2020/16

Nature and extent of 'reasonable accommodation' to be provided to employees with disabilities (IE)

CONTRIBUTOR Orla O'Leary*

Summary

In a recent Supreme Court decision, it was held by a 4–1 majority that there is no reason, in principle, why the provision of 'reasonable accommodation' for an employee with a disability should not involve the redistribution of duties. The case provides guidance for Irish employers as to the extent and nature of 'reasonable accommodation' which is required by law.

Background

The Supreme Court's decision in this case followed nearly a decade of litigation. The decision concerns a special needs assistant (SNA) who had been employed by the Nano Nagle School in County Kerry, which caters for children on the autistic spectrum, and those with mild to profound disabilities. The appellant had suffered a severe accident in July 2010, as a result of which she was paralysed from the waist down and was confined to a wheelchair. In early 2011, she was anxious to resume her employment, however the school board ultimately refused her permission to return to work.

In the decision, the Supreme Court considered the Irish Employment Equality Act 1998, EU Council Directive 2000/78/EC (referred to as the 'Framework Directive'), the United Nations Convention on the Rights of Persons with Disabilities (the 'CRPD') and relevant case law.

* Orla O'Leary is an attorney-at-law at Mason Hayes & Curran, Dublin.

Supreme Court's decision

The majority decision of the Supreme Court analyses the duty of an employer vis-à-vis an employee who has, or develops, a disability which may affect their ability to carry out their role. In this case, the majority of the facts were agreed, but there were issues regarding the manner in which a portion of the expert evidence had been adduced and relied upon in the Labour Court. For this reason, the ultimate decision of the Supreme Court was to send the case back to the Labour Court for a rehearing of two of the factual issues which remained in dispute.

The decision analysed the manner in which statutory bodies must make their decisions, and laid out clear principles in relation to the manner in which section 16 of the Employment Equality Act 1998 should be interpreted.

For context, the relevant parts of section 16 of the Act read as follows:

> "*16.—(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position,* ***to retain an individual in a position****, or to provide training or experience to an individual in relation to a position, if the individual—*
>
> *(1)(b)* ***is not (or, as the case may be, is no longer) fully competent*** *and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.*
>
> *(3)(a) For the purposes of this Act,* ***a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties****.*
>
> *(3)(b) An employer shall take* ***appropriate measures****, where needed in a particular case, to enable a person who has a disability—*
> i. *To have access to employment,*
> ii. *To participate and advance in employment,*
> iii. *To undergo training,*
>
> *unless the measures would impose a* ***disproportionate burden*** *on the employer. …*
>
> *3(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of—*

doi: 10.5553/EELC/187791072020005002005

i. *The financial and other costs entailed,*
ii. *The scale and financial resources of the employer's business,*
iii. *The possibility of obtaining* ***public funding or other assistance****. …*" (Emphasis added)

Much of the debate in this case turned on whether section 16(1) should take priority over section 16(3), or whether the entirety of the section should be read cumulatively. The Supreme Court overturned the decision of the Court of Appeal and adopted the latter approach, that is, that the section must be read in its entirety and implemented in its entirety.

This means that the competence of an individual to carry out their role must mean their competence *with* reasonable accommodation having been provided. An employer is not entitled to a defence against an accusation of discrimination if they have not fully assessed the ability of the employee to carry out the relevant role after reasonable accommodation has been provided. This is particularly relevant, as one form of reasonable accommodation suggested by the Act involves the redistribution of tasks.

In this case, there was some evidence to suggest that, even with reasonable accommodation, the employee was no longer competent to carry out the role of an SNA in this particular type of school. However, the Supreme Court found that the question the case really turns on is whether or not the school adequately explored all options, and adequately investigated whether or not reasonable accommodation would enable the Appellant to carry out her role. For example, it would be necessary for the School to investigate whether, by reducing the tasks/duties of the employee, she would then be competent to carry out the remainder of her role.

This question was returned to the Labour Court to decide upon.

Commentary

This decision is from the Irish Supreme Court, meaning that its authority is binding on all courts/decision-making bodies within the jurisdiction. The impact of this decision is to impose a more onerous standard on employers than was imposed previously. The difference in standard can most easily be seen by comparing the decision of the Court of Appeal in this case to the decision of the Supreme Court.

The Court of Appeal had made a distinction between the 'duties' and 'tasks' of the role of the employee. This decision would allow the employer to firstly assess whether the employee would, with reasonable accommodation, be capable of carrying out *all* of the duties of the role. Only if this was the case would the employer be obliged to consider reallocating various tasks which the employer may no longer be capable of undertaking. In the Supreme Court, Mr Justice MacMenamin reversed this position by removing this distinction between 'duty' and 'task' due to the lack of any clear basis for the distinction to be made on a strict reading of the relevant legislative provision and further stated that there is no reason why providing reasonable accommodation should not involve a redistribution of what might be termed core 'duties' as well as non-core 'tasks'.

The Supreme Court further indicated that "*a wise employer will provide meaningful participation in vindication of his or her duty under the Act*" for the employee. This does not make a consultation process with the employee mandatory, but it certainly goes against the Court of Appeal's comments that such a consultation would not be necessary.

The Supreme Court appears to be raising the bar for employers in this decision, making it clear that the assessment of whether or not the employee can be facilitated to continue in their role with reasonable accommodation is no mere box ticking exercise. The dissenting judgment of Mr Justice Charleton is slow to criticise the employer in this case because there was no evidence that they acted in bad faith, or purposely endeavoured to discriminate against the employee. The majority decision, meanwhile, makes it clear that this is not enough. In order to avoid falling foul of the more rigorous standard of the Supreme Court, the employer will need to actively engage in a process of assessing the needs of the employee, the accommodations necessary to enable them to carry out their role, and whether or not such accommodations can be classed as 'reasonable'.

What is particularly interesting for employers is that they will now be obliged under Irish law to assess whether by narrowing the duties comprised in any given role, it will be possible for the employee to carry it out competently. This increases the amount of adaption which is 'reasonably' expected of employers, as well as leading to a grey area where one must ask how much a role can be adapted before it is a new role altogether? This is a burdensome assessment for employers to undertake, with potentially far-reaching ramifications.

Comments from other jurisdictions

Belgium (Gautier Busschaert, Van Olmen & Wynant): In Belgium, the duty of reasonable accommodation is also given a wide scope in the sense that when an employee becomes unable to perform his/her function because of a disability, the employer should look for alternatives which could involve adapting the duties and/or tasks required by the function or finding a new position altogether within the company.

The need for reasonable accommodation is in principle assessed by the occupational health doctor of the employer. His medical recommendations, despite what their name suggests, are compulsory for the employer who must propose an alternative in line with them except if it is technically or objectively impossible or for

doi: 10.5553/EELC/187791072020005002005

duly justified reasons. This is not a box ticking exercise as the labour tribunals will examine if the employer has considered all the available options within the company.
In terms of process, the occupational health doctor is obliged to meet in person with the employee before issuing his recommendations and the employer should consult the employee and/or their doctor when preparing a reintegration plan based on these recommendations.

Germany (Ines Gutt, Luther Rechtsanwaltsgesellschaft mbH): "Reasonable accommodation" is already provided for in Art. 5 of Directive 2000/78/EC and is therefore relevant for all European countries. Art. 5 of Directive 2000/78 stipulates that:

> *"Article 5*
> *Reasonable accommodation for disabled persons*
> *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 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.*"

These requirements are also implemented in German law. However, it should be noted that specific regulations were only made for employees who are disabled to a degree of at least 50% (in Sec. 162(4) and (5) of the Social Security Code IX (*Sozialgesetzbuch IX*, 'SGB IX')). Whereas for disabled employees who are not disabled to a degree of at least 50% there is no national regulation. In such cases the obligation of the employer arises from an interpretation in conformity with European law of Sec. 241(2) of the Civil Code (*Bürgerliches Gesetzbuch*, 'BGB').
In this respect, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') stated that a dismissal of a disabled employee is only effective if the employer proves that it is not able to recover the employee's inability to work by taking appropriate measures. The inability of the disabled employee to work must be given with all reasonable accommodation having been provided. If an employer does not prove that it is able to provide so-called "reasonable accommodation" and is therefore unable to employ the disabled employee, this circumstance is usually not due to the employee's disability, but to the employer's failure. A dismissal of a disabled employee for not being able to be employed is then not justified (BAG, 19 December 2013 – 6 AZR 190/12). In accordance with this decision of the BAG, the Regional Labour Court of Berlin-Brandenburg (*Landesarbeitsgericht*, 'LAG') also decided that the hypothetical workplace must be taken into account within the framework of the comprehensive balancing of interests and not the original workplace (LAG Berlin-Brandenburg, 5 June 2014 – 26 Sa 427/14). Otherwise, the employer could always argue in a work-related way and legitimately exclude disabled employees from participation in working life.
With regard to the possible accommodations the BAG usually refers to the listing of possible arrangements in recital 20 of Directive 2000/78. Recital 20 states that:

> *"(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.*"

In this context, the ECJ (Court of Justice of the European Union) has already ruled that the listing is not conclusive (ECJ, C-335/11, C-337/11 *Ring*).
Therefore, it is very likely that a German court would have stated the same. Whether the reasonable accommodations are given in the corresponding case must be examined by the responsible court. In making its decision, it must in particular consider the financial and other expenses involved, taking into account the size and financial strength of the employer and the possibility of obtaining public funds or other support.

The Netherlands (Peter Vas Nunes):

1. This Supreme Court judgment overturns a judgment by the Court of Appeal that was reported in EELC 2018/12. Both judgments are based on an analysis of Ms Daly's job. According to that analysis, her job encompassed 16 'duties'. It was established that, even with reasonable accommodation, Ms Daly was unable to perform seven out of the 16 duties. The Court of Appeal therefore concluded that Ms Daly was "not fully competent" to undertake all of the duties attached to her position.
2. This case involves at least three issues that are highly relevant to Dutch practice: (a) does the mere failure to *consider* reasonable adjustment ('accommodation') make an employer liable, even where it is later established that no reasonable adjustment was possible and, if so, how far does the duty to consider go? (b) is redistribution of tasks among employees a reasonable adjustment? and (c) what makes a function '*essential*'? Less interesting to Dutch readers is the debate in this Irish case on the relationship between, on the one hand, (i) the fact that an employer need not retain an employee who is incapable of performing the essential functions of his/her post (see recital clause 17 of Directive 2000/78) and, on the other hand, (ii) the employer's duty to provide reasonable accommodation. There has never been debate in The Netherlands as to whether (i) takes priority over (ii) or whether they should be read and implemented in their entirety. It has always been understood, as did the Irish Supreme Court, that

doi: 10.5553/EELC/187791072020005002005

the capability of an employee to perform his/her job refers to capability *with* reasonable accommodation.

3. Re (a): The Court of Appeal in this case took a material as opposed to procedural approach. What matters is whether a reasonable adjustment is or would have been possible. If an employer makes no effort to examine this possibility, but it is later established that no reasonable adjustment would have been available, the employer is not liable. The Court of Appeal phrased this approach thus: "*It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated, the fact that the process of decision is flawed does not avail the employee*." The author of this case report suggests that the Supreme Court took a more formalistic approach, holding that an employer is not entitled to a defence against an accusation of discrimination if they have not fully assessed the ability of the employee to carry out the relevant role after reasonable accommodation has been provided. This is the approach taken by the Dutch Human Rights Commission. However, my reading of the Supreme Court's judgment (at §104) is that it is more qualified: "*I respectfully disagree with the Court of Appeal's conclusion on this issue, but I do not go so far as to say there is a mandatory duty of consultation with an employee in each and every case, the section does not provide for this, still less does it provide for compensation simply for the absence of consultation in an employment situation. But, even as a counsel of prudence, a wise employer will provide meaningful participation in vindication of his or her duty under the Act. But absence of consultation cannot, in itself, constitute discrimination under s.8 of the Act.*"
4. This leaves the question of how far a duty to 'consider' goes. Must the employer in all cases involve the employee in its examination? Should the school in this case have also consulted Ms Daly's colleagues? My understanding is that the school consulted neither Ms Daly (in Dutch practice, this in itself would likely have been a fatal mistake) nor her colleagues. Suppose it had consulted all parties involved, it is easy to imagine a situation where Ms Daly had argued in favour of redistributing certain of her tasks to those colleagues and that they had objected to such redistribution. Such a situation is an unenviable one for an employer. The Dutch Supreme Court has held (in *Bons – v – Ranzijn*) that under such circumstances, employees must accept additional duties, going beyond their job description, in order to accommodate a disabled colleague.
5. Re (b): The Irish Equality Tribunal and courts in this case (in total, five instances!) went to great length to analyse the various elements of Ms Daly's position. An expert had identified her position as comprising 16 duties. For each of these 16 duties, the courts described, in detail, the duty in question, the 'task demands' involved, whether Ms Daly was fit to perform those task demands and what adaptations and equipment would be required for her to be able to carry out the duty. I wonder whether a Dutch court would do this so thoroughly.
6. The Irish Supreme Court leaves no doubt that a reasonable accommodation can be to remove ('strip out') duties from an employee. It does not, and could not, specify how far the employer's obligation in this respect goes. The limit seems to be where redistribution of duties would create an entirely new position. As the court said, "*The test must be one of fact, to be determined in accordance with the employment context, instances of which are as illustrated in s. 16(3). The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee. It is, therefore, the duty of the deciding tribunal to decide, in any given case, whether what is required to allow a person employment is reasonable accommodation in the job, or whether, in reality, what is sought in an entirely different job. Section 16(1) of the Act refers specifically to 'the position', not to an alternative and quite different position.*" Obviously, this raises the question as to whether a position becomes another position.
7. This brings us to issue (c). Recital clause 17 of Framework Directive 2000/78 provides, "*This Directive does not require the (…) maintenance in employment (…) of an individual who is not competent, capable and available to perform the essential functions of the post concerned (…), without prejudice to the obligation to provide reasonable accommodation*". I find it strange that such a crucial provision is not part of the actual body of the Directive, merely one of the recitals. The courts in this Irish case applied (the Irish transposition of) this provision, unfortunately without tackling certain basic questions which this recital clause raises, such as: what makes a function essential? What if an employee can (where necessary, after reasonable adjustment) perform some but not all of the essential functions of the post concerned? The Supreme Court seems to accept that the school in this case was obligated to consider whether removing one or more of Ms Daly's duties – even one or more essential duties – would be a reasonable adjustment. It did not however specify how many of those essential duties could be removed without creating an entirely new position.
8. Finally, I note that the system of Framework Directive 2000/78 is slightly different from that of the Dutch law implementing its provisions on disability discrimination. The Directive outlaws all forms of disability discrimination, both direct and indirect. According to Article 2(2)(b), indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice (PCP) puts disabled persons at a particular disadvantage, unless (i) the PCP is objectively justified OR (ii) the employer is obliged, under national legislation, to provide reasonable accommodation. Until recently, the ECJ dealt with claims of indirect disability discrimi-

doi: 10.5553/EELC/187791072020005002005

nation by applying the objective justification test. See, for example, *Ring* (C-335/11). Last year, in *Nobel* (C-397/18), the ECJ took a different approach; it applied the reasonable accommodation test. My reading of this test is that there is no indirect discrimination where the employer has complied with its "reasonable accommodation" obligation. Hence, an employer may limit its defence to "no reasonable accommodation was available", without needing to go into legitimate aim and proportionate means. This seems essentially what Nano Nagle School did.

United Kingdom (Richard Lister, Lewis Silkin LLP): An interesting aspect of the Supreme Court's judgment is the extent to which it imports *procedural* obligations for employers into the concept of "reasonable accommodation" under Irish law. As explained in the report, the Court emphasised the employer's duty to adequately explore the options for accommodations and investigate how effective they would be in enabling the employee to perform her role. The Supreme Court also appears to have come close to suggesting that a consultation process with the employee is required.

The equivalent law in the UK is the duty to make "reasonable adjustments" for disabled employees under the Equality Act 2010, for which it is well established that the test of reasonableness in this context is objective. In *Royal Bank of Scotland – v – Ashton* [2011] ICR 632, the Employment Appeal Tribunal (EAT) emphasised that the focus should be on the practical result of the potential adjustment, rather than the reasonableness of the *process* by which the employer decided whether to make it (e.g. whether the employee was consulted). According to the EAT, since the reasonable adjustment provisions are concerned with practical outcomes rather than procedures, the tribunal should address whether the adjustment itself can be considered reasonable.

There is no question that under the Equality Act, depending on the circumstances, it may be a reasonable adjustment for an employer to excuse an employee from certain duties or reallocate duties to other employees. In considering the reasonableness of the adjustment, the Employment Tribunal will consider matters such as whether it would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption it would have had on the employer's activities.

A key issue in the *Nano Nagle* case was clearly whether, even with reasonable accommodation, the claimant would have been able to carry out her SNA role. Under UK law an employee does not have to show that the proposed reasonable adjustment would be effective, but merely that there is a *chance* it would be successful. An adjustment might be reasonable, and therefore required, where there is 'a prospect' that it will succeed in removing the disabled employee's disadvantage (*Firstgroup plc – v – Paulley* [2014] EWCA Civ 1573).

Subject: Disability Discrimination

Parties: Nano Nagle School – v – Marie Daly (Appellant) and Irish Human Rights and Equality Commission (Amicus Curiae)

Court: Supreme Court

Date: 31 July 2019

Case number: [2019] IESC 63

Internet publication:https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IESC/2019/S63.html&query=("nano)+AND+(nagle)+AND+(school")

doi: 10.5553/EELC/187791072020005002005