Bulletin of Comparative Labour Relations

Reasonable Accommodation in the Modern Workplace

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Potential and Limits of the Integrative Logics of Labour Law

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Introduction

Frank Hendrickx

I GENERAL BACKGROUND

This volume provides the papers of a project coordinated by the Institute for Labour Law of the University of Leuven with support of the Fund for Scientific Research Flanders in Belgium. The University of Leuven hosted the 2015 meeting of the International Association of Labour Law Journals (IALLJ), which went together with a scientific seminar with invited papers focusing on the topic of the present work: 'Reasonable accommodation in the modern workplace: potential and limits of the integrative logics of labour law'.

The above-mentioned research project examines the issue of work incapacity and disabled workers and the need to give it an approach against the broader background of (re-) integration. It is, in light of this, considered relevant to examine whether our labour law is sufficiently 'integration minded'. Integration is potentially a richer concept than, for example, employability, as it seems to also call on efforts from the labour market, and from employers, for the benefit of workers' individual interests, instead of asking workers to take care of themselves, or reinforce themselves in a context of change and, perhaps, precariousness on the labour market. It may imply an accommodating approach from an integrative and inclusive workplace perspective. This is not only relevant for an issue like disability, but potentially goes far beyond this. The 'integrative function' of labour law has been proposed by the late Bob Hepple[1] and we have defended it after him.[2]

The focus on the role of employment discrimination law, at least as a starting point, seemed highly relevant. Employment discrimination law received new impetus in the European Union (EU) since the adoption of new legislative instruments. In light of extended competences at the EU Treaty level, the EU adopted Council Directive

1. Cf. B. Hepple, 'The Future of Labour Law', *Ind. L.J.* 1995, 322.
2. F. Hendrickx, 'Foundations and Functions of Contemporary Labour Law', *ELLJ* 2012, afl. 2, 108-129.

2000/78 EC establishing a general framework for equal treatment in employment and occupation.[3] The Directive widely influenced national anti-discrimination laws in European States. Inspired by the experience of North American legal systems, it launched a system of rules for a new generation of discriminatory criteria, such as age, disability and religion or belief.

This body of rules and principles is now developing in a time in which diversity and employability constitute growing challenges for the modern workplace. The need to match workforce diversity, or the workers' own characteristics and choices, with the employers' organizational or business needs becomes increasingly challenging. In this horizon of anti-discrimination provisions and the 'integrative function' of labour law, the notion of reasonable accommodation arises. Accommodation can be seen as referring to adapting the workplace to make it more accessible and inclusive for workers. It can be imagined that the concept of reasonable accommodation in anti-discrimination law is an emanation of a broader accommodation duty in labour law and ultimately a legal translation of a more abstract integration concept.

The central question of the 2015 IALLJ scientific seminar, referred to above, was to find out whether the idea of reasonable accommodation, under the influence of employment (anti-) discrimination law, is winning ground in labour law and whether it can be seen to be influencing labour law in a broader way in light of an integrative logics of labour law. Although the perspective of legal development in the EU has been taken as a starting point, the analysis is made with perspectives from major jurisdictions and labour law systems around the world, including Australia, Canada, Israel, Russia, South Africa and the United States.

In discussing the potential and limits of the legal concept of reasonable accommodation, the project aims to examine how employment discrimination law gives shape to an accommodated workplace in three main areas of interest: age, disability and religion or belief. Different sub-questions were raised such as: What does reasonable accommodation exactly mean in these contexts? How is it related to formal or substantial equality claims or other notions such as (in-)direct discrimination in employment discrimination law? What is the scope of 'accommodation'? How is 'reasonable' defined? Which recognized business requirements may override the duty to accommodate the workplace? Alternative concepts may be regarded depending on the national legal system from which the analysis is made. The legal analysis used legislation, case law and legal doctrine as main sources.

II OVERVIEW OF THE ANALYSIS

The different individual contributions provide an extensive analysis taking into account various perspectives, though all circling around the same problem setting and questions set. Hereafter, an attempt is made to point at findings that are seen to be relevant or essential in order to provide a broader understanding and picture of the

3. *OJ* 2 December 2000, no. L 303.

place and position of reasonable accommodation in employment discrimination law as well as in the broader labour law context.

As is shown in the contribution of *Steve Wilborn*, the concept of reasonable accommodation as a framework for discrimination law, was initially developed in the United States in the areas of religious and disability discrimination. While the U.S. could be seen as a leading example, certainly for Europe, the U.S. system has been rather reluctant in applying the reasonable accommodation model further beyond these areas, although there are examples. It is, for example, not applied to age discrimination. In areas in which reasonable accommodation can work, the U.S. case shows that the standard for it can still be vague. The duty to make reasonable accommodation seems stronger and more effective for disability as compared to religion.

Kevin Banks shows us in his contribution that in Canada reasonable accommodation stands central in anti-discrimination law. The duty to accommodate arose out of the efforts of Canadian courts, tribunals as well as legislatures. The Canadian example sheds some light on how reasonable accommodation is viewed. For example, it is accepted that the extent of the required accommodation will depend upon the wealth and the size of employer. Furthermore, reasonable accommodation does not require pay without productive work. Disability is reported to be the most frequently used ground of accommodation in the case law and the concept of disability seems to be quite broad, including injury, illness and some temporary conditions. The idea of 'accommodation' is found in measures on leave for family reasons, workers' compensation and in accessibility statutes. As Banks points out, the Canadian experience 'demonstrates the possibility and the implications of implementing reasonable accommodation of a wide range of intrinsic personal characteristics and choices fundamental to human dignity through employer obligation and duties.'

A thorough insight in the system of Australia is offered by *Anna Chapman*. She shows that a number of legal mechanisms have developed through which a worker can seek to have adjustments made to individual work arrangements. The most firmly established right to reasonable accommodation relates to the attribute of disability, but modifications might also include, for example, modifications in working time in light of family responsibilities. Nevertheless, the only anti-discrimination statute at the Commonwealth level that contains an explicit obligation of reasonable accommodation is the 1992 Disability Discrimination Act. Reasonable adjustments are defined in the act, but it ultimately requires a balancing process, weighing up various matters. Chapman shows that State and Territory anti-discrimination legislative initiatives have largely mirrored the Commonwealth Act. Beyond the anti-discrimination provisions, the more recent Fair Work Act (2009) is reported as an area in which employee requests for accommodation are facilited for reasons of care responsibilities. However, it is pointed out that this Act provides a procedural framework for the process of requesting an adjustment or change. It does not seem to envisage a process of balancing the employee's interest in being accommodated against the interests of the employer.

In my own paper (*Frank Hendrickx*), I discuss disability and reintegration in work, focusing on the interplay between EU non-discrimination law and labour law. Importance is attached to the case law of the Court of Justice of the European Union

(CJEU). In *Chacon Navas* this Court used a medical model of disability discrimination law. In order to determine the concept of disability, the Court focused on the impairment(s) of a person concerned. However, in *HK Danmark* the CJEU left this approach in favour of a social model. It added that 'the concept of "disability" must be understood as referring to 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.' It is remarkable that the CJEU is strongly influenced by the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), adopted on 13 December 2006. The UN CRPD has a broad and integrated approach of disability, encompassing various areas and sectors of individual and societal life, including the aim to cover all persons with a disability. The step from the medical model to the social model of disability is argued to be an inevitable one. The social model is more proper to a labour law understanding of integration. It also seems more appropriate in terms of a labour market policy model searching for strategies of employability and inclusion.

Alan Neal critically discusses the Europe-wide framework of regulation concerning disability discrimination. He refers to his proposition that normative compliance was being placed above functional integrative outcomes for disabled persons seeking to participate in the labour market. He drew this from the suggestion that Anglo-American Common Law experience had given rise to a 'promotional' model regarding disabled persons at work while the EU approach would bring an essentially 'penal' regime for this issue. That may, indeed, lead to wrong 'mind-set' and limit the impact of regulatory initiatives. He is also critical for what he names the 'one size fits all' nature of the equal treatment principle in EU legislation. The concept of reasonable accommodation in the European Directive is seen to provide a variety of 'exit gateways' to enable employers to avoid liability in cases of disability discrimination. Building further on Neal's suggestion it appears that the concept of reasonable accommodation in case of disability loses its potential when it remains (too much) locked in the model of equal treatment.

The model of Sweden is presented in the analysis of *Mia Rönnmar*. The Swedish system knows the concept for reasonable accommodation for disability discrimination law. It involves an assessment on a case by case basis. It is apparent that the assessment of reasonableness allows for reference to various factors including the employer's economic situation and the form and duration of the employment relationship. The case law on the subject, however, remains rather limited. Interestingly, Rönnmar refers to a complaint made under the UN CRPD in relation to a judgment from the Swedish Labour Court. The UN Committee did not find a violation of the UN Convention. Nevertheless, Rönnmar sees the case as a sign of the increased attention paid to international law and human rights law instruments in Sweden. That may be promising in light of the UN Convention. Furthermore, it is worth noting that Sweden introduced a new legal provision in order to ban inadequate accessibility for people with disabilities. The new ban has a wider scope than the previous requirement for reasonable accommodation and applies to working life and beyond. The aim of the ban

is to increase accessibility for people with disabilities in order to achieve equality and increase participation. It remains to be seen whether this is an effective strategy.

Andrzej Świątkowski focuses on Poland. He refers to recent initiatives to bring national legislation in line with the EU anti-discrimination instrument. For this reason, Polish legislation was amended in 2010, in particular with regard to disabilities. The mentioned act has been effective from 1 January 2011. A new concept of reasonable accommodation to persons with disabilities was adopted in Poland following the principles that there is a positive obligation of each employer to adapt the workplace to the requirements and needs of 'non-typical' employees or candidate employees. At the same time, a justification (exception) is introduced and the criterion of reasonableness for employer refusal is applied. However, in Polish labour law no examples were reported which would illustrate the types and scope of adaptation of workplaces to the needs and requirements of persons with disabilities. Świątkowski opens the issue by referring to financial incentives for employers employing disabled employees and measures supporting disabled workers seeking (new) employment. It is clear that Poland applies a broader framework than merely a non-discrimination concept, but nevertheless has adapted its system to the EU legal framework of equal treatment.

With the contribution of *Katayoun Alidadi* the issue of reasonable accommodation for religion or belief is being dealt with. Alidadi treats this subject as well as company 'neutrality policies' in a theoretical and European context, with particular attention to Belgium. She argues that despite the steady rise of EU non-discrimination law, its effectiveness in addressing religious or philosophical disadvantage, remains limited. Aspects of reasonable accommodation may concern dress codes, time demands, religious and workplace demands, job duties and conscientious objections, and workplace socializing expectations or demands. According to Alidadi, 'the judicial legitimating of private sector neutrality policies (clauses banning religious, philosophical (and often also political) is legally flawed and must be reversed, sending the right -integrative- message out.'

Sophie Robin-Olivier discusses reasonable accommodation for religion and other motives in French labour law. It is interesting to note that, in France, the notion of 'reasonable accommodation' does not provide the concept to solve conflicts concerning religion in the workplace. Reasonable accommodation remains reserved for the field of disability law. In this context, in recent case law, no duty to accommodate was imposed on employers with regard to wearing the Islamic headscarf. This would rather be discussed under the French notion of *'laïcité'*. Robin-Olivier demonstrates that 'negative accommodation' rather than 'positive accommodation' seems to prevail. Nevertheless, she argues that under French rules implementing EU anti-discrimination law, accommodation is already a requirement, even if the concept is not used. She refers to the case law of the CJEU in which employers are not allowed to invoke a business related justification for differentiation if clients demand not to be provided services by a woman wearing an Islamic headscarf.

Beyond this, the idea of accommodation is found present in other sections of French labour law and, perhaps, in a stronger way than under discrimination provisions. For example, case law has made it clear that employers have to take into account workers' family lives when applying mobility clauses or when organizing working