measure 'must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered'.⁷⁰ This was a matter for the referring court to decide on and that court had to examine:

whether the Danish legislature, in pursuing the legitimate aims of, first promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, omitted to take account of the relevant factors relating in particular to workers with disabilities.⁷¹

In that respect, the Court stated that ‘the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market and have specific needs in connection with the protection their condition requires, should not be overlooked’.⁷²

The measure, which the Court regarded as indirectly disadvantaging persons with disabilities, was therefore potentially justified. However, the Danish court that was subsequently called upon to decide the case refrained from assessing whether the 120-day rule amounted to indirect disability discrimination where the sick leave was a consequence of the employee’s disability and instead found that the employers had directly discriminated against the two disabled individuals by dismissing them after 120 days of sick leave, when the sick leave itself was due to the employer’s original failure to make a reasonable accommodation.⁷³

Lastly, under the Employment Equality Directive, a measure that would otherwise amount to indirect discrimination against persons with disabilities can be subject to a second disability-specific justification.⁷⁴ In essence, the justification provides that a provision, criterion or practice will not be regarded as amounting to indirect discrimination against the group of disabled people, if an employer or other covered party makes a reasonable accommodation for a specific individual to eliminate the disadvantages resulting from the provision, criterion or practice for that individual. In such situations, the otherwise indirectly discriminatory can continue to apply, as long as disadvantaged disabled individuals are accommodated.

Different treatment in recognition of the different situation of persons with disabilities, including the obligation to make a reasonable accommodation

As noted above, the reasonable accommodation obligation requires employers, and other covered parties, to recognize the limitations associated with an individual’s impairment and to accommodate those by making changes to meet the needs and skills of the individual in question. However, this requirement to accommodate is itself subject to the condition that providing the different treatment does not amount to a disproportionate burden for the employer or other covered party. In short, the reasonable accommodation obligation justifies different treatment of persons with a disability, whilst the disproportionate burden test justifies a failure to provide that different treatment. In this way, the law seeks to balance the interests of individuals with a disability with those of employers and other providers of social goods.

It is worth noting that in some cases courts have recognized the need to provide different treatment to a person with a disability, in recognition of the different situation they find themselves in, without relying on the reasonable accommodation obligation. On occasions, courts have founded this obligation on the prohibition of indirect discrimination and held that this requires that a disabled individual should be treated in a different way to other employees.

There is now a wide body of case law exploring the reasonable accommodation obligation and the kinds of different treatment that it requires. One accommodation that has been considered by a number of courts is the obligation not to move a disabled employee to another location in accordance with normal practice, where the employee would find it

difficult to comply with this requirement for a reason related to disability. Two cases from Denmark and Italy illustrate how courts and equality bodies respond to such situations. The Danish Board of Equal Treatment⁷⁵ found that an employer, a local police and prosecution department, had discriminated against a worker with a disability, by failing to provide a reasonable accommodation, when they required her to move to a workplace in another city. The longer travelling time to the new place of employment aggravated the complainant's pre-existing serious back problems and this led to her going on extended sick leave shortly after the relocation. She was subsequently dismissed. The Board found that the employer had been obliged to accommodate the complainant by allowing her to continue working at her original location and that it was not probable that this would have amounted to a disproportionate burden. In contrast, a finding of indirect discrimination was reached in an Italian case, in which a court officer with a disability was relocated to another work place. The complainant had a mobility disability and needed to work near to her place of residence, a requirement met by her original work place. The court did not find that there was any justification for the relocation and that it amounted to indirect discrimination.⁷⁶

It is clear that the forced relocation of a disabled employee to another workplace can either be regarded as a failure to make a reasonable accommodation, where the accommodation in question would be to allow the worker to continue to be based at the original workplace, or as a form of indirect discrimination, where the need for the relocation is not objectively justified with regard to a disabled worker. In both instances, the law requires that a disabled worker be treated differently from another worker who would not experience such problems as a result of the relocation.

A second example of an obligation to provide different treatment in the context of employment is drawn from France. *Volot-Pfiser v. Ministry of Justice*⁷⁷ concerned a lawyer working within the public prosecution office who became deaf and was consequently unable to work as a prosecutor (magistrate) at public hearings. His employer accommodated him by reallocating work within his office. As a result, he took on more administrative duties, whilst his colleagues took over his work at public hearings. This change in tasks also led to the plaintiff receiving lower pay, as he no longer received additional payments connected to participating in public hearings. These additional payments were made in recognition of the extra burden of work involved and the fact that court hearings sometimes continued until late at night. The employer, the General Prosecutor, argued that this difference in treatment was objective and reasonable and reflected the lower burden of work on the complainant, as well as the fact that other prosecutors had taken on additional work. On appeal, the *Conseil d'Etat* held that the duty of reasonable accommodation also included a guarantee that the accommodation would not create a disadvantage with regard to remuneration or career development. The *Conseil d'Etat* held that the fact that the disabled worker received lower remuneration based on a comparison between his work and that of his colleagues, where the changes to his work were the result of a reasonable accommodation, amounted to indirect discrimination. It seems clear that had the difference in work, and consequent difference in salary, been based on other factors, such as preference or availability, the lower pay would have been justified. However, the reasonable accommodation obligation, in combination with the prohibition of indirect discrimination, required that a disabled worker be treated differently.

A final example of an employment-related reasonable accommodation can be found in the decision of the UK House of Lords in *Archibald v. Fife*.⁷⁸ The complainant in this case worked as a road sweeper for Fife Council. As a result of an operation she became disabled and was no longer able to continue in this position. She received retraining from her employer and subsequently applied for over 100 internal vacancies involving junior level office work. However, because all office positions were assessed as being at a higher grade than her previous manual position, the Council applied its standard redeployment policy which meant that she had to undertake a competitive interview. She failed to obtain any of the posts and was subsequently dismissed. The complainant argued that she had been the victim of disability discrimination and that she should not have been required to go through the competitive interviews if she could show she was qualified and suitable for the job in question. The House of Lords held that the obligation to make a reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person. This clearly required the employer to treat a disabled individual in a different way from other internal candidates, where a reasonable accommodation was at issue.

As noted above, the reasonable accommodation requirement can also apply in areas beyond employment and, whilst EU law does not require this, the law of many Member States does have this broader reach, as does the UN CRPD. Cases from a number of jurisdictions concern the refusal of restaurants or food shops to serve or allow access to people accompanied by a guide dog. Such cases have been identified in Slovenia, Ireland, Finland and Hungary, and in all instances, the courts ruled that such a refusal amounted to discrimination and found that staff members were obliged to accommodate such individuals by allowing them access with their dogs. It is noticeable that whilst all courts reached similar final conclusions, they did not all base their judgments on the reasonable accommodation principle.

The Slovenian Animal Protection Act specifies that guide dogs cannot be refused access to public places. In spite of this, a waiter refused to serve the applicant, who was blind, on the grounds that she was accompanied by a guide dog. The Advocate of the Principle of Equality⁷⁹ found that the prohibition of entry to restaurants or other public facilities by dogs, although valid for all persons, disproportionately affected people with visual impairments who were assisted by guide dogs. The Advocate held that there was an obligation on the owner of public facilities to accommodate persons in a specific situation in order to avoid indirect discrimination. The Advocate also noted that the assessment of what accommodation is reasonable in such cases had already been conducted by the legislator through the Animal Protection Act. A similar decision was reached by the Irish Equality Tribunal in *Roche v. Alabaster Associates Limited t/a Madigans*.⁸⁰ In this case the complainant, who was visually impaired and used a guide dog, was refused access to a service in the respondent's premises (a pub). The complainant submitted that he was discriminated against on the grounds of his disability as the respondent failed to provide special treatment to accommodate his needs. The respondent argued that it would have been contrary to the Food Hygiene Regulations to allow the complainant's dog into the pub, which served food. The Tribunal held that the respondent had failed to provide a reasonable accommodation to the complainant, namely, allowing him to enter their premises whilst being accompanied by his guide dog and had consequently

discriminated against him on the grounds of disability. Meanwhile, in Finland, the District Court of Vaasa⁸¹ has found that a refusal to allow access to a disabled person accompanied by a guide dog amounted to discrimination on the basis of disability under the Penal Code,⁸² whilst the Hungarian Metropolitan and Metropolitan Appeals Court have held the denial of access to a supermarket to a visually impaired person accompanied by a guide dog was a form of direct discrimination.⁸³ The Hungarian courts regarded the denial of entry to the dog as amounting to a denial of entry on the basis of disability, since the dog and the owner constituted an inseparable unit.⁸⁴

All of these cases reveal that whilst it is possible, and sometimes even obligatory, to deny access to people accompanied by dogs to certain public places, to apply this rule to a person with a disability who is accompanied by a guide dog can amount to discrimination. Consequently, the law can require that such individuals be treated differently, in light of their different situation, and that access be allowed. It is noticeable that the courts, whilst all requiring the same result, reached different conclusions regarding the nature of the discrimination which was at issue and consequently the origin of the de facto duty to accommodate. The above cases reveal that the courts regarded the denial of access as indirect discrimination (Slovenian Advocate of the Principle of Equality), direct discrimination (Hungarian Metropolitan Courts), discrimination resulting from a failure to make a reasonable accommodation (Irish Equality Tribunal) and even discrimination in breach of the Penal Law (Finnish District Court).

The UN CRPD Committee has also considered an individual communication in which reasonable accommodation was at issue.⁸⁵ In *H.M. v. Sweden*,⁸⁶ the author claimed that the state authorities had discriminated and failed to provide a reasonable accommodation, by refusing to allow her permission to build a hydrotherapy pool adjacent to her home and on her own land. The author had a complicated and serious disability, which could only be treated through hydrotherapy. Her condition meant that she could not leave her home for treatment elsewhere, and therefore she wished to build a suitable pool and treatment unit at her home. She was refused permission to build the pool under the relevant planning laws, as part of the new building would have been on land on which no construction was permitted. The Swedish courts found that the construction would have breached the planning laws and that no major deviations were possible. Before the Committee, the State argued that the planning laws were applied in the same way to everyone, and the rejection of the application was not connected to the author's disability. Therefore no discrimination had taken place. In response the Committee observed:

... a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individual to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.⁸⁷

The Committee continued to find that access to a hydrotherapy pool at her own home was the only effective way of meeting the author's health needs and that an '[a]ppropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool'.⁸⁸ The State party had not

argued or indicated that this would amount to a disproportionate burden, and the relevant law did allow for departures from the development plan. Therefore, a reasonable accommodation in this particular case was to allow the construction of the hydrotherapy pool, and, by refusing such permission, the State had breached inter alia Article 5(1) and 5(3).

But no reasonable accommodation required if this would amount to a disproportionate burden

It is possible to justify a failure to make a reasonable accommodation. The UN CRPD provides that a reasonable accommodation is not required if it would impose ‘a disproportionate or undue burden’,⁸⁹ and the Employment Equality Directive requires a reasonable accommodation ‘unless this would impose a disproportionate burden’.⁹⁰ The Convention does not provide any further elaboration on the concept of disproportionate or undue burden, whilst the Directive provides some limited guidance in Recital 21 of the Preamble:

To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

A handful of national cases have arisen in which an employer has successfully claimed that making the accommodation requested by the disabled applicant would result in a disproportionate burden. In some instances, these cases have involved financial claims when a significant amount of money was at stake. One such case is *Equality Ombudsman v. Swedish Social Insurance Agency*.⁹¹ The case concerned an individual who applied for a position with the Swedish Social Insurance Agency and who was rejected on the grounds that the computer system which she would need to use was inaccessible to her because of her visual impairment. The Agency claimed that adapting the system to render it accessible would require 20,000 hours of work. Whilst the Labour Court criticized the Agency for installing an inaccessible computer system, it nevertheless found that it was not reasonable to require the Agency to incur such extensive costs in order to accommodate the individual. Since the plaintiff did not demonstrate that any less expensive accommodation was possible, the Court found that there was no discrimination.

In *Cordell v. Foreign and Commonwealth Office*,⁹² the Employment Appeal Tribunal in the United Kingdom similarly found that the respondent had not discriminated and was not obliged to make the requested accommodation, which was very expensive. The claimant was a diplomat who was profoundly deaf and who required an accommodation in the form of lip speakers. She had initially been offered a post in Kazakhstan but that offer was withdrawn when it became clear that it would cost 1 million pounds to supply the required lip speakers over the course of the 3-year appointment. It was also unclear whether lip speakers could be appointed to this posting. The Tribunal found that the requested accommodation was not reasonable in light of both the uncertainty of the availability of lip speakers and the cost involved, which was equivalent to 500% of the claimant’s salary.

Cost was also at issue in *A v. Heritage Agency of Denmark*,⁹³ although the costs of the requested accommodation do not seem to have been extensive as the two cases considered above. *A.* was a visually impaired architect who was employed by the Danish Heritage Agency. As a result of his impairment, *A.* was unable to carry out building and site inspections on his own and required an assistant. He was subsequently dismissed by the Agency, which cited budget reductions and the need to prioritize employees who were able to work unassisted. The Eastern High Court found that providing *A.* with assistance from another architect when carrying out inspections would impose a disproportionate burden on the employer, and consequently, the failure to provide the assistance, as a form of reasonable accommodation, was justified. A dissenting judge found that providing this accommodation did not amount to a disproportionate burden.

One instance in which cost was not the immediate issue was a Swedish case involving the dismissal of a disabled worker from a supermarket.⁹⁴ The worker in question had a disability that prevented her from holding and lifting heavy items. She was not required to do this in her original job. However, the employer decided to reorganize the work tasks and required all workers to rotate between tasks, which meant that all employees had to be able to fill shelves, which involved lifting heavy items. The disabled employee was unable to carry out this task and was dismissed. The Labour Court found that the employer was not obliged to create or maintain a position that matched the ability of a disabled employee. An accommodation was only required to the extent that it involved a small adaptation to an existing position. In the present case, the Court found that there were no technical adaptations that could be made at a reasonable cost, to allow the applicant to stack shelves, and therefore carry out this element of the reorganised work. As a result, the dismissal was justified and was not a breach of either the Discrimination Act or the Work Environment Act.

One could argue that in these cases the fact that no reasonable accommodation was required meant that the disabled individual could be treated differently from other job applicants or employees. Specifically, the disabled individual could be denied an opportunity or dismissed, in a situation where a non-disabled person, who did not face an equivalent barrier, would have received more favourable treatment. The alternative perspective is that the disabled individual received the same treatment as a mythical comparator who was equally limited in their abilities. In reality though it is often difficult to make a comparison between a disabled individual and a mythical comparator, since no non-disabled person would find themselves in the same position. The case of the diplomat who needed assistance from expensive lip speakers is an example of such a case.

Conclusion

This article has sought to map and explore the various exceptions to the non-discrimination principle and justifications for differential treatment with regard to disability. Legislation, as well as decisions from the UN Committee on the Rights of Persons with Disabilities, the Court of Justice of the EU, and a variety of national judgments and opinions of equality bodies have been considered. A wide range of exceptions and justifications have been noted, serving a variety of purposes. The analysis has revealed that exceptions to the non-discrimination requirement and justifications for

different treatment, which are compatible with non-discrimination law, do not always limit the obligations of employers or other covered parties in the context of disability. Certainly, some exceptions and justifications, such as limitations related to the personal and material scope of the law, the disproportionate burden requirement and the genuine occupational or good-/service-related requirement do serve to restrict the duty not to discriminate against persons with disabilities. Therefore, if the obligations connected to non-discrimination legislation provoke resistance to that legislation from employers and Member States/State Parties, then these exceptions and justifications may serve to limit that resistance.

However, other provisions serve to extend the duty not to discriminate against persons with disabilities and allow for different treatment. This includes the wide-ranging exception for positive action that favours persons with disabilities and the justification, and indeed requirement, related to reasonable accommodation and different treatment. These more extensive obligations or possibilities with regard to different treatment of persons with disabilities may not serve to provoke resistance or antagonism, but rather are recognized as being necessary in the context of disability. Indeed, limitations on positive action measures, such as those which are inherent to gender equality law, and as embodied in the EU directives and case law on gender equality, may provoke significant resistance from States that wish to retain the freedom to maintain their extensive and wide-ranging existing positive action measures, such as employment quotas and employment subsidies. In the context of disability, exceptions and justifications can therefore be a tool to fine-tune or target non-discrimination law, with the potential to both limit and extend protection from discrimination, depending on how they are crafted and applied.

Acknowledgements

The author gratefully acknowledges the work of country experts from the European Network of Experts in the Non-Discrimination Field, who report on relevant national judgments on non-discrimination law and whose research has been drawn on in this article. Available at: <http://www.non-discrimination.net/> (accessed 28 April 2014). The author is particularly grateful to the following members of the network who provided her with further information on national cases: Rainer Hiltunen (Finland), Sophie Latraverse (France), Andras Kadar (Hungary), Else Leona McClimans (Norway) and Neza Kogovsek (Slovenia). The author is also very grateful to Maria Ventegodt Liisberg of the Danish Human Rights Institute for providing further information on Danish and Swedish case law.

Funding

This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

Notes

1. The social model of disability can be contrasted with the medical model of disability. The latter argues that a disability is a direct consequence of an impairment and is the result of an incapacity caused by an impairment. There is a wealth of literature addressing theoretical models of disability. See, for example, M. Oliver, *Understanding Disability: from theory to practice*.

- (New York: Macmillan Press Ltd, 1996); and M. Priestley, 'Constructions and Creations: Idealism, Materialism and Disability Theory', *Disability and Society* 13(1) (1998), p. 75.
2. This section draws on L. Waddington and A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', *The International Journal of Comparative Labour Law and Industrial Relations* 18(4) (2002), pp. 403–427; and L. Waddington, 'Chapter Six, Reasonable Accommodation, Section 6.1.1', in D. Schiek, L. Waddington and M. Bell, eds. *Cases, Material and Text on National, Supranational and International Non-Discrimination Law, Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2007).
 3. This statement only relates to an employment-related obligation. However, an obligation to provide reasonable accommodation that is imposed on, for example, providers of goods and services can be justified in the same way.
 4. S. Fredman, 'Disability Equality, A Challenge to the Existing Anti-Discrimination Paradigm?', in A. Lawson and C. Gooding, eds. *Disability Rights in Europe. From Theory to Practice*. (Oxford: Hart Publishing, 2005), pp. 199–203.
 5. P.S. Karlan and G. Rutherglen, 'Disabilities, Discrimination and Reasonable Accommodation', *Duke Law Journal* 46(1) (1996), p. 9.
 6. S. Fredman, 'Disability Equality, A Challenge to the Existing Anti-Discrimination Paradigm?', in A. Lawson and C. Gooding, eds. *Disability Rights in Europe. From Theory to Practice*. (Oxford: Hart Publishing, 2005), p. 203.
 7. Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 and Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.
 8. Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
 9. One exception to this is Dutch disability non-discrimination law, which protects both persons with disabilities and persons without disabilities from disability-related discrimination.
 10. Such as priority and reduced rate parking, reduced fees or charges for various social activities and priority schemes for employment and training.
 11. See Case C-450/93 *Kalanke v. FreieHansestadt Bremen* [1996] ECR I-3051.
 12. See L. Waddington, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws', *Comparative Labor Law Journal* 18(1) (1996), p. 62.
 13. This section draws on: L. Waddington, 'Section 3 in: Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in L. Waddington, G. Quinn and E. Flynn, eds. *European Yearbook of Disability Law. Vol. 4*. (Antwerp: Intersentia, 2013), p. 169.
 14. G. Quinn, *The UN Convention on the Human Rights of Persons with Disabilities*, 10 June 2007, unpublished paper on file with author, at 3.
 15. For information on the drafting history of this article, see S. Trömel, 'A Personal Perspective on the Drafting of the United Nations Convention on the Rights of Persons with Disabilities', in G. Quinn and L. Waddington, eds. *European Yearbook of Disability Law. Vol. 1*. (Antwerp: Intersentia, 2009), pp. 122–124, at 115; and M. Schulze, *Understanding the UN Convention on*

the Rights of Persons with Disabilities A Handbook on the Human Rights of Persons with Disabilities. (New York: Handicap International, July 2010). Available at: http://www.hrea.org/index.php?base_id=104&language_id=1&erc_doc_id=5575&category_id=747&category_type=2&group=, at pp.61-64 (accessed 2 June 2014).

16. See J. Kumpuvuori and M. Scheinin, (undated) 'Treating the Different One Differently – A Vehicle for Equality for Persons with Disabilities? Implications of Article 5 of the Convention on the Rights of Persons with Disabilities', in J. Kumpuvuori and M. Scheinin, eds. *United Nations Convention on the Rights of Persons with Disabilities, Multidisciplinary Perspectives*. (Helsinki: The Center for Human Rights of Persons with Disabilities (VIKE), Publications Series of VIKE No. 5), p. 54.
17. Article 5(1).
18. Article 5(2).
19. Article 5(3).
20. The Convention does not refer to positive action but instead speaks of 'Specific measures that are necessary to accelerate or achieve de facto equality', Article 5(4).
21. Preamble, Recital (e) and Article 1.
22. Quinn, 'The UN Convention on the Human Rights', at p. 9; and T.J. Melish, 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify', *Human Rights Brief* 14 (2007), p. 37 at footnote 11, who describes the Convention as adopting a 'hybrid approach'.
23. Article 14, which covers liberty and security of the person.
24. Article 24.
25. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. This section draws on L. Waddington, 'Section 4 in: Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in L. Waddington, G. Quinn and E. Flynn, eds. *European Yearbook of Disability Law, Vol. 4*. (Antwerp: Intersentia, 2013), p. 169.
26. Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.
27. Article 2(2)(a).
28. Article 2(2)(b).
29. Article 2(2)(b).
30. Article 2(2)(b).
31. Article 2(3).
32. Article 2(4).
33. See Case C-303/06 *Coleman v. Attridge Law and Steve Law* [2008] ECR I-5603.
34. *Chief Constable of Lothian and Borders Police v. Cumming* [2010] IRLR 109, Employment Appeal Tribunal, 29 July 2009, UKEATS/0077/08. Available at: http://www.bailii.org/uk/cases/UKEAT/2009/0077_08_2907.html (accessed 28 April 2014).
35. This was important since the relevant statute stated that 'a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out *normal day-to-day activities*' (emphasis added). See section 1 of the Disability Discrimination Act 1995.
36. See *Chief Constable of Lothian and Borders Police v. Cumming* [2010], para. 36.

37. *F (HK) v. Danish Crown (DI)*, Western High Court, *Weekly Law Journal*, 20 March 2009, U. 2009.1966 V.
38. Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, judgment of 11 April 2013.
39. *Revacenter Horsens v. A*, Western High Court, *Weekly Law Journal*, 23 September 2009, U2010.93VL.
40. Decision of 20 May 2012, VIII Ips 24/2011. Available at: http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113044683/ (accessed 28 April 2014).
41. See *Chief Constable of South Yorkshire Police v. Jelic* [2010] IRLR 744.
42. *K. v. Österreichische Post AG*, Administrative High Court (*Verwaltungsgerichtshof*), of 17 December 2007, Nr. 2006/12/0223. Available at: www.ris.bka.gv.at (accessed 28 April 2014).
43. Information in this paragraph is partially based on L. Waddington and M. Bell, 'Exploring the Boundaries of Positive Action: A Search for Conceptual Clarity', *Common Market Law Review* 48(5) (2011), pp. 1503–1526.
44. For a comparison of temporary special measures under the Women's Convention and positive action under European Union law, see: L. Waddington and L. Visser, 'Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?', in I. Westendorp, ed. *The Women's Convention Turned 30: Achievements, Setbacks and Prospects*. (Antwerp: Intersentia, 2012), p. 95.
45. See Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 1(4), Convention on the Elimination of All Forms of Racial Discrimination.
46. Article 5(4), Convention on the Rights of Persons with Disabilities.
47. Reference 2/2009, dated 19 November 2009.
48. Law Providing for the Hiring of Trained Blind Telephonists in the Public and the Educational Sector and in Public Bodies (Special Provisions) N. 17/1988.
49. *Minister of Healthcare Labour and Social Policy v. PADC Protection Against Discrimination Commission*, Decision N 1666011111 in administrative case N 135325665/2011, final, Supreme Administrative Court, 30 August 2012.
50. Specifically, the European Union, Cyprus, Greece and the United Kingdom have made reservations that relate in some way to the exclusion of the protection from disability discrimination with regard to employment in the armed services.
51. *F (HK) v. Advokat A*, F-3-09, The Maritime and Commercial Court, 16 August 2011.
52. *Svenska Metallindustriarbetarförbundet v. Skandinaviska Raffinaderi Aktiebolag Scanraff and Kooperationens Förhandlings organisation*, case 2003, no. 47, Labour Court, 4 June 2003.
53. *SAC v. the Swedish Church*, Labour Court, 27 September 2006, case 2006, no. 97.
54. It is worth noting that Cyprus has made a reservation to the CRPD specifically allowing it to maintain the justification for different treatment on the grounds of a genuine occupational requirement.
55. *College vor de Rechten van de Mens (2002) Oordelen*, Oordeelnummer 2007-26. Available at: <http://www.mensenrechten.nl/publicaties/oordelen/2007-26> (accessed 28 April 2014).
56. Law on Equal Treatment on Grounds of Disability/Chronic Illness, Article 6.

57. Decision of 23 June 2011, case no 2009/2. Available at: <http://www.ldo.no/no/Klagesaker/Arkiv/2011/Sporsmal-om-diskriminering-pa-grunn-av-ADD/> (accessed 28 April 2014).
58. Advocate of the Principle of Equality, 31 January 2011, UEM – 0921-36/2009/6.
59. Br. 001 C 133/08b-9. Available at: <http://www.klagsverband.at/archives/870> (accessed 28 April 2014).
60. Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, judgment of 11 April 2013. See also L. Waddington, 'HK Danmark (Ring and Skouboe Werge)', *Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities*, *European Anti-Discrimination Law Review* 17 (2013), p. 11.
61. See Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 76.
62. *Ibid.*, para. 76.
63. *Ibid.*, para. 77.
64. *Ibid.*, para. 78.
65. *Ibid.*, para. 79.
66. *Ibid.*, para. 83.
67. *Ibid.*, para. 84.
68. *Ibid.*, para. 85.
69. *Ibid.*, para. 87.
70. *Ibid.*, para. 89.
71. *Ibid.*, para. 90.
72. *Ibid.*, para. 91.
73. *A (HK) v. Pro Display*, F-0013-06, The Maritime and Commercial Court, 31 January 2014 and *A (HK) v. Dansk Almennyttigt Boligselskab*, F-0019-06, The Maritime and Commercial Court, 31 January 2014. I am grateful to Maria Ventegodt Liisberg of the Danish Human Rights Institute for updating me on developments in Denmark concerning these two cases.
74. Article 2(2)(b)(ii).
75. Board of Equal Treatment, 9 May 2012, Decision No. 276/2012. Available at: <http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=893&type=Afgoerelse> (accessed 28 April 2014).
76. *Laura Neri v. Ministry of Justice*, Court of Pistoia, Labour Section, 30 September 2005.
77. *Conseild'Etat*, no 347703, 11 July 2012, VAULOT PFISTER.
78. See *Archibald v. Fife Council* [2004] UKHL 32, [2004] IRLR 651.
79. Advocate of the Principle of Equality, 16 April 2008, UEM – 0921-1/2008-2.
80. Equality Tribunal, 1 August 2002, Decision DEC-S2002-086. Available at: http://www.labourcourt.ie/en/Equality_Tribunal_Import/Database-of-Decisions/2002/Equal-Status-Decisions/DEC-S2002-086.pdf (accessed 28 April 2014).
81. Judgment of 27 September 2005.
82. See section 11:9.
83. Under Article 8 of the Equal Treatment Act. By refusing access to the supermarket, the defendant had failed to comply with Hungarian legislation which states that guide dogs are exempt from the ban on entry to food shops, public baths and restaurants.

84. Metropolitan Appeals Court (*Fővárosi Ítéltábla*), case no. 2.Pf.21.104/2010/5. Judgment available at: http://helsinki.hu/wp-content/uploads/Fovarosi_Iteletotabla_itelet_SzSz_20101207.pdf (accessed 28 April 2014).
85. The Committee also considered a second case in which reasonable accommodation issues were raised. *SzilviaNyusti and PéterTakács v. Hungary* concerned the accessibility of bank machines (automated teller machine (ATM)) for people with visual impairments. Whilst the authors had initially raised claims relating to reasonable accommodation in their first case before a Hungarian court, in later cases broader issues, relating to the accessibility of a bank's entire network of ATMs for persons with visual impairments were argued. In light of that, the Committee examined the claims under Article 9 UN CRPD, on accessibility and did not further explore the reasonable accommodation issue. Communication No. 1/2010, views adopted by the Committee at its 9th session, 15–19 April 2013, CRPD/C/9/D/1/2010.
86. Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, views adopted by the Committee at its 7th session, 16–27 April 2012, CRPD/C/7/D/3/2011.
87. *H.M. v. Sweden*, para. 8.3.
88. *H.M. v. Sweden*, para. 8.4.
89. Article 2 UN CRPD.
90. Article 5.
91. Labour Court, 2 February 2010, Case 2010 No. 13.
92. See *Cordell v. Foreign and Commonwealth Office* UKEAT/0016/11/SM, judgment of 5 October 2011.
93. *A v. Heritage Agency of Denmark*, 5 March 2008, *Weekly Law Journal* (U.2008.1450).
94. *The Retail Worker's Union v. Coop.*, Labour Court, 2012 nr 51, 11 July 2012.