

THE RIGHT TO BE DISABLED? – 25 YEARS OF FIGHT AGAINST DISCRIMINATION ON THE GROUNDS OF DISABILITY IN THE EU LAW AND ITS IMPACT ON THE CZECH NATIONAL LAW

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Abstract: *The aim of the article is to analyse the EU legislation concerning fight against discrimination based on disability in employment. The first part is dedicated to the notion of disability and its interpretation in the case-law of the CJEU. It analyses the role of the social approach to disability in the interpretation of the notion of disability by the CJEU. The second part is dedicated to forms of discrimination on the grounds of disability in professional life. Particular attention is paid to indirect discrimination based on disability and the right to reasonable accommodation for persons with disabilities. The third part analyses the impact of the EU legislation concerning fight against discrimination on the grounds of disability and its interpretation by the CJEU on national law of the Czech Republic.*

Keywords: *employment, discrimination, equality, disability, reasonable accommodation*

INTRODUCTION

Every human being may experience disability or illness which can hinder (full) participation in professional life on equal basis with others. Every human being may face discrimination on the ground of disability during his/her professional career. Persons with disabilities are not homogenous group. They include people with easily perceptible impairments like physical disabilities (visible lack of limb) to disabilities that are not discernible like illnesses (diabetes, oncological diseases, heart diseases, arthritis or mental diseases for instance chronic depression). The EU legislation concerning fight against discrimination based on disability in employment dates back into 1990s. On 1st May 1999 the Treaty amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts (Treaty of Amsterdam) entered into force. This Treaty had a significant impact on EU equality law because it introduced new competences for EU institutions to adopt appropriate measures to combat discrimination based on, among others, disability. On the legal base of the Treaty of Amsterdam Council directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter Employment Equality Directive) was adopted. This legally binding act of secondary law addresses to Member States to ensure equal treatment in employment and occupation irrespective of, among others, disability. In order to guarantee compliance with the principle of equal treatment with persons with disabilities, this directive lays down, inter alia, the employer's obligation to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a

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disproportionate burden on the employer. However, number of job seekers with disabilities do not inform employers on their disability or on special needs in the process of recruitment because of fear of not being employed. Moreover, number of workers with disabilities do not inform their employer on their disability or special needs because of fear of dismissal or transfer to less qualified job. Some experts highlight the fact that many disabled people face barriers – in essence discrimination resulting from false assumptions about ability and stigma.¹

It is noteworthy that the EU equality law does not protect only persons who are themselves disabled. According to the interpretation approach of the Court of Justice of the European Union (hereinafter CJEU), the Employment Equality Directive, as regards direct discrimination and harassment, protects also workers taking care of a person with disability.² It is apparent that the purpose of EU law comprises fight against discrimination by association with a person with disability because workers who are carers face difficulties in (full) participation in professional life on equal basis with others, as well.³

I. NOTION OF DISABILITY FOR THE PURPOSE OF EQUALITY LAW

As has been mentioned, Employment Equality Directive was adopted with the purpose to combat discrimination based on, among others, disability. However, the EU primary and secondary law do not define disability for the purpose of equality law. “*Traditionally, disability had been perceived as a deficit of a person, which possibly can be cured and, as long as it is not cured requires compensation.*”⁴ Medical model of disability was used by legislation for the purpose of social security benefits replacing or supplementing income from employment or occupation and for entitlements to specific services. National laws usually define degrees of disability (for example for the purpose of reduction of working capacity) and different degrees of disability entitles persons to different level of social security benefits. Later, so called social model of disability based on the idea that people with impairments are disabled by barriers operated in society that exclude and discriminate against them has developed. This model of disability suggests that disability results from the reaction of society to impairments. The social model of disability was developed by disability rights movements for the purpose to combat discrimination and exclusion of people with disabilities. Since the EU primary and secondary law provides no definition of disability as one of the prohibited grounds of discrimination, this concept has been interpreted by the case-law of the CJEU. It should be mentioned that most of the cases concerning equal treatment and prohibition of discrimination on the grounds of disability relate dismissal of workers.

¹ WADDINGTON, Lisa. Saying all the Right Things and still Getting it Wrong – the Court of Justice’s Definition of Disability and Non-Discrimination Law. *Maastricht Journal of European and Comparative Law*. 2015, Vol. 22, No. 4, p. 587.

² Case 303/06 S. Coleman v. Attridge Law and Steve Law, ECLI:EU:C:2008:415, par. 56 and 63.

³ In more details see KOMENDOVÁ, Jana. Prohibition of Discrimination on the Grounds of Disability in the EC Law, pp. 657–659. In: *Days of Law – 2008* [online]. 5. 11. 2008. [2024-05-14]. Available at: <<https://www.law.muni.cz/sborniky/dp08/files/3mezinaro.html>>.

⁴ SCHIEK, Dagmar. Intersectionality and the Notion of Disability in the EU Antidiscrimination Law. *Common Market Law Review*. 2015, Vol. 53, No. 1, p. 39.

The first case concerning interpretation of the concept of disability for the purpose of EU equality law was Chacón Navas case (C-13/05). The dispute in the main proceedings related to a dismissal of a worker by the employer (catering provider) on grounds of eight months of absence from work caused by illness. In the judgement in this case the CJEU declared that the concept of disability under Employment Equality Directive must be given an autonomous and uniform interpretation.⁵ However, the CJEU took rather restrictive approach to disability by distinguishing between disability and illness and decided that “*by using the concept of ‘disability’ in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts cannot therefore simply be treated as being the same*”.⁶ In fact, the Court refused that a dismissal based on absence from work caused by illness constituted discrimination on the grounds of disability which is prohibited. In its decision the CJEU took into consideration the fact that sickness is not explicitly mentioned in the art 13 of the Treaty Establishing the European Community (now art. 19 of the Treaty on the Functioning of the EU) and in Employment Equality Directive.

In 2010 the EU ratified the UN Convention on Rights of Persons with Disabilities. This Convention has significant impact on EU equality law and its interpretation by the CJEU that in its case-law makes references to the definition of disability according to Article 1 stipulating that “*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*”.

In joined cases HK Danmark (C-335/11 and C-337/11) the CJEU dealt with the relation between illness and disability again. Dispute in the main proceedings concerned two secretaries who suffered by illness resulting in chronic back pain. After number of paid sick leaves caused by chronic pain, they were dismissed with a shorten period of notice according to the national law. In the judgement in this case the CJEU for the first time applied definition of a person with disability according to UN Convention on Rights of Persons with Disabilities and decided that “*if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78*”.⁷ It is apparent that unlike the UN Convention on Rights of Persons with Disabilities, which uses participation in society as a reference point, the judgement in HK Danmark requires that a person is hindered in participation in the more limited field that is professional life.⁸

In the judgement in Kaltoft case (C-354/13) the CJEU recognised obesity of the worker as a disability. The dispute in the main proceedings concerned dismissal of a childmin-

⁵ Case C-13/05 Sonia Chacón Navas v. Eurest Colectividades SA, ECLI:EU:C:2006:456, par. 42.

⁶ *Ibid.*, par. 44.

⁷ Joined cases C335/11 HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and, C337/11 HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, ECLI:EU:2013:C:222, par. 41.

⁸ In more details see WADDINGTON, Lisa. *Saying all the Right Things and still Getting it Wrong – the Court of Justice’s Definition of Disability and Non-Discrimination Law*, p. 582.

der who had been classed as obese according to WHO IC adopted in 1998. The CJEU noted that the EU law does not recognise obesity as particular grounds of discrimination and confirmed that the list of grounds on which discrimination is prohibited by Employment Equality Directive is exhaustive and cannot be expanded by way of interpretation.⁹ However, *“if the obesity of the worker hindered his full and effective participation in professional life on equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity”*.¹⁰ Some experts argue that *“the Court’s approach places an emphasis on the need for limitations resulting from impairments (which in interaction with various barriers hinder participation in professional life), and the examples given of such limitations in the context of obesity are clearly physical, and directly connected to obesity or a related medical condition. It seems an individual who is ‘disabled’ by the false assumptions and prejudice of others – by discrimination – but who does not experience a physical limitation, may be excluded from protection from disability discrimination”*.¹¹

As has been mentioned, some types of disability are not discernible. Number of persons with type of a disability not visible at the first sight face barriers in recognising their disability and special needs. In case HR Rail SA (C-485/20) the CJEU interpreted the notion of disability with respect to heart disease. Dispute in the main proceedings related to a dismissal of a worker undertaking traineeship following his recruitment who, owing to his disability, has been declared incapable of performing the essential functions of the post he occupied. The CJEU decided that *“a person suffering from a health condition that requires him to be fitted with a pacemaker, a device that is sensitive to electromagnetic fields emitted, inter alia, by railway tracks, which prevents him from being able to carry out the essential functions of the post for which he was recruited falls within the scope of application of Employment Equality Directive as a person with a disability”*.¹²

Nevertheless, in case Z (C-363/12) the CJEU did not recognise disability of a worker who could not have given birth to a child because she had no uterus. The dispute in the main proceedings concerned refusal to grant paid maternity leave (or equivalent leave under national law) to a worker who had a child through surrogacy. The CJEU did not dispute that a woman’s inability to bear her own child may be a source of great suffering for her. However, in the Court’s opinion *“the concept of ‘disability’ within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers”*.¹³ It is apparent that the CJEU applied social model of disability and agreed with the Opinion of the Advocate General stating that *“the inability to have a child by conventional means does not in itself, in principle,*

⁹ Case C-354/13 Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund, ECLI:EU:C:2014:2463, par. 35.

¹⁰ Ibid., par. 60.

¹¹ WADDINGTON, Lisa. *Saying all the Right Things and still Getting it Wrong – the Court of Justice’s Definition of Disability and Non-Discrimination Law*, pp. 587-588.

¹² Case C-485/20 XXXX v. HR Rail SA, ECLI:EU:C:2022:85, par. 35.

¹³ Case C-363/12 Z. v. A Government department, The Board of management of a community school, ECLI:EU:C:2014:159, par.79 and 80.

*prevent the commissioning mother from having access to, participating in or advancing in employment”.*¹⁴ As regards the application of social model of disability one may ask whether it was really appropriate in the mentioned case. One may argue that medical condition of a commissioning mother hindered her access to the paid maternity leave (or equivalent leave under national law) and other instruments of protection of motherhood governed by national law. The instruments of reconciliation of family life and working life shall be considered as a part of professional life as well. The author of this paper fully agrees with the opinion that *“the Court’s approach to disability in this case may exclude individuals who do not have an actual limitation directly related to their impairment, but who nevertheless experience disability discrimination, from protection under the Directive”.*¹⁵

II. FORMS OF DISCRIMINATION ON THE GROUNDS OF DISABILITY IN EMPLOYMENT

The Employment Equality Directive defines forms of discrimination, namely direct discrimination, indirect discrimination and harassment. Moreover, it provides that instruction to discriminate against a person constitutes discrimination. However, it leaves to national law or practice to define this form of discrimination. Direct discrimination on the grounds of disability shall occur when one person is treated less favourably on the grounds of disability than another person is treated, has been treated or would be treated in a comparable situation.¹⁶ In practice, persons with disabilities face less favourable treatment in the access to employment. Number of employers prefer job seekers without disability. As has been analysed in chapter 1 of this article, disability may be a cause of dismissal made by the employer. Except for access to employment and dismissal, persons with disabilities meet direct wage discrimination or denial the access to vocational guidance or training which may hinder their promotion and future professional career. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular disability, at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom the Employment Equality Directive applies, is obliged, under national legislation, to take appropriate measures in order to eliminate disadvantages entailed by such provision, criterion or practice.¹⁷

Harassment is defined as an unwanted conduct related to a disability that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidat-

¹⁴ Opinion of the AG Wahl in Case C-363/12, Z. v. A Government department, The Board of management of a community school, ECLI:EU:C:2013:604, par. 95-97.

¹⁵ WADDINGTON, Lisa. *Saying all the Right Things and still Getting it Wrong – the Court of Justice’s Definition of Disability and Non-Discrimination Law*, p. 583.

¹⁶ Article 2 (2) a) of the Employment Equality Directive.

¹⁷ Article 2 (2) b) of the Employment Equality Directive.

ing, hostile, degrading, humiliating or offensive environment.¹⁸ As has been mentioned, the CJEU decided that protection against harassment is not limited to persons who are themselves disabled. In the Court's opinion *"Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof"*.¹⁹ It is apparent that the definition of harassment does not include comparison between an employee or job seeker with disability and an employee or job seeker without disability. As regards discrimination by association the definition of harassment does not include comparison between an employee taking care of a person with disability and an employee who is not carer. The main purpose of protection against harassment is to prevent violation of human dignity and creation of safe working environment for all.

II.1 Refusal or Denial to Provide Reasonable accommodation for Persons with Disabilities

Specific form of discrimination against people with disabilities consists in refusal or denial to provide a reasonable accommodation. According to Article 2 of the UN Convention on Rights of Persons with Disabilities *"reasonable accommodation means necessary and appropriate modification and adjustments not imposing disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"*. Reasonable accommodation shall be distinguished from accessibility. The Committee on the Rights of Persons with Disabilities notes that *"reasonable accommodation duties are different from accessibility duties. Both aim to guarantee accessibility, but the duty to provide accessibility through universal design or assistive technologies is an ex ante duty, whereas the duty to provide reasonable accommodation is an ex nunc duty. As an ex ante duty, accessibility must be built into systems and processes without regard to the need of a particular person with a disability, for example, to have access to a building, a service or a product, on an equal basis with others.... As an ex nunc duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights."*²⁰

The EU law regulates reasonable accommodation by Article 5 of the Employment Equality Directive stipulating that *"in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or to undergo training, unless such measures would impose a*

¹⁸ Article 2 (3) of the Employment Equality Directive.

¹⁹ Case 303/06 S. Coleman v. Attridge Law and Steve Law, ECLI:EU:C:2008:415, par. 59.

²⁰ General Comment of the Committee on Rights of Persons with Disabilities No. 6 (2018) on equality and non-discrimination point 24. In: *United Nations* [online]. [2024-05-14]. Available at: <<https://documents.un.org/doc/undoc/gen/g18/119/05/pdf/g1811905.pdf?token=u7SM7KMNalRabUdTy8&fe=true>>.

disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

Examples of measures that shall be taken are mentioned in point 20 of the reasoning of the Employment Equality Directive. They include adapting premises and equipment, patterns of working time, distribution of working tasks or the provision of training or integration resources. The list of mentioned measures is not exhaustive. In any case such measure shall be effective and practical. In the abovementioned judgement in joined cases Jette Ring (C-335/11) and Lone Skoube Werge (C-337/11) the CJEU interpreted notion of reasonable accommodation. As has been mentioned in chapter 1 of this article, the dispute in the main proceedings concerned two workers employed as secretaries suffering from chronic back pains. They were capable to continue their employment under conditions adjusted to their disability – reduction of working hours and provision of height adjustable desk. The employer did not accommodate working conditions to their disabilities which resulted in frequent absences in employment because of chronic pain. Later, both were dismissed. The CJEU decided that a reduction of working hours may constitute one of the accommodation measures referred to in Article 5 of the Employment Equality Directive.²¹

In case Tartu Vangla (C-795/19) the CJEU dealt with reasonable accommodation with respect to adaption of working tasks and using assistive technology. The dispute in the main proceedings concerned dismissal of a prison officer because of hearing impairment. The CJEU decided that reasonable accommodation may consist in *“use of a hearing aid, exemption, for him, from the obligation of performing tasks requiring him to meet the minimum standards of sound perception prescribed, or assignment to a post which does not require those standards to be reached, and no indication is provided as to the possible disproportionate nature of the burden which would be imposed by such measures”*.²² The CJEU finally decided that the dismissal of a prison officer constituted discrimination because the national legislation did not allow to ascertain whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures.²³

In the judgement in the abovementioned case HR Rail SA (C-485/20) concerning a dismissal of a worker during probationary period the CJEU agreed with the opinion of the Advocate General and observed that *“where a worker becomes permanently incapable of remaining in his or her job because of the onset of a disability, reassignment to another job may constitute an appropriate measure in the context of reasonable accommodation within the meaning of Article 5 of Directive 2000/78”*.²⁴ As has been mentioned, such measure should not give rise to a disproportionate burden. In the opinion of the

²¹ Joined cases C335/11 HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and, C337/11 HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, ECLI:EU:2013:C:222, par. 64.

²² Case C-795/19 XX v. Tartu Vangla, interveners, justiitsminister, tervise- ja tööminister, õiguskantsler, ECLI:EU:C:2021:606, par. 53.

²³ Ibid., par. 53.

²⁴ Case C-485/20 XXXX v. HR Rail SA, ECLI:EU:C:2022:85, par. 43.

ECJ (and the Advocate General), “*the possibility of assigning a disabled person to another job is only available where there is at least one vacancy that the worker in question is capable of holding*”.²⁵

The right of a person with a disability to reasonable accommodation e. g. adjustment of working environment or working equipment and accommodation of working hours (reduction of working hours, providing more breaks at work, transfer from night work to daytime work) is regulated as a part of equality law. The purpose of such accommodation is to enable to a person with a disability participation in professional life on equal basis with others. However, some types of adjustment of working conditions to specific needs of a person with a disability are necessary for the purpose of protection of health and safety at work. Both, refusal or denial to adjust working equipment or working conditions to needs of a person with a disability may create possible risk at work and promote the employee’s disability. The author of this paper shares the opinion that the employer’s duty to provide reasonable accommodation shall be regulated as a part of working conditions of specific categories of employees like working conditions of pregnant employees, employees who are carers and young employees.

II.2 Limitations to the Right to Equal Treatment with Persons with Disabilities

The right to equal treatment irrespective of disability is subjected to some limitations. First of them relates to armed forces. Member States may provide that the Employment Equality Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.²⁶ The Member States which make that choice must define the scope of that derogation. The purpose of this limitation is to enable the Member States to continue to safeguard the combat effectiveness of their armed forces.²⁷ The second limitation relates to genuine and determining occupational requirement. Member States may provide that a difference of treatment which is based on a characteristic related to any of ground of discrimination covered by the Employment Equality Directive, including disability shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.²⁸

This limitation was interpreted several times by the CJEU. In the abovementioned case *Tartu Vangla* (C-795/19) concerning dismissal of a prison officer because of hearing impairment the employer argued by need to guarantee the safety of persons and public order that justifies the minimum standards of sound perception laid down by national regulation, as well as by prohibition on the use of a hearing aid to meet those requirements laid down by national legislation. The CJEU recognised the operational capacity and proper functioning of prison services as a legitimate objective within the meaning

²⁵ Ibid., par. 48.

²⁶ Article 3 (4) of the Employment Equality Directive.

²⁷ See point 19 of the reasoning to the Employment Equality Directive.

²⁸ Article 4 (1) of the Employment Equality Directive.

of Article 4 (1) of the Employment Equality Directive.²⁹ Subsequently, the CJEU decided that *“by reason of the nature of a prison officer’s duties and of the context in which they are carried out, the fact that his or her auditory acuity must satisfy minimum standards of sound perception laid down by national legislation may be regarded as a ‘genuine and determining occupational requirement’ within the meaning of Article 4(1) for the purposes of employment as a prison officer.”*³⁰

In case *Komisia za zashtita ot diskriminatsia*, (C-824/19) the CJEU dealt with a question whether it is permissible that permanently blind person is excluded from the activity of juror participating in criminal proceedings and whether the ability to see may be considered as a genuine and determining occupational requirement according to Article 4 (1) of the Employment Equality Directive. In the judgement in this case the CJEU noted that *“by reason of the nature of a juror’s duties in criminal proceedings and the context in which they are carried out, which may in certain cases involve examination and assessment of visual evidence, vision may also be regarded as a ‘genuine and determining occupational requirement’ for the activity of juror in such proceedings, within the meaning of Article 4(1) of Directive 2000/78, in so far as such examination and assessment of that evidence cannot be made by means of, inter alia, medico-technical equipment”*.³¹ Moreover, the CJEU held that the objective of ensuring full compliance with principles of criminal proceedings including those of immediacy and direct assessment of evidence, is capable of constituting a legitimate aim.³² However, the CJEU left to national court to *“determine whether total exclusion of a person with visual disability from any participation in criminal proceedings, irrespective of the matters concerned and without any investigation as to whether reasonable accommodation, such as material, personal or organisational assistance could be offered to her was necessary for achieving of the mentioned aim”*.³³

III. IMPACT OF THE EU ANTIDISCRIMINATION LAW ON NATIONAL LAW – THE PERSPECTIVE OF THE CZECH REPUBLIC

The EU legislation adopted for the purpose to implement the principle of equal treatment in employment had a significant impact on the national law of the Czech Republic. In 2009 Act no. 198/2009 Coll. on Equal Treatment and on the Legal Means of Protection against Discrimination and on Amendment of Some Laws (hereinafter Antidiscrimination Act) was adopted. This act implements inter alia the Employment Equality Directive. The prohibition of discrimination of employees is provided by the Act no. 262/2006 Coll. Labour Code, as amended (hereinafter Labour Code), and the right to equal treatment with job seekers is governed by the Act no. 435/2004 Coll. on Employment, as amended (hereinafter Act on Employment).

²⁹ Case C-795/19 *XX v. Tartu Vangla*, interveners, justiitsminister, tervise- ja tööminister, õiguskantsler, ECLI:EU:C:2021:606, par. 35.

³⁰ *Ibid.*, par. 41.

³¹ Case C-824/19 *TC and UB v Komisia za zashtita ot diskriminatsia and VA*, ECLI:EU:C:2021:862, par. 52.

³² *Ibid.*, par. 53.

³³ *Ibid.*, par. 62.

It should be mentioned that the Czech national law provides two definitions of disability for the purpose of labour law. The first one concerns definition of a person with disability for the purpose of protection on labour market. It is contained in Section 67 (2) of the Act on Employment, providing that persons with disabilities are natural persons who have been recognised by a social security authority to have:

- a) A grade 3 disability (a person with a serious disability),
- b) A grade 1 or a grade 2 disability, or
- c) Health disadvantage.

Grades of disability are regulated for the purpose of disability pensions and are recognised exclusively with respect to reduction of working capacity of a person.³⁴ Such disability is long-term which means that lasts or is expected to last at least one year.³⁵ A health disadvantaged person is a natural person who has retained the ability to consistently perform work or another gainful activity, but its ability to be or remain in employment, to pursue the current profession or to make use of the current qualification or obtain qualification is substantially limited due to its long-term unfavourable health.³⁶

The second definition concerns disability for the purpose of equality law and protection against discrimination based on disability. For this purpose *“disability shall mean a physical, sensory, mental, psychological or some other impairment which precludes or may preclude the right of persons to equal treatment in the areas defined by the Antidiscrimination Act; it must be a long-term disability which lasts, or according to the findings of medical science should last, for at least one year”*.³⁷ This definition of the term disability does not require decision of state authority. The author of this paper states the opinion that the notion of disability differs in antidiscrimination law, on the one hand and laws regulating social security benefits or social services, on the other hand. She agrees with the argument that *“for the purpose of discrimination law, it is completely sufficient that exclusion results from the ascription of disability. Thus, it is unequal treatment based on assumption that a certain appearance or feature constitutes a barrier to full participation which constitutes disability”*.³⁸ It should be noted that whereas Antidiscrimination Act implementing EU legislation concerning equality of treatment prohibits discrimination based on disability, the Labour Code prohibits discrimination based on the state of health.³⁹ This means that persons with short-term health troubles such as injury or illness can claim the right to equal treatment as well. However, the obligation to provide reasonable accommodation is provided only for persons with disabilities not for persons suffering from short-term health troubles.⁴⁰

The Antidiscrimination Act defines the employers' obligation to provide reasonable accommodation. Refusal of failure to provide appropriate measures to enable to a per-

³⁴ Section 39 of Act no. 155/1995 Coll. on Pension Insurance, as amended.

³⁵ Section 26 of the Act on Pension Insurance.

³⁶ Section 67 (2) of the Act on Employment.

³⁷ Section 5 (6) of the Antidiscrimination Act.

³⁸ SCHIEK, Dagmar. *Intersectionality and the Notion of Disability in the EU Antidiscrimination Law*, p. 58.

³⁹ Section 16 (2) of the Labour Code.

⁴⁰ See TOMŠEJ, Jakub, POLÁK, Petr, KOLDINSKÁ, Kristina, PRESSEROVÁ, Petra. *Antidiskriminační zákon a související předpisy; praktický komentář*. Praha: Wolters Kluwer, 2023, p. 150.

son with a disability to have access to a certain employment, working activities, career progression or other promotion, to use employment advice, or participate in other vocational training, or to use services available to the public, unless such a measure represents an unreasonable burden are defined as a form of indirect discrimination on the grounds of disability.⁴¹ In determining whether any specific measure represents an unreasonable burden, regard shall be given to:

- a) the degree of benefit which the person with a disability has from the implementation of the measure,
- b) the financial tenability of the measure for the natural or legal person intended to implement the measure,
- c) the availability of financial and other assistance for the implementation of the measure and
- d) the capacity of substitute measures to satisfy the needs of the person with the disability.⁴²

A measure which a natural person or legal entity is obliged to take in accordance with special provisions shall not be considered to be an unreasonable burden.⁴³ As has been mentioned throughout this article, such measures include adaption the workplace or working equipment to needs of an individual with a disability, adapting working hours including reduction of working time, providing of special training or adaption of working tasks. Currently, some experts argue that reasonable accommodation for persons with disabilities include transfer to alternative work according to Section 41 (1) of the Labour Code and possible measures to be adopted should be taken into consideration by occupational medical service in the process of evaluation of the employees' ability to work (its loss) for the purpose of fulfilment of one of the reasons for notice of termination of an employment relationship.⁴⁴ They argue by the abovementioned judgement of the CJEU in the case HR Rail SA, (C-485/20).⁴⁵ However, transfer of an employee to alternative work is one-sided act in law made by the employer, the result of which may be the change in the type of work agreed in an employment contract. According to the settled case-law of the Czech Supreme Court such transfer should last for limited period till the termination of an employment relationship or till the moment of amendment of an employment contract by agreement concluded between an employer and an employee.⁴⁶ The reason of limitation of transfer to alternative work effected by one-sided act in law made by the employer is to avoid forced labour. The author of this paper states the opinion that an employer should offer to an employee with disability alternative position as a form of reasonable accommodation, if there is at least one vacancy at the employer, and both parties of an employment relationship should agree on the amendment of an employment contract. In her opinion, permanent trans-

⁴¹ Section 3 (2) of the Antidiscrimination Act.

⁴² Section 3 (3) of the Antidiscrimination Act.

⁴³ Section 3 (4) of the Antidiscrimination Act.

⁴⁴ Section 52 d) and e) of the Labour Code.

⁴⁵ RANDLOVÁ, Nataša, KALINA, Vojtěch. Ještě jednou k přiměřeným opatřením pro zaměstnance se zdravotním postižením. *Práce a mzda*. Vol. 2023, No. 4, p. 4.

⁴⁶ See for instance order of the Supreme Court of the Czech Republic of 3/11/2016, sp. zn. 21 Cdo 1276/2016.

fer to alternative work should not be made without the consent of an employee with disability concerned.

CONCLUSIONS

The EU equality law provides no definition of the concept of disability for the purpose of protection against discrimination. However, clear definition of the meaning of the term disability is relevant for determining a personal scope of application of the Employment Equality Directive in other words for determining who is protected against discrimination on the grounds of disability. The concept of disability has been interpreted by the CJEU which applies social model of disability according to UN Convention on Rights of Persons with Disabilities. It is apparent that for the purpose of fight against discrimination based on disability in employment, 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 professional life on an equal basis with others. Unlike EU law, the Czech legal order prohibits discrimination based on both, disability and state of health, The Czech national law defines persons with disabilities for the purpose of employment policy and labour law relations. The status of a person with disability for this purpose shall be recognised by the decision of state authority. However, for the purpose of the right to equal treatment in employment such narrow definition appears insufficient. For this reason, the Antidiscrimination Act defines disability as a physical, sensory, mental, psychological or some other impairment which precludes or may preclude the right of persons to equal treatment in the areas defined by the Antidiscrimination Act. Such impairment must be a long-term disability which lasts, or according to the findings of medical science should last, for at least one year. This definition has significant meaning inter alia for the obligation to provide reasonable accommodation for persons with disabilities that can include adaption of working equipment, adaption of working time, including reduction of working hours, or providing specific training. As has been mentioned, the CJEU held discrimination based on disability consisting in prohibition to use assistive technologies at workplace. In practice, discrimination based on disability can be constituted by imposition of working conditions that do not respect differences.