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Title	Disability, EU law and the CRPD: A New Dawn?
Author(s)	Quinlivan, Shivaun; Bruton, Claire
Publication Date	2017
Publication Information	Quinlivan, Shivaun, & Bruton, Claire. (2017). Disability, EU law and the CRPD: A New Dawn? In Charles O'Mahony & Gerard Quinn (Eds.), Disability Law and Policy: An Analysis of the UN Convention. Dublin: Clarus Press.
Publisher	Clarus Press
Link to publisher's version	https://www.claruspress.ie/shop/disability-law-policy-analysis-un-convention/
Item record	http://hdl.handle.net/10379/16112

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Disability, EU law and the CRPD: A New Dawn?

Claire Bruton and
Shivaun Quinlivan¹

Introduction

This paper will examine the definition of disability in anti-discrimination employment law in Europe. This paper reviews some of the approaches to defining disability both within the European Union and by the European Union. The underlying theme of this paper is to assess what if any impact the European Union's ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) will have on those definitions. The CRPD is a significant development for persons with disabilities, described by some commentators as "ground breaking."² It is ground breaking for a number of reasons, but most significantly for ensuring that it embodies the social model of disability.³ The main focus of this paper is to assess whether the various definitions of disability perpetuate the medical/individual model of disability or support the social model of disability and to determine the most appropriate approach to the definition within the EU.

Medial Model v. Social Model

In order to place the concept of 'disability' within context, it is important to examine the two primary models of disability. According to the medical/individual model of disability the problems disabled persons face in their daily life are mainly caused by their impairment, either physical or mental, and these impairments inhibit the ability of such individuals to participate in the workforce. The response has been to focus on the 'problem' caused by the particular impairment or condition. Additionally the medical model approach is based on the belief that any reduction in the individual's quality of life is a result of the condition intrinsic to the individual. The entire focus is on addressing the functionality of the individual to allow them to live a more 'normal' life, in other words all the failings are with the individual.⁴

By contrast the second model of disability, the social model, focuses on how society and societal constraints and barriers seek to limit or inhibit full participation by, and inclusion

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² *Waddington L.*: A New Era in Human Rights Protection in the European Community: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the European Community, Maastricht Faculty of Law, Working Paper No. 2007 - 4, 1-22

³ See generally, *Barnes C.*: Theories of Disability and the Origins of the Oppression of Disabled People in Western Society. In *Barton L.*: (ed) *Disability and Society: Emerging Issues and Insights*, Longman, London (1996); *Oliver M.*: A Sociology of Disability or a Disablist Sociology? In *Barton L.*: (ed) *Disability and Society: Emerging Issues and Insights*, Longman, London (1996); *Shakespeare T. and Watson J.*: The social model of disability: An outdated ideology? *Research in Social Science and Disability*, Vol. 2, 9-28, (2001)

⁴ Quinlivan, S, "The United Nations Convention on the Rights of Persons with Disabilities: An Introduction" *ERA-Forum*, Volume 13, No. 1, 2012
<http://www.springerlink.com/content/74541066131743p/>

of, persons with disabilities in society.⁵ Consequently it is society that disables people through designing everything to meet the needs of a perceived norm those without disabilities. The social model recognizes that there is a significant amount that society can do to reduce and remove disabling barriers. This is the responsibility of society and not the individual. The purpose of anti-discrimination legislation invoking this model is to govern societal actions and prohibit objectionable behaviours. Anti-discrimination legislation ascribes equality rights to people with disabilities, thus endorsing the social model of disability as it sites the problem of disability outside the individual.

The social model of disability underpins the entire CRPD.⁶ In adopting this approach, the legal landscape has changed within the EU, the social model adopts a rights based approach to inclusion. This is what many have described as the “paradigm shift.” We have moved from the charity-based to the rights-based approach to disability policy. The theoretical battle has been won the social model has triumphed. But as Degener highlighted the social model does not “give any guidance as to how to legally define disability alternatively.”⁷ However it can be said that in adopting the social model of disability, a solid base is provided from which an expansive definition of disability can be built.

Legal Definitions of Disability: some problems!

What is apparent is that the attempts to provide a legal definition of disability have been the subject of much debate, a debate that has failed to culminate with an internationally accepted definition of disability, a failing not remedied by the CRPD.⁸ In fact there are often several different definitions of disability within any particular jurisdiction dependant on the purpose of the legislation.⁹ Legislation whose purpose is to distribute a social benefit may adopt a narrow definition of disability, or may adopt a needs based approach. For the purposes of this paper it is contended that no such limiting factors are necessary in the context of anti-discrimination legislation, the purpose of which is to prohibit objectionable behaviour: discrimination.

It is undoubtedly the case that disability is hard to define as it encompasses a variety of conditions: physical, mental and sensory. Further disabilities span a range, including mild, moderate, severe and profound disabilities. Moreover, disabilities may be temporary in nature or may be controlled by medication. This leads to demarcation

⁵ Barnes, ‘A Working Social Model? Disability Work and Disability Politics in the 21st Century’ (2000) 20 *Critical Social Policy* 441. See also Waddington, ‘Case note Chacón Navas’ (2007) 44 *CMLR* 487 at 491.

⁶ See Ambassador MacKay’s comments, <http://www.un.org/disabilities/default.asp?id=160>

⁷ Degener, T, “Definition of Disability” *EU Network of Experts on Disability Discrimination*, August 2004 at pp 5/6.

⁸ See for example: Altman, B.M., “Disability Definitions, Models, Classification Schemes and Applications”, In: Albrecht, G.L., Seelman, K.D., and Burg, M., “Handbook of Disability Studies”, Thousand Oaks: Sage Publications, 2001, pp. 97-122; Degener, T, “Definition of Disability” *EU Network of Experts on Disability Discrimination*, August 2004; Waddington, L., and Lawson, A.M., ‘Disability and Non-Discrimination Law in the EU: An Analysis of Disability Law in employment and beyond’ (Luxembourg, EU Commission, 2009).

⁹ In Ireland for example there are a multitude of definition, see for example: Disability Act 2005, Education for Persons with Special Educational Needs Act 2004, Employment Equality Act 1998-2011 all of which adopt different definitions/approaches to disability.

disputes, “when does a visual limitation constitute an impairment?”¹⁰ and what is the appropriate filter for disabilities. In addition, definitions of disability change according to developments in medical science. New disabilities emerge with new medical developments and discoveries. Genetic dispositions to certain diseases are recent examples.¹¹

There is a further issue to consider. The CRPD adopts the social model of disability; therefore there is no place for the medical model or individual model of disability. However, anti-discrimination law by its nature is individualistic, it provides in the main individual remedies or solutions to specific events or situations. The protection is not a group protection, but an individual protection for members of a group, i.e. a woman may claim gender discrimination; this does not necessarily translate into a right for all women. One potential solution suggested by a number of commentators is that we don’t need to define disability, rather we prohibit disability-based discrimination, thus ensuring that the focus is non-discrimination and not on the individual. To a large extent this is the approach adopted by the Framework Employment Directive¹² (FED) and it is contended that the resulting case law is in the main disappointing.

It may be a gross generalisation but there appear to be three distinct approaches to defining disability, the *non-definitional approach* such as that adopted by the FED. The *restrictive approach* which attempts to restrict the application of discrimination laws to the “deserving” disabled by including limiting factors such as the necessity for the disability to be substantial, long-term and to severely impact on the individual. This is the approach adopted by the American’s with Disabilities Act¹³ and the United Kingdom’s Equality Act 2010.¹⁴ Finally there is the *purposive approach*, which may be based on impairment but contains no threshold of severity, or time limitations on the applicant, this approach will be discussed below.¹⁵

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Non-Definitional Approach

¹⁰ Degener, T, “Definition of Disability” *EU Network of Experts on Disability Discrimination*, August 2004 at pp 4

¹¹ In Australia the definition of disability has recently been expanded to expressly include a genetic predisposition to a particular disability, the Disability Discrimination Act 1992 as amended by the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009

¹² Council Directive 2000/78/EC

¹³ Section 4 of the Americans with Disabilities (Amendment Act) 2008 defines disability, inter alia, as ‘long term physical, mental, intellectual or sensory’ impairments.

¹⁴ Section 5(1) of the Equality Act 2010 provides that a person has a disability if they have “ a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities.” For a discussion on the difficulties with the definition of disability in the ADA and the DDA see generally; Burgdorf, R., “Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability” *Villanova Law Review*, 1997, p. 409; Anderson, C., “Deserving Disabilities’: Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement” 65 *Missouri Law Review* (2000) p. 83; Degener, T, “Definition of Disability” *EU Network of Experts on Disability Discrimination*, August 2004; Hendriks, A. “Different Definition – Same Problems – One Way Out?” DREDF - From Principles to Practice - <http://www.dredf.org/international/Hendricks.html>; Woodhams, C., “Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995,” *Journal of Social Policy*, Volume 32, Issue 02, 2003.

¹⁵ Such as the approach in the Irish Employment Equality Acts 1998-2011.

The FED prohibits discrimination on “grounds of disability”¹⁶ but does not provide any definition of disability or provide any guidance on who is protected from such discrimination. This absence of a definition of the protected ground is common in EC anti-discrimination legislation: for example the Equal Treatment Directive¹⁷ (now subsumed into the Recast Gender Directive)¹⁸ prohibits discrimination on grounds of sex but no further detail is provided. Many member states do not provide any legislative definition of disability¹⁹ and therefore guidance will have to be sought from the relevant courts or tribunal as to the elucidation of the precise parameters of the definition.

In *Chacón Navas v. Eurest Colectividades SA*²⁰ the CJEU was asked to consider the parameters of the definition of disability for the purposes of the FED given that there was no express definition contained in the Directive.²¹ The applicant in this case challenged her dismissal as discriminatory as she had been on leave of absence and temporarily unfit for work for 8 months. The Spanish Court asked the CJEU for its view on the relationship between sickness and disability and whether sickness was subsumed into disability for the purposes of the FED.

The Advocate General argued for a restrained interpretation of ‘disability’ due to the economic consequences that might flow from claims by disabled persons.²² He saw it as desirable that a uniform interpretation of the concept of disability be developed in the European Community.²³ Interestingly he expressly acknowledged the existence of the social model of disability whereby account is taken of social perception of a disability, together with changes in the biomedical understanding of disability and that it “cannot be excluded in this context that certain physical or mental shortcomings are in the nature of ‘disability’ in one social context, but not in another.”²⁴ However, he adopted a medical definition of disability and stated that it would apply to persons “with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.”²⁵

The Grand Chamber of the CJEU in its judgment followed the decision of the Advocate General in July 2006.²⁶ The Court took the view that the concept of disability must be understood to refer to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life²⁷ and that by using the concept of disability in Article 1 of the Directive which provides the aim of the Directive is to combat certain types of discrimination (including disability) as regards employment and occupation the legislature deliberately chose a term which differs from sickness. Therefore the court stated that the two concepts could not be treated the same.²⁸ While, in certain cases, the two may

¹⁶ Article 1 of the Framework Employment Directive.

¹⁷ Council Directive 76/207/EEC.

¹⁸ Recast Directive 2006/54/EC.

¹⁹ Gerards, J. ‘Discrimination Grounds’ in Schiek, D., Waddington, L., and Bell, M., *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law*, (Oxford, Hart Publishing, 2007) at p. 128.

²⁰ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706.

²¹ See also Hoskins, D.L., ‘A High Bar for EU Disability Rights’ [2007] 36(2) IJL 228 and Waddington, L., ‘Case note Chacón Navas’ (2007) 44 CMLR 487.

²² (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 711 (paragraphs 47-51).

²³ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 711 (paragraph 64).

²⁴ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 711 (paragraph 58).

²⁵ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 711 (paragraph 76).

²⁶ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706

²⁷ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 715 (paragraph 43).

²⁸ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706 at 715 (paragraph 44).

overlap, not any sickness may qualify as a disability in the meaning of the FED. The CJEU examined the provisions of the FED concerning the obligation to provide reasonable accommodation and stated:

The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.²⁹

The definition of disability propounded by the CJEU is certainly in line with definitions in other jurisdictions,³⁰ instruments³¹ and that developed by the CJEU³² which require the disability to be long term in nature in order to be worthy of inclusion in a protected characteristic.

Finally the CJEU held that the Directive could not be extended to cover 'sickness' as an additional ground of discrimination as the grounds listed in the Directive were exhaustive.³³ In fact earlier in its judgment, the CJEU stated that it could see nothing in the FED allowing for workers to be come within its ambit of protection "as soon as they develop any type of sickness" and therefore distinguished itself from the finding of the Advocate General that persons with sicknesses of the nature of a long-term limitation should be regarded as disabled.³⁴

The judgment of the CJEU and opinion of the Advocate General are open to criticism on a number of grounds. The primary difficulty with the reasoning adopted by the CJEU is the ramifications of the decision to determine that disability for the purposes of the FED encompasses only narrow medically based disability of a long-term nature.³⁵ While it was acknowledged by the CJEU that the applicant's sickness was one which resulted in her being unfit for work for 8 months and required an operation, neither the CJEU or the Advocate General gave any consideration as to whether this relatively serious (though unspecified) condition was sufficient to amount to a disability. It has been argued that by labelling the applicant as sick, this excluded her from also being labelled as disabled.³⁶ It is also apparent from the decision of the CJEU that it felt it necessary to devise a definition of disability that would only include those deserving of being cloaked with the protection of the Directive in that they have a disability that will last for a lengthy period of time. Further the CJEU provided no consideration of the now recognised social model of disability and instead apparently unthinkingly adopted the classic medical model of disability. By adopting a purely medical model of disability without any reference to the social constructs of the reality of disability, it is arguable that

²⁹ [2006] IRLR 706 at 715 (paragraph 45).

³⁰ Section 5(1) of the Equality Act 2010 provides that a person has a disability if they have "a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities."

³¹ Article 1 of the United Nations Convention on the Rights of Individuals with Disabilities defines disability as 'long term physical, mental, intellectual or sensory' impairments.

³² *Chácon Navas v. Euresit Colectividades SA* C-13/05 [2006] IRLR 706.

³³ [2006] IRLR 706 at 716 (paragraph 56).

³⁴ [2006] IRLR 706 at 75 (paragraph 47). Emphasis added.

³⁵ Waddington, L., and Lawson, A.M., argue that the adopting of an exclusive medical model of disability is questionable in light of the recognition by the EU Parliament and the EU Commission in a number of documents and communications of the social model of disability. See Waddington, L., and Lawson, A.M., 'Disability and Non-Discrimination Law in the EU: An Analysis of Disability Law in employment and beyond' (Luxembourg, EU Commission, 2009) at p. 16.

³⁶ Hoskins, D.L., 'A High Bar for EU Disability Rights' [2007] 36(2) ILJ 228 at 232-233.

the definition of disability developed by the CJEU is not capable of extending to discrimination on the basis of a past disability or imputed disability.³⁷

The failure to define disability within the FED ensured that the ultimate arbiter as to what could amount to a disability would be the CJEU. As is evident from the decision in *Chácon Navas v. Eures Colectividades SA*³⁸ the courts cannot always be relied on to provide a positive and expansive definition of disability. That said the second decision of the CJEU pertaining to disability, *Coleman*, took an admirably progressive and expansive approach to the protection.³⁹

Purposive Approach

The approach adopted by Irish legislators has been defined as the purposive approach for this paper. The rationale for this term is that the definition of disability employed by the Employment Equality Acts 1998-2011 does not act as a gatekeeper to the protections contained within the legislation. The purpose of these Acts is to prohibit discrimination, thus the focus of the Acts is primarily on whether or not discrimination has occurred, not whether or not a person comes within the terms of a particular definition. There is the necessity to come within the definition of disability but in the main this is not a difficult threshold to meet.

The definition within the Employment Equality Acts 1998-2011 has been criticised as being an example of the medical model or individual model of disability, the authors disagree with that analysis. The World Health Organisation defines disability as:

Disabilities is an umbrella term, covering impairments, activity limitations and participations restrictions. An impairment is a problem in the body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restrictions is a problem experienced by an individual in involvement in life situations. Thus disability is a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives.⁴⁰

Consequently, the WHO, which is the closest we have to an international definition of disability, defines disability as the interaction between an impairment and society which give rise to a disability. Thus it is:

Impairment + Discrimination = Disability.

Degener therefore contends:

A discrimination law has to separate these two things by saying which treatment is regarded prohibited discrimination against whom. Disability discrimination laws thus need to define discrimination as well as disability and it makes no sense to define disability as the outcome of discrimination.⁴¹

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³⁷ See also Hoskins, D.L., 'A High Bar for EU Disability Rights' [2007] 36(2) ILJ 228 at 233.

³⁸ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706.

³⁹ (C-203/06) [2008] ECR I-05603, [2008] I.R.L.R. 722.

⁴⁰ World Health Organisation, <http://www.who.int/topics/disabilities/en/>

⁴¹ Degener, T, "Definition of Disability" *EU Network of Experts on Disability Discrimination*, August 2004 at pp 6

Accordingly disability discrimination is almost always a negative or prejudicial act based on an actual or presumed impairment. The factory manager who fires a person with epilepsy on the false assumption that his/her impairment means s/he cannot perform the functions of the job.⁴² Impairments may be visible or invisible, real or imputed but the common denominator is the response to the belief in such impairment. Consequently, it seems logical that any definition of disability in discrimination laws should refer to impairment and that reference does not in itself perpetuate the individual or medical model of disability.⁴³

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Assuming that a reference to impairment does not in itself offend the social model of disability, there are still concerns to be addressed. Ideally a definition based on impairment should not be drafted too narrowly, the terminology adopted should be neutral,⁴⁴ and there should be no threshold of severity to overcome, or arguably a threshold of duration.⁴⁵ Finally the ideal definition of disability should recognize that disability discrimination could happen to those with a history of disability, those who are imputed a disability, who may have a future disability, or those associated with a person with a disability. To achieve all this in one definition seems like a herculean feat of drafting magic. But it is contended here that the definition of disability utilized in the Employment Equality Acts 1998-2008 meets these requirements.

Commented [N4]: Hi Claire – the main contention by Degener is that the Irish model is the perfect example of the social model – not the medical model. If disability is “Impairment + Discrimination = Disability” Then in anti-discrimination legislation – both impairment and discrimination must be defined - and that does not offend the social model.

The Employment Equality Acts 1998-2008 prohibits discrimination against individuals who come within the definition of ‘disability’⁴⁶ contained in those Acts.⁴⁷ The definition does not list conditions but sets out general statements that will include most, if not all, impairments, for example paragraph (a) provides:

the total or partial absence of a person's bodily or mental functions,
including the absence of a part of a person's body,

As is evident from this there are no thresholds to overcome, similarly the definition does not exclude any conditions from the ambit of the definition of disability.⁴⁸ The Equality

⁴² See *McCorry Scaffolding (NI) Limited v A Worker* EED055 (Labour Court)

⁴³ See Degener, T, “Definition of Disability” *EU Network of Experts on Disability Discrimination*, August 2004.

⁴⁴ For example the Irish Disability Act 2005 defines disability as: “disability” in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment.” This definition focuses on the individual's inability or their restrictions in carrying on a profession, business or occupation. The focus of the definition is therefore quite negative and not neutral.

⁴⁵ That stated even the CRPD has included a threshold of duration, therefore it would appear that it is now universally accepted that only disabilities that will persist for a long-time will be covered.

⁴⁶ “disability” means—

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
 - (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
 - (c) the malfunction, malformation or disfigurement of a part of a person's body,
 - (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
 - (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,
- and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person

⁴⁷ Section 2(1) of the Employment Equality Acts 1998-2011. This definition is based on the definition of disability contained in the Australian Disability Discrimination Act 1992. For more detail on the Australian definition see Quinn, G., McDonagh, M., and Kimber, C., *Disability Discrimination Law in the United States, Australia and Canada*, (Dublin, Oak Tree Press, 1993) , pp 124-128.

⁴⁸ Disability Discrimination (Meaning of Disability) Regulations 1996. On disability discrimination in the United Kingdom see generally Doyle, B., *Disability Discrimination Law and Practice*, (6th ed, Jordans, 2008) and

Tribunal and Labour Court have interpreted the definition of disability in an extremely broad and all encompassing manner. Accordingly claimants in Ireland have not faced the difficulties which their counterparts in the UK and US have whereby the issue of whether the condition was within the definition of disability is often the deciding preliminary issue prior to any examination of the merits of the substantive cases alleging discrimination on grounds of disability.⁴⁹

An example of the pragmatic approach taken by the Equality Tribunal is well illustrated by the decision in decision of the Tribunal in *A Government Employee v A Government Department*⁵⁰ where it was held that hypertension was a disability within the meaning of the Acts, even when it was treated and being well managed.

To date conditions, which are minor and temporary in nature, have been found to be within the protected ground.⁵¹ The primary reason relied in these decisions is the express reference within the definition to disabilities which “previously existed but no longer exists” in section 2 of the Acts. In *Customer Perception Limited v. Leydon*⁵² the complainant was involved in a road traffic accident that resulted in reduced movement in her shoulder, back and neck. The Labour Court held that the injury at issue came within the meaning of paragraph (c) of the definition of disability:

taking the ordinary and natural meaning of the term malfunction...the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. It thus constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.

Moreover, in *Fernandez v. Cable & Wireless*⁵³ the complainant suffered complications from her treatment with an intravenous injection used to deal with her kidney infection and was hospitalised for one week. Upon her return to work she requested time off to attend hospital for a check up whereupon she was informed if she did so she could be open to disciplinary action. The Equality Officer had no difficulty in finding that the illness, although temporary in nature, suffered by the complainant amounted to a disability. This decision stands in marked contrast to the finding of the CJEU in *Chácon Navas*⁵⁴ discussed above which eschewed the approach of allowing an illness or sickness to be subsumed into the definition of disability in the FED.

The definition of disability extends the definition of disability to situations where the disability exists, existed in the past, may exist in the future or is imputed to the person concerned thus fully reflecting the social model of disability as it reflects and takes

Keen, S., and Outlon, R., *Disability Discrimination in Employment* (OUP, 2009). This was amended by the Equality Act 2010 so now no exclusions of any conditions exist.

⁴⁹ Quinn, G., and Quinlivan, S., ‘Disability Discrimination : the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment’ in Costello, C., and Barry, E., (ed), *Equality in Diversity: The New Equality Directives*, (ICEL, 2003)at pp. 218.

⁵⁰ DEC-E2010-055

⁵¹ For example see *Customer Perception Limited v. Leydon* [2004] 15 ELR 101 (injuries sustained from road traffic which resulted in reduced movement in back, neck and shoulder) and *Fernandez v. Cable & Wireless* DEC-E2002-052 (illnesses as a result of reaction to intravenous injection which required hospitalisation).

⁵² [2004] 15 ELR 101. See also more recently *An Granian Hotel v Langford* EDA1211 (Labour Court, 2012).

⁵³ DEC-E-2002-052.

⁵⁴ [2006] IRLR 706

cognizance of the discrimination against the individual as opposed to the disability itself. The Equality Tribunal in *HSE Employee v HSE*⁵⁵ addressed the issue of an imputed disability. In this case the complainant's appointment to staff nurse was deferred by approximately 9 months on the receipt of an Occupational Health Report which found the complainant to be morbidly obese. The Equality Tribunal found that the HSE had imputed a disability to the complainant without carrying out a risk assessment and without communicating directly with the complainant about the situation and had discriminated against the employee based on this imputed disability. The Equality Officer made no finding on whether obesity of itself is a disability, as the complainant had not made any such claim. Rather the Equality Officer found, as argued by the complainant, that a disability had been imputed to the complainant by the HSE on the basis of her serious weight problem.⁵⁶

Not only does the definition of disability include disabilities actually faced by claimants at the time of the alleged discrimination, it also includes past disabilities (such as mental health difficulties), disabilities which may arise in the future (for example a genetic predisposition to a particular disability) and disabilities which are imputed to an individual (for example an intellectual disability to a claimant who is in a wheelchair). The Employment Equality Acts 1998-2011 also prohibits discrimination on the basis of a person's association of a person with a disability.⁵⁷

In a recent decision, the Labour Court provided useful guidance on the issue of whether work related depression could amount to a disability but in doing so expressed the opinion that there has to be a certain minimum level of symptoms manifest in the condition suffered by the individual concerned to be sufficient to be a disability.⁵⁸ The Labour Court noted that while the definition in the Acts did not refer to a minimum level of extent to which the symptoms were to be present, the Labour Court held that a *de minimis* rule must be applied such that "effects or symptoms, which are present to an insignificant extent, would have to be disregarded." Significantly the Court expressed the view, on an obiter basis,⁵⁹ that mere unhappiness, ordinary stress or disappointment would not amount to a disability. In a similar vein, a more recent decision has determined that work related stress of itself does not constitute a disability for the purposes of the Acts.⁶⁰ The decision of the Labour Court establishes for the first time that there must be a minimum level of symptoms of a particular condition present for the condition to amount to a disability and receive the ascribed protection provided by the Acts. Should a claimant only have symptoms of a condition which are of an insignificant or lower extent, it appears that they would not meet the threshold established by the decision.⁶¹

⁵⁵ DEC-E2006-013 (Equality Tribunal). See also *HSE East Coast Area v. A Worker* EDA 0711 and *Ms X v. An Electronic Company* DEC-2006-042.

⁵⁶ No test has yet been established to determine when a disability is imputed to an employee. The test utilised in Australia provides useful guidance see particularly *Gordon v. Commonwealth of Australia* [2008] FCA 603.

⁵⁷ Section 6(1)(b) of the Employment Equality Acts 1998-2011. See also the decision of the CJEU in *Coleman v. Attridge Law* [2008] IRLR 722.

⁵⁸ *A Government Department v. A Worker* EDA094, Labour Court, 2009.

⁵⁹ The Labour Court expressly stated that it was not reaching a concluded view on the issue as it was not required to do so in the matter before it.

⁶⁰ *Mr A v. A Charitable Organisation* DEC-E2011-049.

⁶¹ See also *O'Rourke v JJ Red Holdings Limited t/a Dublin City Hotel* DEC-2010-045.

Further, recent case law from Ireland suggests that more employers are raising preliminary arguments as to whether particular conditions amount to disabilities most particularly where the conditions are manifested in a very minor way and there is an absence of medical evidence. Thus an element of demarcation about when does a limitation become an impairment has crept into Irish case law. The worrying element about this trend has been the willingness of the Equality Tribunal to utilize dicta from the Court of Justice in *Chácon Navas* to import a threshold of requiring the condition to last for a long time into the Irish case law.⁶² In addition the reliance of the Equality Tribunal on the CJEU decision in *Chácon Navas*⁶³ is worrying (and it is submitted incorrect) given the wide definition of disability in this jurisdiction without reference to any temporal limits. It is also arguably in breach of Article 8 and Recital 28 of the FED which clearly provide that the Directive cannot be used by member states to reduce or regress the level of protection provided in their law.⁶⁴ The importance of the decision in *Chácon Navas* becomes evident when it impacts on a detailed legislative definition of disability and serves to restrict that definition. This adds weight to the arguments that this decision should be re-visited, and the CRPD may provide the legal basis to do just that.

CRPD

Article 1 of the CRPD is described as ‘the purpose’ of the convention and part of that purpose contains what has been described as the definition or non-definition, of disability.⁶⁵ The Convention is often described as not including a definition of disability, however, there are elements within the convention that provide significant guidance on who is covered for the purposes of the Convention. There was significant concern during the drafting of the CRPD of the inclusion of a precise definition of disability as advocated by NGOs, not least from the EU Commission and government delegations.⁶⁶ As a compromise, the approach which has been described as providing “*a soft threshold definition in the form of guidance which is open-ended and inclusive*” was adopted within the CRPD.⁶⁷ The first element of that *definition* or meaning is contained in the preamble at paragraph (e) which is the part of the CRPD on purposes rather than the second article which is concerned with definitions. The meaning of disability contained in the preamble provides as follows:

⁶² *Colgan v Boots Ireland Ltd* DEC-E2010-008. See also *O'Rourke v JJ Red Holdings Limited t/a Dublin City Hotel* DEC-2010-045.

⁶³ [2006] IRLR 706.

⁶⁴ Council Directive establishing a general framework for equal treatment in employment and education Directive 2000/78/EC. See also *Catholic University School v Dooley* [2010] IEHC 496 where in the context of the Part Time Workers Directive (Directive 97/81/EC) and the Fixed Term Workers Directive (99/70/EC), Ms Justice Dunne of the Irish High Court accepted the argument made by the employees that “*the Directive rights are a floor not a ceiling. In other words, the Directive provides the minimum rights that may be provided and the State legislature can expand on that.*” For an excellent overview of the non-regression clause in EU law see Peers, S., ‘Non-Regression Clause: The Fig Leaf has Fallen’ [2010] 39(4) *Industrial Law Journal* 436.

⁶⁵ For a discussion for the rationale for not including a definition of disability see Trömel, S., ‘A Personal Perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities.’ *European Year Book of Disability Law*, Vol. 1 p115-137 at 121-122.

⁶⁶ de Burca, G., ‘The European Union in the negotiation of the UN Disability Convention’ [2010] 35(2) *European Law Review* 174 at p. 186 and 191.

⁶⁷ de Burca, G., ‘The European Union in the negotiation of the UN Disability Convention’ [2010] 35(2) *European Law Review* 174 at p.191.

Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The above statement must be read with the provision in Article one which provides:

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.

This *definition* clearly endorses the social model of disability. The focus is on the barriers and obstacles that hinder or prevent full, equal and effective participation in society; thus the focus on the failings of society and not the perceived failings of the individual. That said this *definition* also includes a potential limiting factor with the inclusion of the phrase “long-term.” However this *definition* does not require a disability to be long-term so much as provide that persons with disabilities include those who have long-term impairments. The focus of the definition is on the disabling effects of the interaction between an impairment and attitudinal and societal barriers, a very different focus to that adopted in *Chácon Navas*. It is clear that the European Union definition of disability as encompassed by the decision of *Chácon Navas* is not in compliance with the CRPD.

Commented [CB5]: But what of the long term nature requirement, is that not the same as Chacon Navas

Commented [N6]: Hi Claire – indeed I had overlooked that element – I don’t know if this comment addresses this concern. The issue with Chacon Navas is not so

The CRPD is the first human rights convention ratified by the European Union in its own right.⁶⁸ Thus the CRPD will have a new “legal status within EC law, and will have to be respected in its totality, and not as a mere add on to be referred to in passing in Community instruments.”⁶⁹ While the exact impact of EU ratification is as of yet unclear: it is the case that in areas of EU competence, international treaties, once ratified by the EU, are binding on Member States and European Institutions alike.⁷⁰ Further it is the case that directives are subordinate to international treaties, and human rights treaties like all other international agreements once ratified by the EU form an integral part of the EU legal order. The role of the CJEU is to uphold the law of the EU⁷¹ and to ensure that the EU executive and legislative bodies comply with that law which now includes the CRPD.

In 2011 a reference for a preliminary ruling was referred to the CJEU: *Jette Ring v. Dansk Almennyttig Boligselskab DAB*.⁷² The reference requests the CJEU to consider the

⁶⁸ See Council Decision 2010/48/EC

⁶⁹ Waddington, L.: A new era in human rights protection in the European Community: the implications of the United Nation’s Convention on the Rights of Persons with Disabilities for the European Community. Maastricht Faculty of Law, Working Paper No. 2007-4, 1–22

⁷⁰ Article 300(7) TEC and see also Article 216(2) Treaty of Lisbon.

⁷¹ Article 19 TFEU

⁷² Case C-335/11: the question referred: 1. (a) Is any person who, because of physical, mental or psychological injuries, 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 of the Court of Justice in Case C-13/05 Navas [1] covered by the concept of disability within the meaning of the directive?

(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?

2. Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means only that the person concerned is not capable of working full-time be regarded as a disability in the sense in which that term is used in Council Directive 2000/78/EC [2]?

3. Is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC?

4. Does Council Directive 2000/78/EC preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of illness for a total of 120 days during a period of 12

parameters of the definition of disability along very similar lines to those initially referred in *Chácon Navas*. For example amongst the questions raised is whether a “condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?”⁷³ While there are some nuanced differences between the issues referred in *Chácon Navas* and those currently before the CJEU as a result of *Jette Ring*, the issues are in the main the same. The issue then is what would allow the CJEU to re-consider or re-visit its decision in *Chácon Navas*, and it is contended that the EU adoption of the CRPD will require a different approach. A new decision is warranted as there is a new source of law, the CRPD and the CRPD is steeped in the social model of disability. Thus the CJEU must now read the FED in light of the CRPD which in turn should lead to a reassessment of *Chácon Navas*.

Conclusion

From the foregoing, it is axiomatic that the Irish definition of disability, straddling a combination of impairments and discrimination, is the most comprehensive and legally sophisticated definition discussed in this chapter. The CRPD provides an opportunity for a re-assessment of the definition so disappointingly and restrictively adopted in EU law and the FED in the CJEU decision in *Chácon Navas*.⁷⁴ Given the opportunity provided by the ratification of the CRD by the EU and the brave expansive approach adopted by the CJEU in *Coleman*,⁷⁵ it is likely that illnesses will be covered by the term ‘disability’ within the FED and the view expressed by the CJEU on sickness not being covered by the Directive in *Chácon Navas* will need be to be approached in light of these considerations. However the threshold of long-term nature of the disability may not be disturbed given the inclusion of this in the CRPD.

consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the directive, where

(a) the absence was caused by the disability

or

(b) the absence was due to the fact that the employer did not implement the measures appropriate in the specific situation to enable a person with a disability to perform his work?

⁷³ Para 1 (c), Case C-335/11.

⁷⁴ (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706

⁷⁵ (C-203/06) [2008] ECR I-05603, [2008] I.R.L.R. 722.