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Original Citation

Lane, Jackie and Kelly, Rebecca (2013) A comparative analysis of the attitudes in Denmark and the United Kingdom towards disabled adults, in particular those with autism, in the workplace. In: LLRN Inaugural Conference, 13th - 15th June 2013, Barcelona, Spain. (Unpublished)

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A comparative analysis of the attitudes in Denmark and the United Kingdom towards disabled adults, in particular those with autism, in the workplace.

Presented at the Labour Law Research Network Inaugural Conference at Pompeu Fabra University, Barcelona, June 13-16, 2013

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Denmark and the UK are both members of the European Union and are therefore bound by the same European legislation. The purpose of this research is to investigate the key differences between the interpretation and implementation of the EC Equal Treatment in Employment and Occupation Directive 2000/78/EC in the two countries, and to ask whether any differences can be attributed to a general difference in attitude towards inequality between the UK and Denmark. There will be a particular focus on disability, more especially autistic spectrum disorders (ASDs), a lifelong developmental disability that affects how a person communicates with and relates to other people. It is a spectrum disorder and those affected will exhibit a range of difficulties, but many are able to live normal, independent lives, while some high-functioning adults may have specialised and invaluable skills to offer employers, particularly in maths, science, computing and engineering.

This investigation is inspired by the work of the founder of a Danish employment agency, *Specialisterne*, Thorkil Sonne, who was motivated to set up the agency, specialising in jobs for autistic people, after finding that his own son was autistic. It was the first agency in the world to establish a business model which specifically places people with autism, recognising that they have particular capabilities which make them especially suited to testing software and mobile phone applications, and computer programming. The company is also branching into other areas and finding suitable work for those with low functioning autism. It is a prime example of positive action for the disabled. The agency now has a base in Scotland, and it is the UK and Denmark that therefore form the basis of this comparative analysis, as Sonne's project suggests a constructive and forward-thinking attitude that embraces disabilities rather than viewing them as a problem that needs to be overcome; the

question is whether this attitude extends to Danish legislators and society, and whether it compares favourably with the UK. ¹

¹ The organisation is spreading and now has bases in the USA, Iceland, Austria and Switzerland

Discrimination and anti-discrimination in Denmark – analysis of the legal challenges²

Denmark is a kingdom made up of the countries of Denmark, Greenland and the Faroe Islands; the latter two countries are not members of the European Union and are therefore under no obligation to transpose EU Directives into domestic law, nor are they governed by Danish anti-discrimination legislation unless similar legislation is passed there.

It is instructive to note that the historical attitudes towards discrimination generally between Denmark and the UK appear to be quite different. For example, prior to the implementation of the ethnic and racial equality *Equal Treatment Directive*³, a special Committee on Equal Treatment (CET) was set up in Denmark to consider its implications. The CET consisted of some of the main stakeholders in Danish anti-discrimination policy. There was no general prohibition against discrimination under the Danish constitution⁴ suggesting that the state was allowed to promote majority culture in certain areas, for example religion. This is in stark contrast to the situation in the UK where anti-discrimination legislation has existed since the mid-1970s, and legislation to protect the disabled has been in force since 1995, many years before EU member states had been legally required to introduce such a law. However, under articles 74 and 75 of the Danish Constitution, citizens were granted free and equal access to employment and business which may have had the effect of eliminating discrimination at work. Denmark had also, since 1971, had legislation that prohibited the difference in treatment on the basis of race etc, although crucially this did *not* extend to the labour market whereas the early UK legislation (the Sex Discrimination Act 1975 and Race Relations Act 1976) did.

This was addressed in 1995 following a finding by the Danish Ombudsman who made it clear that Denmark was in breach of international obligations⁵ with regard to regulating discrimination in the labour market. This was quickly acted upon and a new civil law came into force in 1996, prohibiting difference of treatment in the labour

² Olsen, T.V. *Discrimination and anti-discrimination in Denmark – analysis of the legal challenges*. Emilie. 2008. European Commission Research DG.

³ EC Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁴ *Danmarks Riges Grundlov*, adopted by referendum in 1953. The Constitution sets out the rules governing the most important institutions of the State, the Government, the Parliament and the judiciary. National legislative authority rest with the Government and the Parliament jointly.

⁵ International Labour Organisation Convention (no. 111).

market on grounds of race, political conviction, sexual orientation and national or social origin.⁶ In this, Denmark was ahead of the UK in terms of making discrimination on the grounds of sexual orientation unlawful (introduced in the UK in 2003⁷) and currently there is no protection at all in the UK from discrimination on grounds of political conviction in the workplace. However, there was no attempt to protect the *disabled* from discrimination and thereby follow the UK's example set by the *Disability Discrimination Act 1995*. Neither was there any obligation to initiate positive action, and the burden of proof lay squarely on the complainant in the majority of cases.

In 1993, the Danish Parliament reflected the view that the encouragement of voluntary integration of disabled workers was preferable to a more formal approach, adopting the Parliamentary Resolution Concerning Equalisation of Opportunities for Disabled People and Non-Disabled people).⁸ The resolution stated that:

The Danish Parliament appeals to all national and municipal authorities as well as private enterprises that, with or without public support, they:

- Follow the principle of equal rights and equality of opportunities for disabled persons compared with other citizens, and
- Show regard for and create possibilities for expedient solutions in consideration of disabled citizens' needs in connection with the preparation of resolutions in which such consideration is at all relevant.

While not legally binding, the Resolution signalled a commitment to the principle that disabled persons should be given equal treatment, and that this could be achieved through a collective commitment. This view was not limited to disability, with a similar approach taken in relation to other grounds of discrimination.

The 1996 legislation was criticised on many counts: for failing to focus on positive action which would ensure *de facto* equality of opportunity; for lack of precision in the definitions of both direct and indirect discrimination; for difficulties with proof; and for

⁶ The Act on the Prohibition of Discrimination in the Labour Market [Lov om forbud mod forskelsbehandling på arbejdsmarkedet]

⁷ The Employment Equality (Sexual Orientation) Regulations 2003.

⁸ B 43, Folketingsbeslutning om ligestilling og ligebehandling af handicappede med andre borgere

problems with obtaining redress in the courts.⁹ It is useful here to compare the UK approach to fundamental rights in the workplace with the ‘Danish model’. In the UK, Parliament will legislate to protect certain rights, including those relating to equality; these laws will apply to everyone, without exception. All employers, all industries, all public authorities and all employees would be equal under the equality legislation, subject to the same obligations and rights. In Denmark, however, the labour market is generally regulated by collective agreements between the labour market social partners, i.e. employers’ organisations and employees’ organisations. A specialised Labour Court¹⁰ deals with conflicts between them. The agreements are supplemented by statutory provisions in areas such as health and safety at work and these areas of civil law are dealt with in the ordinary courts. According to the 2008 Civil Act no.1349 on the Prohibition of Discrimination in the Labour Market¹¹, provisions in the Act may be *replaced* by similar provisions in collective agreements, i.e. this law covers only those parts of the labour market not already regulated by collective agreements.¹² This is in sharp contrast to the UK model, where everyone is equal before the law and collective agreements do not act to replace legislative provisions under any circumstances.¹³

The 2008 Danish Act covers race, colour, religion, political opinion, belief, sexual orientation, age, disability, and national, social or ethnic origin. Collective agreements are only applicable if they provide the same or better protection against discrimination than the statutory provisions, and yet this is bound to lead to differences in protection between various employers and thereby to inequality, even though it is recognised that the potential to provide protection for the minority groups through collective agreements is to be welcomed to some extent.

The Legislation – positive action

Under the UK *Equality Act 2010* (which implements the *Equal Treatment Directive 2000/78, inter alia*), there are a number of protected characteristics, including

⁹ Justesen, P. *Racisme og discrimination – Danmark og menneskeretighederne*. [Kbh.], Ademisk Forlag, 2003, pp.116-7; cited at Olsen, p. 6.

¹⁰ *Arbejdsret*

¹¹ Introduced 5 chapters, based on previous Acts against differential treatment on the labour market, including Notification No.31 of 2005 of Act 756 of 2004, and No. 31 of 2005.

¹² Act 1349, Chapter 2, Articles 2-5b.

¹³ Badse, Christoffer, *Report on Measures to Combat Discrimination*, Country Report 2010, Denmark. Drafted for the European Network of Legal Experts in the Non-discrimination field, p.8.

disability. Under the UK Act, positive action is permitted for the first time; for example, an employer can decide to appoint an applicant from a group sharing a protected characteristic if he reasonably believes this group to be disadvantaged or under-represented in the workforce, or if their participation in an activity is disproportionately low. The employer can only use these 'tie-break' provisions when faced with a choice between two or more candidates who are equally well qualified. In addition, an employer can take steps to encourage people from groups with different needs or with a past track record of disadvantage or low participation to apply for jobs.¹⁴ Another form of positive action is that employers have had a duty to make reasonable adjustments in the workplace for disabled workers since the implementation of the *Disability Discrimination Act 1995*; these could include such things as the provision of special equipment, changes to policies and the way an employer organises the workplace, or simply adjusting physical barriers. The requirement to make adjustments or accommodations is common to all EU member states, but may be interpreted widely or narrowly in the various jurisdictions, according to the general attitude towards disability prevalent in those states.

The UK also legislated in 2009 for the specific needs of adults with autism¹⁵. It is the first UK Act of Parliament that is specific to one disability, and puts a duty on public bodies to provide support services to autistic adults. This ground-breaking act recognises what Sonne has been in no doubt about – that those with autism have special skills that are ignored, and these people are written off at an early age. He relates how, when he started working with autism charities, he met an 18 year old man, bright and good with computers, who had been given an 'early retirement' pension and living with his gift lying idle.¹⁶ The employment rate in the UK for those with autism is just 15% in full time work and 9% in part time work.¹⁷ This is a situation that cannot be tolerated in any fair and liberal modern society.

In a further move that demonstrates the growing recognition of autism around the world, the United Nations declared that April 2nd 2013 should be World Autism

¹⁴ S.158 Equality Act 2010.

¹⁵ Autism Act 2009.

¹⁶ <https://www.ashoka.org/fellow/thorkil-sonne> Accessed 25.4.2013.

¹⁷ <http://www.autism.org.uk/news-and-events/news-archive/3-march/the-undiscovered-workforce-campaign-launches.aspx>. Accessed 09.05.2013.

Awareness Day; this was the sixth annual event of this kind. United Nations Secretary-General Ban Ki-Moon's message for the event was:

This international attention is essential to address stigma, lack of awareness and inadequate support structures. Now is the time to work for a more inclusive society, highlight the talents of affected people and ensure opportunities for them to realise their potential.¹⁸

Without such recognition and intervention at all levels, from the UN, through legislators and judges, down to employers and service providers, the disabled would continue to be a distinctly disadvantaged group, discriminated against despite the attempts to ensure equality with the rest of society.

Danish law has similar provisions relating to adjustments / accommodations in the workplace and to the definition of disability. The *Danish Act on the Prohibition of Discrimination in the Labour Market 1996* obliges the employer to adapt the workplace in order to accommodate the employment of people with handicaps, unless this will place a *disproportionate* burden on the employer. It is a matter for the courts to decide what is disproportionate, and a comparison of cases heard in the UK and Denmark will help to show whether the Danish 'disproportionate burden' accommodations equate to the UK's 'reasonable adjustments', and also whether the definition of disability in each country is comparable. The difference in emphasis between the two jurisdictions is fundamental to this comparative analysis.

The Legislation - Reasonable adjustment / accommodation duties

Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market obliges the employer to adapt the workplace in order to accommodate the employment of people with handicaps, unless this will place a disproportionate burden on the employer. This is similar to UK law; under section 20 of the Equality Act, the employer is required to make reasonable adjustments to provisions, criteria or practices and to the physical environment, and to provide auxiliary aids where

¹⁸ <http://specialistpeople.com/> Accessed 25.04.2013

necessary to overcome the effects of a disability; regulations may determine what is reasonable but the courts also have discretion to decide on a case-by-case basis.

While the UK definition of disability is based on a medical model, the requirement on employers to make reasonable adjustments takes the actual protection into more of a social model, requiring measures to be taken to allow effective participation. The duty to make reasonable adjustments consists of three requirements that apply in situations where a disabled person would otherwise be placed at a substantial disadvantage in comparison with a non-disabled employee.

A key factor in determining whether an adjustment is reasonable is the cost of making it. However, financial help to support employers making reasonable adjustments from government schemes, such as Access to Work, must be taken into account in deciding how financially reasonable an adjustment is. Those with ASD may appear to be rude or difficult, given that their disability is less physically apparent, but which will nevertheless impact on their social skills and normal understanding of instructions. For employees with conditions such as ASD, in addition to making alterations to the physical environment and paying for specialized equipment, funding from Access to Work can be used to support vital training of colleagues to make them aware of the needs of those with an ASD.¹⁹

Under Danish law, when evaluating whether the burden on the employer is disproportionate, consideration is given to whether the public administration would cover all or some of the expense. Whether an accommodation is disproportionate is for the courts to decide, as the case law discussed below will demonstrate.

The legislation - the definition of disability

Section 6 of the *Equality Act* defines disability widely as a physical or mental impairment which has a substantial and adverse long-term effect on the person's ability to carry out normal day-to-day activities. This definition is based on the medical model, with the focus on what a person is unable to do due to their disability. A social model, in contrast, would place the responsibility for inclusiveness on

¹⁹ Department for Work and Pensions (2011) *Getting In, Staying In and Getting On: Disability Support Fit for the Future*, Available at www.dwp.gov.uk/docs/sayce-report.pdf [Accessed 15 April 2013]

society as a whole; such an approach would encourage what may otherwise be an disadvantage to a disabled person to be 'designed out' wherever possible.

The term used in Danish law is usually 'handicap'. A person with a handicap is described in the Act on the Prohibition against Discrimination in the Labour Market as a person with a 'physical, psychological or intellectual impairment who must be compensated in order for that person to function on an equal level with other citizens in a similar situation.' In the preparatory works to this Act it was stated that 'it is not a requirement for protection against differential treatment on the grounds of disability that there is a *specific* need for compensation.'²⁰ This means that the Act protects against discrimination on the ground of disability when a disabled person is in need of specific reasonable accommodation in order to carry out a job as well as situations where the disability has no influence on the ability to carry out a specific job.²¹

Compared with the UK definition, this definition appears to take more of a 'social model' approach, with an impairment disability only becoming a handicap if, in interaction with society, that impairment causes inequality. The wording does not specifically state that the person is 'less able' to perform a function, but immediately focuses on external factors that prevent him or her from functioning equally with others. Whilst the impairment must still be objectively ascertainable, it is suggested that the real handicap is society itself failing to meet the needs of people with impairments.

The Danish definition of 'disability' has arguably been given a narrower interpretation even than that given by the ECJ in its *Chacon Navas* judgment²². The Framework Directive for Equal Treatment in Employment²³ left open the definition of disability, enabling the European Court of Justice (ECJ) to adopt its own definition. The Advocate General's Opinion in this case adopted a medical model, rather than a social model of disability, saying that an 'autonomous and uniform' Community meaning should be given to disability. This was to be tied to the concept of a *permanent* limitation on activities, while sickness alone was not enough to trigger

²⁰ Proposal L92 of 11 November 2004, '4.1. Handicapkriteriet' and 'Bemaerkninger til de enkelte bestemmelser', 'Til nr.2'.

²¹ U.2008B.302, Pia Justesen, Handicap og discrimination pa arbejdsmarkedet, p.2, cited at Badse, p.32.

²² *Chacon Navas v Euresit Colectividades SA* C-13/05.

²³ Council Directive 2000/78/EC.

protection under the Directive. The ECJ started with Article 136 of the EC Treaty²⁴, which states that the Community exists with 'a view to lasting high employment and the combating of exclusion.' It referred to the definition of disability in the Community Charter of the Fundamental Social Rights of Workers:²⁵

43. ...the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

The ECJ's interpretation unfortunately limited the definition of disability as well as medicalising it, which stands in contrast to EU policy makers' attempt to introduce the social model, now entrenched in the Convention on the Rights of Persons with Disabilities.²⁶ The ECJ decision, with its inherent uncertainty, and reliance on the medical approach, may reinforce the medical model in the EU member states.

Case law – Reasonable adjustments / accommodations and the definition of disability

Recent cases which consider the definitions of both disability and reasonable adjustment are considered here, and comparisons drawn between Danish and English cases where applicable. In terms of reasonable adjustments to the workplace, it is possible in both the UK and Denmark for the employer to justify what would otherwise be a discriminatory act in certain limited circumstances. In *A v The Heritage Agency of Denmark*²⁷, an architect with a visual impairment worked at the Heritage Agency. He needed to be accompanied when carrying out inspections. He

²⁴ Now Art. 151 Treaty on the Functioning of the European Union (TFEU).

²⁵ Para. 26: All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.

²⁶ Article 1: The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. 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.

²⁷ Eastern High Court, *Weekly Law Journal* U.2008.1450ø, 5.3.2008

was dismissed because of budget reductions and took action under the Act. The Eastern High Court found that in the light of the financial restrictions it was permissible to prioritise employees who were able to carry out inspections alone. Judging employees on their flexibility was therefore an objective criterion pursuing a legitimate aim, and the cost of providing assistance from another architect would be to impose a disproportionate burden on the employer, thereby providing the employer with a valid defence for the discrimination. A dissenting judge was of the opinion that providing A with reasonable accommodation was not a disproportionate measure for the employer, so there was room for doubt over the decision. However, the High Court found in its final judgment that there was no violation of the Act since retaining the disabled architect would be a requirement for disproportionate measures of reasonable accommodation.

The Danish Heritage Agency is a government agency working under the Ministry of Culture, and therefore a public body. Since April 2011, all public bodies in England and Wales have been subject to a public sector equality duty which requires them to, *inter alia*, have due regard to the need to eliminate unlawful discrimination.²⁸ It seems there is no such corresponding duty on public bodies in Denmark if they are able to lawfully dismiss an employee for having extra needs *which had already been accommodated* and were, therefore, not a disproportionate burden, but which have become a financial burden.

Nevertheless, cost can be an important factor in deciding on the reasonableness of an adjustment. In the UK case of *Cordell v the Foreign and Commonwealth Office*²⁹, the Employment Appeal Tribunal (EAT) considered whether an employer's refusal to provide lip-speaking support to a deaf employee at a cost of £249,500 per year was unreasonable based on cost alone. The EAT suggested that cost alone cannot normally justify refusal to make an adjustment to the workplace. However, this case dealt with an extreme cost and, in reaching its decision, the Tribunal set out its reasons why the circumstances in this case were sufficient to justify the refusal: the proposed adjustments would account for almost half of the employer's annual disability budget, they would cost more than five times the employee's salary, and they equated to more than the entire annual cost of employing local staff at the

²⁸ Equality Act 2010, s.149.

²⁹ UKEAT/0016/11

embassy. For smaller sums, and in organisations with large budgets, a justification defence based on cost alone may still prove difficult, and even public bodies could justify a refusal to implement an adjustment to the workplace on the basis of excessive cost, despite the public sector duty.

Under Danish law, when evaluating whether the burden on the employer is disproportionate, consideration is given to whether the public administration would cover all or some of the expense. The Danish Institute for Human Rights has stated that the relatively high level of compensatory measures available through the public administration mean high demands regarding reasonable accommodations can be made to an employer.³⁰ The high degree of support available in Denmark provides a system that contrasts with the more limited help in the UK through the Access to Work scheme.³¹

The Danish system is operated at municipal level through Employment Centres and is based on the principle of compensation, allowing disabled people the same opportunities to pursue a trade or profession as persons without disabilities. Schemes include subsidies for employers to pay for personal assistance or equipment, training opportunities and wage subsidies for newly educated people. In addition, municipalities are obliged to provide flex-jobs ("Fleksjob") to persons with permanently reduced work capacity. The employer receives a wage subsidy from the municipality, the size of which depends on the degree of the disabled person's working capacity. The scheme entails a wage subsidy of a proportion of the current minimum wage as stipulated in the relevant collective agreement. The subsidies are permanent, unless the ability to work improves. For those with autism where a significant barrier is a negative attitude from employers, such support would clearly encourage employment. The lack of comparable wage subsidies in the UK has been cited as a disadvantage in the UK.³²

The definition of disability, not specified by EU law and therefore open to interpretation by national courts, has been considered in a number of cases. In

³⁰ Danish Institute for Human Rights, *Personer med funktionsnedsættelse i Danmark, report no. 3, 2005.*

³¹ <https://www.gov.uk/access-to-work/overview>.

³² European Commission (2011) Supported Employment for People with Disabilities in the EU: Good Practices and Recommendations in Support of a Flexicurity Approach, Available at ec.europa.eu/.../cowi.final_study_report_may_2011_final_en.pdf [Accessed 15 April 2013]

*F(HK) v Danish Crown (DI)*³³, an employee who was on sick leave, but still working part time, was not considered to have a disability. The Court stated that disability in practice is understood as a situation where a person has a physical, mental or intellectual impairment which causes a need for compensation in order for the person to be able to function equal to other persons in a similar situation. Disability was defined as the consequence of a chronic impairment which is not treatable to a full recovery. Since a full recovery was probable in the long term, her condition was not considered to be a disability as it was not permanent, even though the employer had dismissed her on the grounds that he did not consider that she would be fit to return to full time work in the foreseeable future. She was not considered entitled to compensation under the 1996 Act.

This seemed to go against both the EU approach in *Chacon Navas* and the approach taken in the UK where it is necessary to show only that the disadvantage is likely to be long-term or recurrent. Given that some conditions cannot be fully diagnosed, a need to show permanency could prove particularly problematic. In the UK, many conditions are treated as disabilities, some of them automatically under the 2010 Equality Act, and there is only a requirement that the disability has a long-term effect, interpreted as twelve months or more, rather than a permanent one.³⁴ Cancer and HIV³⁵, for example, are automatically treated as disabilities, whether or not there is a potential for full recovery in the long term, and it is not for an individual employer to make the decision about the potential to return to full time work in the short term. With reference to ASD, some psychologists have conducted a study that they believe shows that autism is not permanent, and that children can grow out of it, challenging the established view that this disorder of social functioning is not without a 'cure'. There is some doubt as to the general applicability of this study since it was conducted with a small group of high functioning adults who may have learned coping strategies rather than received a cure. Nevertheless, if the employer can choose to decide for himself what constitutes a permanent 'handicap', he could potentially seize on this study as evidence to justify dismissing an employee with

³³ Western High Court, *Weekly Law Journal*, U.2009.1966V, 20.3.2010.

³⁴ Equality Act 2010, Schedule 1, Part 1.

³⁵ Human Immunodeficiency Virus

ASD because a recovery could be possible and the person is therefore not disabled.³⁶

In the Danish case *A v O*³⁷, A was employed by O; she suffered from multiple sclerosis, a permanent and incurable condition that affects the nervous system. O, the employer, agreed to A working on reduced, flexible hours when her condition worsened. When she requested a further drop in her hours to 15, O refused and dismissed her. The Court agreed that she had a disability, but did not find that this constituted a *handicap* under the Act on the Prohibition of Discrimination in the Labour Market. In its interpretation of the term handicap, the Western High Court referred to preparatory works to the Act, where a person with a handicap is described as someone with a 'physical, psychological or intellectual impairment who must be compensated in order for that person to function on an equal level with other citizens in a similar situation *in life*'. Since the only compensation A needed was a further reduction in her *working* hours, the Court found that her condition did not fall within the term 'handicap' and therefore there was no violation of the Act; this would appear to be a very narrow interpretation of what constitutes a disability.

Later, the same court found that post-traumatic stress disorder did not constitute a disability as covered by the Act. In contrast, UK courts hearing employment cases have had no problems in accepting that this and other common physical and psychological disorders are 'disabilities' under the Equality Act 2010:

- Personality disorder (in *The Carphone Warehouse Ltd v Mr S Martin*)³⁸
- Dyslexia (in *Price v Transport for London*)³⁹
- Mental impairment, personality disorder and major depression (in *Jennings v Barts and the London NHS Trust*)⁴⁰
- Multiple Sclerosis (in *Burke v College of Law*)⁴¹
- Post traumatic stress disorder (in *Abbey National Plc v Dutton*)⁴²

³⁶ Children Can Grow out of Autism, *The Independent*, 15 January 2013.

³⁷ Western High Court, *Weekly Law Journal* U.2008.306V, 11.10.2007.

³⁸ UKEAT/0371/12/JOJ, and UKEAT/0372/12/JOJ.

³⁹ UKEAT/0005/11/JOJ

⁴⁰ [2013] Eq. L.R. 326

⁴¹ [2012] EWCA Civ 37.

⁴² UKEAT/0879/04/CK.

It is therefore unclear what is needed in order to be considered 'handicapped' under Danish law. The Court's reference to 'situation in life' appears to indicate that the disability must cause limitation in everyday life and not just at work, whereas the *Chacon Navas* judgment referred to limitations in *professional* life; the Danish definition of 'handicap' was therefore arguably narrower than that of the Court of Justice. In addition, the reference to a need for compensation indicates that the limitation must be closely linked to the individual's disability. In fact, 'it is unclear whether the Danish definition of disability was broad enough to live up to Danish obligations under the Employment Equality Directive.'⁴³

Given the lack of clarity on the definition of a handicap under Danish law, it was therefore almost inevitable that there would in time be a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU) under Art. 267⁴⁴ which would question whether the Danish interpretation of the Directive 2000/78 was in fact too restrictive. It is very interesting to note the judgment of the CJEU following a Danish reference⁴⁵ for a ruling on two joined cases on the following questions:

1. (a) Is any person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in paragraph 45 of the judgment [in *Chacón Navas*] covered by the concept of disability within the meaning of [Directive 2000/78]?
- (b) Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the directive?
- (c) Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?

⁴³ *Badse.*, n.13, p.33.

⁴⁴ Treaty on the Functioning of the European Union

⁴⁵ *Jette Ring v Dansk Almennyttigt Boligselskab* Case C-335/11 and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* (C-337/11)

2. Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [Directive 2000/78]?
3. Is a reduction in working hours among the measures covered by Article 5 of [Directive 2000/78]?

The CJEU held⁴⁶ that:

The concept of 'disability'...must be understood as referring to a hindrance to the exercise of a professional activity, not ... to the *impossibility* [emphasis added] of exercising such an activity. The state of health of a person with a disability, who is fit to work, albeit only part-time, is thus capable of being covered by the concept of 'disability'.

The Court also held that the concept of disability covered those arising from an illness, and not just those which were congenital, as long as they entail a limitation which hindered the full and effective participation of the person concerned in professional life, and the limitation is long-term.⁴⁷

In answer to question 3, the Court decided that a reduction in working hours was in fact the type of accommodation (included in Recital 20 of the Directive 2000/78 - patterns of working time) that the Directive was intended should cover.

It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.⁴⁸

This ruling has brought some welcome and necessary clarity to the question of what constitutes both a handicap / disability and also how the concept of reasonable accommodation / adjustment should be interpreted. The Danish preliminary ruling reference is the first case that the CJEU has ruled on since the

⁴⁶ *Ibid.*, para.44.

⁴⁷ *Ibid.*, par.47.

⁴⁸ *Ibid.*, para.64.

United Nations' Convention on the Rights of Persons with Disabilities was ratified by the EU, the UK and Denmark, and which it is bound to honour.⁴⁹ The CJEU did not set aside its decision in *Chacón Navas*, but it did acknowledge that disability must now 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.⁵⁰

Explanation for the differences

In this brief examination of some of the key differences in attitude towards inequality and disability in particular, the question arises as to why there is an apparent reluctance Denmark's part, which is generally seen as a liberal, progressive nation, to implementing law that covers a range of characteristics and whose constitution allows for positive action to ensure equality? It appears that in the 1990s and early years of the twenty first century, the Danes had debated whether in fact discrimination was really a problem and, if it was, how it should be dealt with. Olsen's findings were based on parliamentary debates and a newspaper debate concerning the board for Ethnic Equality, and indicate that the centre-left acknowledged the existence of the problem and saw legislation and public bodies as a way of dealing with it. The right-wing parties were more sceptical and even refused to admit that racial discrimination could possibly exist in their country, eschewing discussion of it as if afraid that acknowledging its existence would be to label their own countrymen racist.⁵¹

It is suggested that Danish legislation and legal practice focuses on the negative duties of removing formal barriers to equal treatment rather than using positive action to create *de facto* equal opportunities. Disability is one of the least protected grounds of discrimination in Denmark, not based on the principle of rights but on that

⁴⁹ By virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions and consequently prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-0000, paragraph 50). The primacy of international agreements over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR I-0000, paragraph 39).

⁵⁰ Judgment of the Court of Justice in Joined Cases C-335/11, C-337/11, at para. 38.

⁵¹ *Olsen n.2.*

of compensation. While the Danish concept of *discrimination* is the illegal difference of treatment, *equality* means that everyone is equally entitled to a differentiated treatment that meets their individual needs – i.e. positive action, or reasonable accommodations/ adjustments for the disabled in the workplace as happens in the UK. Danish trade unions, employers and even judges and lawyers are criticised for their lack of knowledge of discrimination, and there is no acknowledgement from politicians or the public that discrimination is a serious problem.

Conclusion

The Danish definition of disability is narrower than that under the UK Equality Act and may not even satisfy Denmark's obligations under the Equal Treatment Directive. It has been challenged in the CJEU and this may lead to a more liberal interpretation of the law in the future. Given the Danish tendency to view their country as one which has difficulty in recognising the concept of discrimination, and which holds itself up as a model of equality, it is submitted that, despite the enlightened attitude demonstrated by Danish businessman, Sonne, Denmark's legal, moral and social obligations to the disabled in the workplace lag far behind those of the UK and possibly the rest of the European Union. Given the reliance on the role of collective agreements in supplementing or replacing the law, criticisms of the Act on the Prohibition against Discrimination in the Labour Market for lack of precision in the definitions of discrimination, difficulties with proof and the problems with obtaining redress in the courts, the need for further clarification and extension of existing law is necessary to ensure that Danish law is EU compliant. The limits of the law may be in part due to the Danish tendency to view their country as a model of equality, although sadly the number of those with disabilities and out of work (in both countries) suggest that true equality is some way from being realised.

It is true that in terms of social support for disabilities, Denmark shows an impressive commitment that the UK does not quite match, but without further state intervention, such as that provided under the Autism Act, real progress is in future likely to be limited to the far-sighted work of entrepreneurs such as Thorkil Sonne.