

REASONABLE WORKPLACE ACCOMMODATION FOR PERSONS WITH DISABILITIES – RECENT EUROPEAN PRACTICE**

Summary

The right to reasonable accommodation at work derives from the principle of equal treatment of persons with disabilities. By embracing the concept of the full equality of persons with disabilities in all areas of social life and activity, the right to reasonable accommodation has come to be regarded as a functional prerequisite for the effective realisation of the human right to work. Hence, this research examines emerging interpretations and challenges relating to the implementation of the right to reasonable accommodation, as reflected in the jurisprudence of the Committee on the Rights of Persons with Disabilities and European courts, as well as through an analysis of selected cases from the practice of courts and national human rights institutions in European countries. The study aims to identify the fundamental prerequisites for the realisation of this right and to contribute to the development of practical standards that facilitate its effective implementation and promote the equal participation of persons with disabilities in the labour market.

Keywords: Human Right to Work, Human Rights Model of Disability, Reasonable Workplace Accommodation, Necessary and Appropriate Modifications and Adjustments, Disproportionate or Undue Burden.

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RAZUMNO PRILAGOĐAVANJE RADNOG MESTA ZA OSOBE SA INVALIDITETOM – NAJNOVIJA PRAKSA U EVROPSKIM ZEMLJAMA

Sažetak

Pravo na razumno prilagođavanje radnog mesta proizilazi iz prava na jednak tretman osoba sa invaliditetom. Prihvatanjem koncepta potpune ravnopravnosti osoba sa invaliditetom u svim oblastima društvenog života i aktivnosti, pravo na razumno prilagođavanje postalo je funkcionalna pretpostavka za ostvarivanje prava na rad. Ovo istraživanje se, stoga, bavi novim tumačenjima i izazovima vezanim za garantovanje prava na razumno prilagođavanje, na osnovu razmatranja istih od strane Komiteta za prava osoba sa invaliditetom i evropskih sudova, kao i analize pojedinih predmeta iz prakse sudova i nacionalnih institucija za ljudska prava u odabranim evropskim zemljama. Cilj je da se ukaže na osnovne pretpostavke za ostvarivanje ovog prava, kao i za uspostavljanje praktičnih standarda koji će doprineti ispunjenju svrhe ovog prava i stvaranju uslova za ravnopravno učešće osoba sa invaliditetom u procesu rada.

Ključne reči: pravo na rad, model invaliditeta zasnovan na ljudskim pravima, razumno prilagođavanje radnog mesta, neophodne i odgovarajuće modifikacije i prilagođavanja, nesrazmerno ili prekomerno opterećenje.

1. The Notion of Reasonable Workplace Accommodation

There are several competing models for explaining disability. According to the once influential but now widely criticised medical model (Tintor, 2022, p. 97), disability is understood in terms of the functional limitations experienced by a person due to a clinically identifiable pathological condition. This model typically implied sheltered employment, work in rehabilitation enterprises for persons with disabilities, and in social enterprises. The medical model has been extensively challenged and historically superseded (Rabrenović, 2024, pp. 151-152). It has been replaced by the “social model”, which conceptualises disability as the result of societal barriers rather than individual impairment, and emphasises the need to change society in order to accommodate persons with impairments. More recent policies promote a human rights model of disability, according to which disability is not conceived

as a medical condition, but rather as an inability of persons to fully exercise their social roles due to certain health deficiencies, which could expose them to discrimination. The social and human rights approaches are not competing, but are rather “complementary and supportive” (Lawson & Beckett, 2021, p. 371). Therefore, the focus is shifting from providing social assistance to persons with disabilities to their equal inclusion in society, enabling them to perform independently all functions and exercise all rights they are entitled to as human beings. One of these rights is the human right to work, which all persons of full legal capacity should enjoy on an equal basis with other workers (for issues relating to the reduction or deprivation of legal capacity, which may also effect working capacity, see Rabrenović & Tintor, 2024; Tintor & Rabrenović, 2024). A central role in achieving substantive equality in the exercise of the right to work lies in the provision of reasonable workplace accommodation.

The right of employees with disabilities to reasonable accommodation is a legal standard that has been interpreted quite broadly over past decades. However, as Dong, MacDonald-Wilson and Fabian (2010, p. 160) observe, the provision of reasonable accommodation in the workplace is inherently a complex process, unique to each specific situation. Its outcome depends not only on the specificity of the industry and the nature of the person’s working capacity limitations, but also on interpersonal relationships and commitment to ensuring the substantive equality of all employees with a particular employer.

The notion of reasonable accommodation is defined in Article 2 of the Convention on the rights of persons with disabilities (2006): “*Reasonable accommodation* means necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” This definition makes it clear that reasonable accommodation constitutes a composite right, the precise scope of which varies according to the circumstances in which it is applied, primarily the nature of the employee’s disability and the specific work to be performed. Reasonable accommodation measures should not be conflated with the concept of indirect discrimination – on the contrary, they are a means of achieving true equality (Kuzminac, 2024, pp. 21-22). Dong, MacDonald-Wilson and Fabian (2008, p. 221) point out that reasonable accommodation measures enable employees with disabilities to perform the essential functions of their job. In practice, several challenges have emerged in the full implementation of this right, primarily regarding the interpretation of the terms “necessary and appropriate modifications and adjustments” and “disproportionate or undue burden”. A clear understanding of these standards determines how the right is exercised, i.e., the specific obligations of employers

towards employees with disabilities. It should be noted that this framework applies to situations in which the work of persons with disabilities is not regarded as rehabilitative in nature, but rather as equal participation in the labour market, intended to ensure personal and family livelihood through the free choice of employment (Rajić, 2016, p. 177).

The focus of this research is on the interpretation of the right to reasonable accommodation by relevant international and national bodies and institutions. As with any right established at the supranational level, the standards for its enjoyment have evolved over time, reflecting the good practices of states that implement it. Equally important, however, is the identification of poor practices, i.e., the neglect of this right or imposing restrictions that undermine its purpose, which results in its inadequate application. The first part of the paper focuses on the opinions of the Committee on the Rights of Persons with Disabilities (hereinafter: the CRPD), while the second part examines the practice of international courts, specifically the European Court of Human Rights (hereinafter: the ECtHR) and the Court of Justice of the European Union (hereinafter: the CJEU). The focus is not limited to reasonable accommodation at work, extending also to reasonable accommodation in education for two reasons. First, these two rights are functionally interconnected. Second, it is important to consider the standards of reasonable accommodation in a broader context, as the fundamental interpretations are generally applied to situations in which this right is exercised across different areas of social life, i.e., in the realisation of different social roles of persons with disabilities. The third part of the paper is devoted to comparative research, emphasising both the decisions of national courts and the practices of bodies specialised in protecting human rights and equality at the national level. The concluding remarks provide a synthesis of the preceding discussion and a review of the research questions posed. A synthetic method has been employed to sublimate the core standards of good and bad practice that accompany the implementation of reasonable accommodation measures.

The research is based on fundamental hypotheses concerning current interpretations of the right to reasonable accommodation. These hypotheses focus on the implementation of this right and can be summarised in terms of several practical challenges faced by employees and employers in practice:

- How is the concept of disability interpreted, i.e., who is entitled to exercise the right to reasonable accommodation?
- Is the type of employment contract signed by a person with a disability a factor in determining the employer's obligation to implement reasonable accommodation measures?
- Is the employer fully autonomous in selecting the type of reasonable accommodation measures to be implemented?

- How can the existence of a “disproportionate burden” on the employer’s side, which may exempt them from the obligation to implement reasonable accommodation measures, be justified?

In accordance with the presented content and objectives of the study, the analysis employs primarily normative and comparative legal methods. Due attention is also given to the case study method.

2. Recent CRPD Interpretations of Reasonable Accommodation Standards

The definition of reasonable accommodation in the Convention on the Rights of Persons with Disabilities is based on several legal standards that are open to interpretation. Consequently, clear guidance on what constitutes reasonable accommodation and how it is to be achieved can be found in various documents.

Karjalainen and Ylhainen (2021, p. 553) note that “the UNCRPD is not based on the prohibition of discrimination, but on the acceptance of diversity and human rights. The prohibition of discrimination should be seen as only one of the means available to achieve the Convention’s objectives, which includes full and effective participation in working life as an essential aspect of achieving social inclusion.”

The right to reasonable accommodation is a specific right of employees with disabilities, and it at the same time imposes complementary obligations on their employers. However, several challenges must be addressed to determine how reasonable accommodation is to be effectively implemented.

As previously emphasised, the first model to consider is the so-called individual or medical model of disability. This model is based on the exclusive assessment of a person’s social potential through the lens of their impairment. The CRPD condemns such practices, emphasising that they cannot lead to true equality for persons with disabilities, and that they reduce a person’s entire potential to their medical limitations (CRPD General Comment No. 6, 2018, para. 8). This approach has two negative consequences. First, work capacity is expressed in negative terms, focusing on what a person with a disability is not able to do rather than on what they can do. Second, the inevitable consequence is the exclusion of such persons from the labour market, as well as from participation in other social functions and roles. Persons with disabilities are often portrayed as socially vulnerable due to their impairments, instead of being included in the labour market through an assessment of their capabilities in cooperation with them. As the CRPD notes, the human rights model of disability recognises that disability is a social construct, and that impairments should not be considered a legitimate ground for denying or restricting human rights (General Comment No. 6, 2018, para. 9). Disability is only one among several

layers of identity, and the diversity among persons with disabilities must be duly acknowledged. The next challenge concerns the content of the right to reasonable accommodation. Logically, not every action aimed at increasing the employability of a person with a disability qualifies as accommodation. Certain initiatives, such as the employment quota systems, serve primarily to increase the visibility of persons with disabilities in the labour market (Molović, 2023). Only once a person with a disability presents themselves as a job candidate, or once an employer hires an employee with a disability, can the implementation of reasonable accommodation measures be considered. The CRPD provides essential guidance on the core elements of this right, emphasising that the facilities, services, and information must be made accessible to persons with disabilities in order to ensure equal treatment and full enjoyment of their rights (General Comment No. 6, 2018, para. 26). There is a clear distinction between the notion of “reasonable” in “reasonable accommodation” and the concept of “disproportionality of the burden”. “Reasonable accommodation” is a single term, and “reasonableness” should not be understood as an exception clause or a separate qualifier or modifier of the duty. It does not serve as a means to assess the costs of accommodation or the availability of resources; such considerations arise only at a later stage, during the “disproportionate or undue burden” assessment. Rather, the reasonableness of accommodation refers to its relevance, appropriateness, and effectiveness for the person with a disability. Accommodation is considered reasonable if it fulfils the purpose(s) for which it is provided and is tailored to meet the specific needs of the person with a disability (CRPD General Comment No. 6, 2018, para. 25a). However, in practice, this distinction is often blurred. Waddington (2008, p. 339) identifies three interpretations of the “reasonableness” clause: as a measure of effectiveness, as ensuring the accommodation does not impose excessive difficulty or cost, or as a combination of the two. The CRPD also distinguishes between reasonable accommodation and accessibility. While both aim to achieve similar objectives, there are important differences. Accessibility is one potential measure of reasonable accommodation. Before any other measure can be implemented, the workplace, including the workspace, must be made accessible to the employee with a disability. In this respect, accessibility is considered by the CRPD to be an *ex ante* duty; it has to be qualified as proactive; it must precede the engagement of persons with disabilities; and it is intended for an indeterminate (significant) number of potential users. By contrast, reasonable accommodation measures may be used by multiple persons, and they are typically *ex nunc* and reactive, i.e., they are introduced for the benefit of a specific employee or group of employees. Once implemented, these measures may also be used by other workers or third parties in the workspace; however, this is not their primary purpose (CRPD General Comment No. 6, 2018, para. 24; CRPD General Comment No. 8, 2022, para. 19).

Finally, the concept of a “disproportionate or undue burden” on the employer should be understood as a basis for non-compliance with the obligation to provide reasonable accommodation, determined primarily by the financial impact that the implementation of such measures would have on the employer (CRPD General Comment No. 6, 2018, para. 25b). In other words, an employer cannot reasonably be expected to invest in reasonable accommodation measures that would result in excessive costs, significant disruption to work processes, or financial instability. Whether a measure produces such effects depends on the circumstances of each individual employer, including the content of the measure and the manner in which it is introduced and implemented. Practice indicates, however, that a measure will generally not be considered reasonable if its cost exceeds the value of the work to be performed by the employee for whom it was introduced.

Considering all the above, it can be concluded that the CRPD regards reasonable accommodation in practice as a tool for achieving substantive equality, a process in which the most appropriate measures are identified and implemented to enable effective equality for persons with disabilities in the workplace. Nevertheless, numerous uncertainties and questions arise in practice and need to be addressed at both the national and supranational levels.

3. Excerpts from European Court Practice

In recent years, several notable decisions have addressed the reasonable accommodation standard. While not all of these cases fall strictly within the field of the labour law, they may be indirectly related to the right to work, as they are functionally linked to the right to education. It is clear that successful integration into the labour market is often contingent upon vocational training, and that the transition from education to employment is a key factor in achieving the independence of persons with disabilities (Rajić Čalić, 2022, p. 540).

The ECtHR, in the case of *Çam v Turkey* (Application no. 51500/08, Judgment of 23 February 2016), emphasised that the refusal of a Music Academy to admit a student solely on the basis of her disability constituted discrimination. Not only was there no objective and reasonable justification in the specific case, but the absence of any attempt to implement reasonable accommodation measures was also assessed as unacceptable. These arguments were reiterated in the case of *G.L. v. Italy* (Application no. 59751/15, Judgment of 10 September 2020). On the other hand, in the case of *Stoian v. Romania* (Application no. 289/14, Judgment of 25 June 2019, the ECtHR found that there was no discrimination in education, since the authorities had applied at least some (through not all) of the measures that could be considered as

reasonable accommodation. The fact that not all potentially available measures had been implemented did not affect the ECtHR's assessment in these circumstances, which opened a way to interpreting the limits not only of what constitutes a "disproportionate or undue burden" on the legal person implementing such measures but also of the dynamics, which, in this particular case, were aligned with the lack of resources of the local authorities. The rational question raised in this case is whether a lack of funds could be a "universal excuse" for the non-implementation or partial implementation of reasonable accommodation measures. However, it appears that there is little scope for such criticism, since the ECtHR correctly noted, in the specific circumstances, that the authorities had responded and had not remained passive to the needs of students with disabilities, that they had implemented most of the measures that were rational and aimed at achieving substantial equality, and that the lack of funds was an objective circumstance beyond the control of the local authorities, which merely slowed the implementation of the measures, rather than resulting in a complete disregard for the needs of students with disabilities. These are the conditions under which it may be concluded that certain shortcomings in implementing the measures did indeed arise from objective obstacles and that, in this sense, there was no neglect of the obligations to arrange the learning environment in accordance with the standards of reasonable accommodation.

The CJEU has also dealt with several notable cases. It is important to emphasize that, in its decisions, the CJEU based its reasoning precisely on an interpretation of the right to reasonable accommodation in accordance with the standards set by the CRPD and the ECtHR, which led Gyulavári (2023, p. 368) to describe this development as a "new wave of case law".

In the cases of *HK Danmark* (C-335/11; C-337/11, ECLI:EU:C:2013:222), the CJEU delivered an opinion on a situation in which an employee had been dismissed due to absence from work due to reduced work capacity. The CJEU provided several explanations that may be regarded as significant for establishing the basic standards governing the exercise of the right to reasonable accommodation. First, in order for this right to arise at all, the impairment of working capacity must be of a more prolonged duration, though not necessarily permanent (paras. 35, 39). This, for instance, means that it cannot be considered reasonable to require an employer to install a ramp to enable an employee who has broken a leg to attend work, as the limitation of the employee's capabilities is temporary and, consequently, the expectation of employer investment would be unjustified. By contrast, in cases involving chronic or permanent limitations that are likely to last for an uncertain period, the right to reasonable accommodation must be implied. This approach is also consistent with some national practices. Thus, McGrath and O'Sullivan (2022, p. 43) note that employers in Ireland rarely decide to initiate a procedure to

verify the existence of a disability and that, when they do so, their success generally depends on whether the condition has had a significant impact on the individual and whether it is of a long- or short-term nature. The CJEU also underlined that it is the employer's obligation to consider such measures in each individual case when they are requested to do so, to address the possibilities of their implementation, and to initiate discussions with the beneficiaries of the measures as to which options would be the most rational, i.e., which would best fulfil the purpose of their introduction. Any disregard for this obligation, or refusal to initiate a review procedure, constitutes a violation of the right to reasonable accommodation (paras. 66, 70). This is an important conclusion, as it demonstrates that employers are under an absolute obligation to process employees' requests for such measures, even when the outcome of the procedure reveals that it is impossible to implement any measure that would achieve substantive equality.

Furthermore, in the case of *XX v Tartu Vangla* (C-795/19, ECLI:EU:C:2020:961), the CJEU took the view that "the concept of 'reasonable accommodation' should be understood broadly as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers" (para. 48). In this sense, the CJEU considered it impermissible for an employer to refuse to allow an individual to perform work using certain reasonable accommodation measures, even where such measures were not provided for in the employer's internal bylaws.¹ In this case, the CJEU also concluded that discrimination had occurred because the employer had not even attempted to implement reasonable accommodation measures.

A similar position was adopted in the case of *TC and UB v Komisija za zashtita ot diskriminatsia and VA* (C-824/19, ECLI:EU:C:2021:862), in which the question arose as to which has precedence, the principle of non-discrimination of a blind juror or the principle of direct access to evidence in criminal proceedings. Although the Court found it entirely acceptable to maintain an important rule of criminal procedure, the fact that no attempt was made to implement accommodation measures that would have enabled the juror to participate without her disability being a barrier was interpreted as a violation of the principle of equality.

Finally, in the case of *HR Rail* (C-485/20, ECLI:EU:C:2022:85), the CJEU analysed important issue concerning contractual employee employer relations. Although it had previously been stated that an employee's working capacity

¹ In this particular case, a prison guard lost his job because his employer refused to recognise the use of a hearing aid as a corrective mechanism, despite the fact that the guard was able to perform all his duties normally and at full capacity with such an aid. It is particularly noteworthy that an internal document explicitly permitted visually impaired persons to wear glasses freely as a corrective measure for their impairment.

limitation must be of longer duration for there to be an objective need for the employer to implement reasonable accommodation measures, on this occasion, the CJEU held that no distinction should be made between fixed-term and permanent employees, nor in certain specific work models such as trainee employment (para. 32). All of the above must be treated equally so that each employee has the right to be considered for reasonable accommodation measures. In cases where employees are no longer able to perform the tasks they previously carried out, the employer is obliged to consider transferring them to jobs that would be appropriate for their current working capacity, regardless of the nature of the employment contract. This, however, should not impose an unreasonable burden on the employer; accordingly, the Court emphasised once again that such measures are inapplicable if they entail excessive costs or significant disruption to the work process.

The cited examples from the practice of the two European courts allow for several conclusions. First, it is evident that the right to reasonable accommodation is recognised as a distinct right, forming part of a complex set of rights of persons with disabilities, which collectively ensure their equal treatment across different segments of social activities and in the exercise of various rights. It is also apparent that, in accordance with the interpretations of the CRPD, the right to reasonable accommodation is not confined to the sphere of employment but equally extends to the provision (or denial) of services, including those integral to enjoyment of the right to education. Furthermore, it can be concluded that the fundamental obligation of an employer, in relation to the right to reasonable accommodation at work, is to recognise the needs of the employee based on the information available and to take all reasonable steps to implement one or more of the available reasonable accommodation measures. Only where a rational, reasoned, and objective analysis of the available resources demonstrates that no measures or that not all potential measures are feasible, can the employer be considered to have fulfilled its obligations, even if the position of the person with a disability has not been fully equalised with that of other employees. A refusal to consider the adoption of such measures, or a complete disregard for the need for such measures, constitutes a clear violation of the right to reasonable accommodation.

All this is important not only for the observation of international standards in the interpretation of legal concepts relating to the right to reasonable accommodation, but also for understanding how European Union Member States implement the standards governing its application.

4. A comparative overview of selected European case law

Following the conclusions regarding the interpretation of reasonable accommodation standards, the practice in several European countries can be examined. The cases were selected primarily to illustrate the concretisation of certain abstract standards: the employer's duty of conduct, the reasonableness of the selected measures, and the undue financial burden associated with their implementation.²

In one Belgian case (Labour Court Brussels, 20 February 2018, 2016/AB/959, cited in *Equinet*, p. 5), the employer terminated the employment relationship due to a lack of suitable work for an employee returning from a two-year leave for cancer treatment. Although the employer initially arranged a gradual resumption of working hours, the Court emphasised that it had not made sufficient efforts in the selection and implementation of reasonable accommodation measures. A similar standard is evident in other cases and is not limited to employees alone. For example, the court in Liège found that an employer had engaged in discrimination by failing to adapt the workplace for an overweight job applicant (Labour Court of Liège, 26 June 2016, R.G. 15/167/A, cited in *Equinet*, p. 5).

Moreover, it is not sufficient merely to formally implement, or offer to implement, certain measures for an employee. Such measures must be "reasonable", a standard that reflects their effectiveness in achieving equality. If a measure is unsuitable for a person with a disability, fails to achieve full equality, or results in a new violation of rights, it cannot be considered adequate. Courts in Croatia (Municipal Court in Rijeka; 2016, P-102/15; partially altered and confirmed by County Court in Pula, 2017, Gž-67/17-2; cited in *Equinet*, p. 6) concluded that discrimination had occurred in the case of a lawyer with a disability who was denied access to the courtroom. The court offered two solutions, both of which equally inappropriate; the first involved carrying the lawyer into the courthouse, which was entirely unacceptable and undignified; the second amounted to segregation, relocating only the proceedings involving the lawyer to another building.

In order for an employer to implement appropriate accommodation measures, it is essential they are fully informed of the needs of the disabled person in question. Disclosure of disability and the request for accommodations are therefore two fundamental components of this process. However, as Dong, MacDonald-Wilson and Fabian (2008, p. 223) note, persons with disabilities are often highly hesitant to disclose their condition to their employer, particularly when their disabilities are not visible or are associated with greater stigma, such as psychiatric disabilities,

² The cases analysed in this text are available in the publication: Equinet Working Group on Equality Law in Practice, *Case law Compendium on Reasonable Accommodation for Persons with Disabilities*, Brussels, 2021 (hereinafter: *Equinet*).

HIV/AIDS, traumatic brain injuries, or other cognitive disabilities. It is crucial that employees trust their employers and genuinely believe that requesting accommodation measures would lead to an improvement in their working conditions rather than to stigmatisation. In a study conducted in the USA, Dong, Fabian and Xu (2016, p. 377) concluded that employees who were “determined, enthusiastic, and positive about the accommodation process were likely to express an intention to request an accommodation.” Similarly, Hickox and Case (2020, pp. 553-590) observe that discussions regarding an employee’s impairment may give rise to additional layers of conflict and discrimination. However, an employer cannot pursue true equality without having the necessary information, and without being thoroughly familiar with the needs of its employees in the workplace. Accordingly, a court in Germany (Federal Labour Court of Germany, 2014, 8 AZR 547/13; cited in *Equinet*, p. 13) held that detailed questions posed by an employer during a job interview were not discriminatory, provided that they were directed solely at understanding the candidate’s needs and at determining which accommodation measures would need to be implemented if that person were employed. By contrast, claims made in some research (Golda *et al.*, 2012, p. 28) that employees must demonstrate how an accommodation would benefit business operations in order to persuade employers to implement their requests cannot be regarded as correct. The dialogue between employee and employer serves to determine whether certain measures would be sufficiently effective and objectively feasible for the employer to implement. However, the burden of proving that a measure affects – and in most cases it will affect – the productivity of employees with disabilities should not rest on the employee, nor should such a calculation be decisive in selecting the measures, provided that the specific measure meets the requirements relating to the needs of the employee (Sunstein, 2007, p. 1908).

One of the key questions is when an employer is considered obliged to implement a reasonable accommodation measure. In practice, this obligation depends on two factors: whether the employer is aware of the disability, and whether the measure is feasible in the employer’s current situation (i.e., whether its implementation can be shown not to impose an excessive financial or organisational burden on the employer). It is illustrative that McGrath and O’Sullivan (2022, p. 46) identify three types of conduct by employers that generally constitute violations of the right to reasonable accommodation: the employer’s failure to undertake sufficient enquiries to determine the extent of the employee’s disability and consider whether special treatment and facilities could be provided; the employer’s failure to consult with the employee at all stages of the process; and the employer’s failure to process the request in a timely fashion (see also National Disability Authority, 2019, p. 118). With regard to the first condition, there are several decisions of national courts and

other bodies that demonstrate that the employer has a non-negotiable obligation, but only once it is established that the employer is aware – or can be reasonably considered to have been aware – of the existence of the disability and its specific nature. An employer is deemed to be aware of an employee's disability and needs in circumstances where this is evident – such as when the employee has been on sick leave for an illness that clearly indicates the existence and nature of disability, or when the employer has referred the employee for a health assessment – as well as when the employee has explicitly informed the employer of the disability. It is crucial that the information available to the employer is current and complete. Thus, a court in Ireland (Labour Court, 2018, *Swan O'Sullivan Accountants & Registered Auditors v Seamus Counihan*, EDA1810; cited in *Equinet*, p. 22) held that there was no discrimination when an employer dismissed an employee for poor performance without knowledge of a chronic illness that was affecting his work. The court did not consider it sufficient that the employee argued that the employer should have been aware of his health problems merely because he had experienced on one occasion a seizure at work. Conversely, the Irish national independent body for equality found discrimination had occurred when a laid-off employee, having faced potential termination, disclosed to his employer detailed information about a chronic illness that was affecting his performance (The Equality Tribunal, 2012, *An Employee v A Logistics Company* DEC-E2012-11; cited in *Equinet*, p. 23).

Considerable controversy arises when interpreting the standards for what may constitute an unacceptable burden for an employer. Several noteworthy cases illustrate this issue. In Slovakia, the court held that creating new jobs constitutes an undue burden for the employer when no suitable positions exist for the employee with disability (Regional Court in Bratislava, 2019, 8 CO/232/2018; cited in *Equinet*, p. 29). In another case, involving a deaf university professor, a court in Sweden concluded it was not reasonable to require the employer to assess whether the teacher could perform his duties while hiring permanently a sign language interpreter, as this would effectively result in employing two people instead of one (Labour Court of Sweden, Södertörn University, Case A 146/16, Judgement 51/17; cited in *Equinet*, p. 31). A similar situation arose in another case in Sweden, where the court concluded that there was no reasonable accommodation measure that would enable a deaf employee to perform the duties of a hotel receptionist (Labour Court of Sweden, 2020, *Stockholms läns landsting*, AD 2020 Nr 3; cited in *Equinet*, p. 30). This clearly delineates the limits of reasonable accommodation. However, limitations on implementing such measures are not confined to financial costs on the employer. For example, in the case of a city bus driver with heart problems, the court concluded that allowing the driver to operate at his own pace, regardless of the schedule, while guaranteeing a calm and stress-free environment, constituted

an unreasonable demand on the employer given the nature of the activity and the operational requirements of the job (Labour Court of Sweden, 23 October 2013, *Veolia Transport Sverige AB*, Case 78/13; cited in *Equinet*, p. 32).

It should be noted that, according to some authors and judicial practice, a third important factor must also be considered; the employer's obligation to distinguish between "essential" and "marginal" functions for each job (Babbitt & Hawley, 2023, p. 28). Specifically, each position could be divided into tasks that are essential to its performance and those that are ancillary, mechanical, or administrative – tasks that do not materially affect the quality or quantity of the work performed. This distinction is sometimes crucial to determine whether a job can be adapted to an employee's working capacity without substantially altering the work. For example, if a person with intellectual disabilities is hired to work in a store that also involves working behind the cash register, the employer should assess whether it is possible to rotate duties among other employees so that that individual's absence from the cash register does not disrupt the regular workflow. Although it may appear to be a relatively straightforward task for employers, in practice it is far from resolved and often produces the opposite effect, functioning as a mechanism to refuse employment to people with disabilities. Employers may exercise their discretionary authority to impose special conditions for performing certain jobs, resulting in the rejection of a job applicant with a disability on the grounds that the "essential" functions of the job for which he or she applied cannot be performed, even with the implementation of the relevant reasonable accommodation measures (Daly & Whelan, 2021, pp. 747-748).

5. Final Remarks and Recommendations

It is clear that international standards governing the application of reasonable accommodation measures are well established. However, this does not preclude deviations in practice, particularly in situations where the interest in implementing the rights of an employee with a disability must be weighed against the interest in avoiding to impose unreasonable obligations on the employer. Reflecting on the initial research questions, several conclusions can be drawn.

The right to reasonable accommodation is afforded to all persons with a disability. In the context of employment, it applies to all individuals participating in the work process. Disability, understood as an objective obstacles preventing a person from fully realising their work potential, is interpreted broadly and encompasses a wide range of illnesses and health conditions that may affect the employee. However, such condition must be of prolonged duration to justify the employer's investment

in accommodation measures. In case of short-term disability, the employer is not obliged to respond to the employee's request for such measures to be implemented.

However, it remains uncertain as to what extent the permanence of the need for accommodation measures is affected by the type of employment contract held by the employee with a disability or the contracted or expected duration of his or her relationship with the employer. Based on the available examples, such as CJEU's decision in *HR Rail* case, it appears that this should not be a factor influencing the introduction of measures. Nevertheless, in practice, this is not always the case. The argument that it is unreasonable to implement measures for employees who will remain with an employer only for a short period can be defended using the same reasoning that is applied to situations in which the circumstances limiting the employee's capacity are of limited duration. However, a consistent interpretation of this approach would give rise to several issues concerning discrimination against certain categories of workers. First, it can be noted that every employment relationship carries an element of uncertainty. Even in the case of an open-ended employment contract, circumstances may arise – whether due to actions of either party or due to objective circumstances beyond anyone's control – that could lead to the immediate or rapid termination of the employment relationship. Second, concluding that employees engaged on a short-term basis need not be provided with reasonable accommodation measures could incentivise the misuse of short-term employment contracts by employers. Finally, the question arises as to how the absence of these measures could be justified from any side. From the employer's standpoint, an employee with a disability would never be able to provide their maximum work performance, which certainly undermines the purpose of their engagement. From the employee's perspective, and indeed from the standpoint of the broader system of non-discrimination and protection of human rights, all individuals are entitled to human dignity and the right to work. The existence or enjoyment of these rights cannot be made contingent upon the type of contract concluded with the employer.

With regard to the employer's autonomy in selecting accommodation measures, it must be recognised that such autonomy exists only to a limited extent. Specifically, in situations where several equally effective (reasonable) measures are available, the final decision may rest with the employer, guided primarily by considerations of financial feasibility and organisational practicality. However, the employer should reach this decision only through a consultative process with the employee with a disability, which constrains the range of choices. If this process is not followed, the measure may prove insufficient or entirely inadequate, thereby constituting a violation of the obligation to implement it, i.e., achieving the purpose of full equality of employees with disabilities – a principle emphasised by the CJEU

in *Tartu Vangla* case. Therefore, employer autonomy is limited only to choosing among measures that will fully achieve their intended effect.

With regard to the concept of a disproportionate burden that an employer must not be required to bear, it must be acknowledged that this remains a challenge to which neither legislation nor practice has provided a fully satisfactory response. Certain measures have been clearly characterised as excessive, undermining the logic of maintaining regular business operations and the stability of the employer. Examples include the creation of a new job solely to enable an employee with a disability to continue working despite their reduced working capacity, or the provision of a personal assistant who would work alongside the employee at all times. In assessing whether a measure constitutes a disproportionate burden, only the actual costs incurred by the employer in implementing the reasonable accommodation measures should be considered. For example, if, in the previous example, the employer receives full (state or otherwise funded) reimbursement for the costs for an assistant who would support the employee with a disability at work, there can be no question of a financial burden for the employer, even if the measure itself is costly. However, for many other measures, the assessment is far from straightforward. It will typically depend on the size of the employer and its financial capacity. What constitutes an acceptable daily cost for one employer may be a financial burden that could completely disrupt the business of another. There is no clear – or even approximate – formula to establish the relationship between a (reduction in) the employer's profit and the funds that it would need to allocate to this type of support for its employees.

Finally, it can be concluded that, given the complex nature of the right to reasonable accommodation at work, it is possible to consider different options for its further development that have so far been less widely implemented. For example, in accordance with the recommendations of the CRPD (General Comment No. 8, 2022, para. 34), it is possible to link the right to reasonable accommodation with the collective bargaining process. Although the right reasonable accommodation may appear inherently individual and personalised – reflecting the need to select the most effective combination of measures to achieve the full effect – collective agreements can nonetheless provide significant support for persons with disabilities. They can reinforce the employer's obligation to implement these measures and contribute to the standardisation of procedures for their introduction. Given that this process is consultative in nature, a suitable approach would be to regulate it in detail within a collective agreement, thereby ensuring the participation of all relevant stakeholders. This is merely an idea that could inform the further development of reasonable accommodation standards at work. However, it should not be overlooked that, in many countries around the world, these standards remain underdeveloped or even

entirely neglected. In this context, the described European good practices, together with the guidelines provided by regional supranational courts, may serve as a valuable reference for promoting further standardisation and consistent implementation.

What is beyond doubt is that the right to reasonable accommodation is of fundamental importance for the realisation of substantive equality, the right to dignity of a person, and the right to work, i.e., a safe and healthy working environment and the opportunity for individuals to fulfil their full work potential. Consequently, the right to reasonable accommodation cannot be disregarded and must receive appropriate attention both within the national legal systems and in the practical implementation of the established normative standards.

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