DEALING WITH DIFFERENCE:

A STUDY OF THREE MODELS OF REASONABLE ACCOMMODATION FOR DISABLED WORKERS

By

SAPTARSHI MANDAL

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Supervisor: Prof. Csilla Kollonay-Lehoczky

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Introduction

This thesis is about how a single legal idea – in this case 'reasonable accommodation' – is used in three different jurisdictions, to address disability discrimination at workplace. A bare definition of reasonable accommodation is that it is a set of individualized measures that an employer is required to take to accommodate a disabled employee, subject to such measures casting an 'disproportionate burden' on the employer. What is meant by 'disproportionate burden' or 'undue hardship' as it is referred to in some jurisdictions, is the question where the role of judicial interpretation becomes relevant. In this thesis, I shall look at how the idea of reasonable accommodation has been legislatively defined and interpreted by the courts in the United States, Canada and the United Kingdom.

1. Description of the Problem

The 2011 World Report on Disability jointly prepared by the World Bank and the World health Organization confirms once again, that all over the world working age disabled people have a much lower rate of employment than their non-disabled counterpart.[1] One of the reasons behind their relatively low labour force participation is labour market imperfections resulting from biased attitudes towards the disabled. Legal interventions in the area of disability employment seek to target these labour market imperfections through a range of ways. Typically, these strategies either seek to prohibit discrimination on the basis of disability or mandate that a certain proportion of the workforce must be drawn

[1] World Report on Disability, 2011. World Health Organization and the World Bank. Pg. 238. Available online at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (Last visited on 25/11/13)

from the disabled workers or create incentives for employers to voluntarily employ disabled workers or provide for a combination of any of these.

Mandated quotas or incentives for voluntary preferential hiring are part of a much older social welfare approach or distributive justice approach. Laws prohibiting workplace discrimination on the basis of disability, are of much more recent origin. Over the last two decades, there is a worldwide trend whereby the system of quotas is gradually being replaced by anti-discrimination laws.[2] The concept of reasonable accommodation is a mechanism for putting the anti-discrimination mandate into effect.

According to Michael Stein, reasonable accommodation could entail a large range on adjustments to current workplace conditions, which could be divided into two categories.[3] It could entail making changes to the physical structure or equipment at the workplace, such as providing of ramps or lowering of sinks or enabling computers with reading software. Such accommodations require 'hard costs', which are one time and quantifiable costs. Alternatively, there could be changes or adjustments to the ways in which certain jobs are done at the workplace, such as

> "a fellow worker might stack the high shelves while the hypothetical wheelchair-using employee staffs the cash register. Her circumstance might also require a human resource manager to meet with other employees to explain the change in their daily duties or a supervisor to

[2] For a brief summary of the shifts in legal approach towards protecting disabled employees at workplace, see, Waddington, Lisa. 1996-1997. 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws', *Comparative Labour Law Journal*, 18 (62), 62-101

[3] Stein, Michael. 2003. 'The Law and Economics of Disability Accommodations', *Duke Law Journal*, 53, 79-191

learn how to take these alterations into consideration when evaluating overall job performance."[4]

This type of accommodation requires costs which are difficult to quantify, and may be called 'soft costs'.[5]

While the above is the generally accepted view of reasonable accommodation, its theoretical basis and particularly, its relationship with the broad objective of anti-discrimination is contested. Different scholars explain the theoretical foundations of reasonable accommodation in different manners. Some scholars see it as flowing from the idea of substantive equality[6], some see it as an aspect of indirect discrimination[7], while some others link it to the notion of positive obligations[8]. In the United States, there is an active debate regarding whether reasonable accommodation in case of disability, is at all an anti-discrimination measure or does it require employers to do much more than what employers are usually required to do by laws against discrimination based on sex or race.[9] In view of this,

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[4] Harris, Seth & Michael Stein. 'Workplace Disability', New York Law School Legal Studies Research Paper Series 08/09 #5, p.2

[5] ibid.

[6] Fredman, Sandra. 2012. Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India. European Commission Directorate General of Justice. Luxembourg

[7] Bribosia, Emmanuelle et. al. 2010. 'Reasonable Accommodation for Religious Minorities: A promising concept for European Anti-discrimination law?' *Maastricht Journal of European and Comparative Law*, 17(2) pp. 137-161

[8] Goldshmidt, Jenny. 2007. 'Reasonable accommodation in EU equality law in a broader perspective', ERA Forum, 8:39 – 48

[9] The first view is held by: Samuel Bagenstos, 'Rational Discrimination, Accommodation and the Politics of (Disability) Civil Rights', *Virginia Law Review*. 89.5 (2003) 825; Sharon Rabin-Margalioth, 'Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?' *Berkeley Journal of Employment & Labour Law*, 24 (2003) 111; Christine Jolls, 'Accommodation Mandates', *Stanford Law Review*, 53.2 (2000) 223; Christine Jolls, 'Antidiscrimination and Accommodation' *Harvard Law Review* 115 (2001) 642. The second view is held by: Pamela Karlan and George Rutherglen, 'Disabilities, Discrimination and Reasonable Accommodation', *Duke Law Journal*, 46 (1996) 1; Samuel Issacharoff and Justin Nelson, 'Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?' *North Carolina Law Review*, 79 (2001) 307; Mark Kelman, 'Market Discrimination and Groups', *Stanford Law Review*, 53 (2001) 833, and J.H. Verkerke, 'Disaggregating Antidiscrimination and Accommodation' *William & Mary Law Review*, 44 (2003)

in this thesis I shall try to trace the origins of the concept of reasonable accommodation and describe its evolution from the sphere of religious discrimination to disability based discrimination. The ***first chapter*** of the thesis will therefore review the core idea of anti-discrimination and discuss how reasonable accommodation 'fits' within that. Continuing the same thread of discussion, the ***second chapter*** will describe the evolution of the duty to accommodate in the three jurisdictions considered in this thesis. This will be undertaken to illustrate the linkages between already existing frameworks of anti-discrimination and the relatively new legal tool of reasonable accommodation to achieve anti-discrimination in all these jurisdictions.

2. Jurisdictions under Study

The term reasonable accommodation first emerged in the United States, in connection with the duty to accommodate religious beliefs of employees at workplace, in the Civil Rights Act, 1964. But this has been interpreted restrictively by the courts and the employer has minimal obligations under such a duty. The concept was extended to the disabled by the interpretive regulations under the federal Rehabilitation Act 1973. It prohibited discrimination against the disabled in all federally funded programs and services, and imposed an obligation to provide reasonable accommodation in their favour. With the passage of the Americans with Disabilities Act 1990, this obligation was extended to private sector entities with fifteen or more employees. But the legislative intent to accommodate disabled workers in mainstream workplaces has been subverted by

1385. See also, Three Formulations of the Nexus Requirement in Reasonable Accommodation Law. 2013. Note, 126 *Harvard Law Review* 1392.

narrow interpretation of the duty by the courts. The narrow interpretation of the concept based on a conservative cost-benefit analysis of any measure, has also been upheld by the US Supreme Court[10].

In the United Kingdom, the duty of reasonable adjustment was provided for the first time by the Disability Discrimination Act 1995, which was modelled on the American law. Here too the duty extends to employers, educational institutions, goods and service providers, and all public and private authorities. But in spite of the influence of the Americans with Disabilities Act in the making of the British disability anti-discrimination law, the duty to accommodate departs from the American model. In the British law, it is a complex set of duties which differ from context to context. There are one set of accommodation duties that are reactive in nature, which requires the employers to take individualized steps to ameliorate a difficulty faced by a disabled employee at workplace. A second set of accommodation duties are anticipatory in nature, which casts an obligation on the employer to take reasonable steps to remove barriers which are likely to be faced by disabled employees. Both these set of duties apply to sectors beyond employment, but this thesis shall focus only on the operation and judicial interpretation of reasonable adjustment duties in case of employment. The original duty to accommodate disabled people both in employment and other contexts under the 1995 Act was further clarified and incorporated into the comprehensive Equality Act of 2000.

In contrast to both the United States and the United Kingdom where the idea of reasonable accommodation was introduced into anti-discrimination law through

[10] U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

statutes, in Canada the doctrine developed through judicial interpretation. The concept was first used in the 1980s by human rights tribunals under the Canadian Human Rights Act, which was later invoked by the Supreme Court of Canada in the 1985 case of *Ontario Human Rights Commission v Simpson Sears Limited*[11]. This was not a case of disability discrimination but related to the duty of an employer to accommodate religious beliefs and practices of an employee. The Supreme Court derived a duty of reasonable accommodation from the principles of equality and non-discrimination laid in the Canadian Constitution. The concept has been refined and clarified in subsequent cases involving religious practices at workplace and also applied to disability discrimination cases. In contrast to the United States cases where the courts usually uphold only the minimum duties of the employer, in case of Canada, courts have interpreted the duty of reasonable accommodation liberally.[12]

As mentioned earlier, the second chapter shall review in detail, the above legislative and judicial history of the duty to accommodate in the US, the UK and Canada. The ***third chapter*** will build on it by discussing three judgments in detail decided by courts in the three jurisdictions. The objective of chapter three is to compare styles or methods of adjudication. To understand the nature and scope of the duty to accommodate, one usually focuses on questions such as: what is the standard of reasonableness used to assess whether an employer has discriminated against a disabled employee or not; from whose point of view is

[11] [1985] 2 S.C.R. 536

[12] British Columbia Public Service Employee Relations Commission v. B.C.G.S.E.U. (Meiorin), [1999] 3 S.C.R. 3 (Can.); British Columbia Superintendent of Motor Vehicles v. British Columbia Council of Human Rights, [1999] 3 S.C.R. 868 (Can.); Quebec Human Rights and Youth Rights Commission v. Montreal, [2000] 1 S.C.R. 665 (Can.).

reasonableness measured, the disabled employee or the employer; is it reasonable if the employer takes minimum measures to accommodate or should the measures be more than minimum in accommodating the employee; is a comparator always a necessary requirement to establish while seeking accommodation? Discussing landmark judgments of the superior courts of each jurisdiction in detail and comparing them, will help in clarifying the scope, potentials and problem areas of the concept of reasonable accommodation as a tool to combat disability discrimination at workplace.

3. Research Questions

This thesis seeks to answer two broad questions:

1. Despite the fact that reasonable accommodation is currently an international human right of the disabled, which has a uniform meaning, why is it that at the domestic level, the idea of reasonable accommodation is understood and applied differently by different countries?
2. In what way is a comparative method helpful in determining the advantages and disadvantages of different conceptions of reasonable accommodation?

4. Relevance of the Comparative Method

What are the benefits of comparing the legal framework and judicial approaches of different jurisdictions, in understanding a concept? After all, laws of a particular country reflects that culture's ideas about equality, reasonableness, rights and obligations, and therefore each country's interpretation of a concept is bound to be different. What purpose is comparing these different approaches, going to

serve and does it add any real relevance to the rights of the people that are at stake in this exercise?

This is a classic question that comparative law in general has faced for a long time. A standard response of comparative law scholars has been, that comparing different legal regimes allows one to understand each of them better, along with their problems and figure out solutions to those problems. This is referred to in the academic literature as the 'functionalist' approach to comparative law. Critics of functionalism argue that this approach is premised on the belief that legal ideas are universal and that legal problems and their solutions should be uniform across diverse societies and cultures.[13] Mindful of this criticism, Sandra Fredman in a recent article has advocated for "comparativism in the human rights field based on a more general principle of deliberative reasoning".[14] Fredman argues that a deliberative approach to comparison does not assume human rights to be universal, but seeks to improve the quality of judicial reasoning on difficult human rights questions at the domestic level. The deliberative approach requires that judges carefully consider all the relevant comparative material and make their reasons for accepting or rejecting something explicit. Further the deliberative approach to comparison in the area of human rights can prevent judges bringing in their subjective biases in deciding certain controversial questions (pertaining to national security, hate speech or rights of the LGBT persons, for instance) by requiring that they consider all possible solutions to those questions before

[13] Michaels, Ralf. 2006. 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (Eds.) Oxford Handbook of Comparative Law. Oxford University Press, 340-382; Whytock, Christopher. 2009. 'Legal Origins, Functionalism and the Future of Comparative Law', *Brigham Young University Law Review*, 6 (13), 1879-1906

[14] Fredman, Sandra. 2015. Foreign Fads or Fashions? The Use of Comparativism in Human Rights Law, *International & Comparative Law Quarterly*, 64(3), 631-660, at 634.

accepting or rejecting them. This according to Fredman can improve judicial accountability and legitimacy.[15] Although in the article, Fredman limits her arguments to the use of comparison in judicial decision-making, it is applicable in case of comparison as a scholarly method as well.

On the specific question of the relevance of a comparative approach to the duty to accommodate, the most important factor is its adoption at the supranational and international levels. In case of the European Union, the Employment Equality Directive of 2000 requires all member states to provide reasonable accommodation for disabled employees. At the international level, the United Nations Convention on the Rights of Persons with Disabilities came into effect in 2008, (UNCRPD) which provides for non-discrimination measures for the disabled in all areas of life. Article 2 of the CRPD defines reasonable accommodation as:

> "the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

Article 5(2) requires state parties to prohibit all forms of discrimination on the basis of disability, which, vide the definition of "discrimination" in Article 2 includes the denial of reasonable accommodation as well. Article 5(3) further casts a positive duty on state parties to ensure that reasonable accommodation is provided to pursue equality and eliminate discrimination. Thus, the duty to

[15] Ibid.

provide reasonable accommodation is one of the basic principles of the Convention which is meant to inform not only the provisions on work and employment but every Article dealing with myriad aspects of life. Every country which is a signatory to these supranational instruments has an obligation to provide for reasonable accommodation in its domestic laws.

This gives the impression that the duty to accommodate is poised to be a human rights value with application beyond the domestic borders. However, practices of different jurisdictions show a great deal of diversity. Thus, Lisa Wadington has shown how different countries within the European Union have interpreted the mandate of reasonable accommodation differently in their domestic laws, thus expanding or restricting the scope of its application.[16] Similarly, writing about the concept of 'reasonable adjustment' in British law, Anna Lawson has written: "it is nevertheless a concept which British law explicitly adopted well over a decade ago and one which has been crafted by that law into a form it has taken in no other country"[17]. Thus, the duty to accommodate is meant to be a universal value and at the same time, there are multiple specific forms around the world. The diversity of the forms in which reasonable accommodation finds expression in domestic adoption and their respective uniqueness makes this a fertile area for comparative study. Following Sandra Fredman's argument, this thesis shall take a deliberative approach to comparing the law on reasonable accommodation in three jurisdictions. It is not the objective of the thesis to argue that there should be a

[16] Waddington, Lisa. 'When it is reasonable for Europeans to be confused: Understanding when a reasonable accommodation is reasonable from a comparative perspective', Comparative Labor Law & Policy Journal, 29:317, pp. 317-340.

[17] Lawson, Anna. 2008. Disability and Equality Law in Britain: The Role of Reasonable Adjustment. Portland: Hart Publishing, at p. 1

single model of the duty to accommodate and a single approach to judicial interpretation globally. Rather the objective of the thesis is to demonstrate different approaches to addressing similar problems, at the same time being aware of the benefits and drawbacks of these different approaches. This is the essence of the deliberative approach to doing comparative law.

Chapter 1

Justifying Reasonable Accommodation: Theoretical Debates in the United States, Canada and the United Kingdom

Reasonable accommodation is an innovative legal mechanism to further the goal of anti-discrimination for the disabled people at workplace. Despite being promoted as an appropriate legal remedy to fight discrimination against the disabled at the national, supra-national and international, the theoretical basis for reasonable accommodation continues to be a subject of debate. The theoretical debate can be seen at two levels. At one level, scholars ask which theory of anti-discrimination law best explains reasonable accommodation as a tool for ensuring equality and non-discrimination. Is reasonable accommodation best understood within the framework of indirect discrimination, or positive obligation or substantive equality? At another level there is a debate among scholars on whether reasonable accommodation is a part of anti-discrimination law at all. Some scholars argue that reasonable accommodation by requiring employers to do something extra for the disabled employee, is not concerned with equal treatment, but is actually preferential treatment or affirmative action.

In this chapter, I will first review the equal treatment/ preferential treatment debate within which reasonable accommodation is sometimes couched. Next I will consider reasonable accommodation 'fits' with different theories of anti-discrimination law in general. I will conclude the chapter by arguing that reasonable accommodation is best understood as a form of anti-discrimination measure, when we understand anti-discrimination law to perform an anti-subordination function.

1.1. Reasonable Accommodating as Equal Treatment Plus?

Is it normatively and doctrinally faulty to place reasonable accommodation within the framework of anti-discrimination? Does reasonable accommodation depart from the basic requirement of an anti-discrimination mandate by requiring the duty holders to do something extra beyond what any anti-discrimination provision demands? Is the duty to accommodate actually the duty of equal treatment plus something more? Many legal scholars would answer these questions in the affirmative. But this is not simply a question of academic interest. As we shall see in Chapter three, judges deciding cases involving the duty to accommodate face the challenge to justify why reasonable accommodation is ultimately an anti-discrimination norm and not simple preferential treatment.

In a widely cited article, American legal academics Samuel Issacharoff and Justin Nelson argue that while all employment discrimination laws have the dual objective of preventing discrimination and redistribution of resources, the duty to accommodate under the Americans with Disabilities Act is solely concerned with the latter.[18] In other words, the authors argued that traditional workplace anti-discrimination laws demand that the employer should not discriminate between employees based on irrelevant characteristics, like race or sex. This is what traditional anti-discrimination laws do and this is what courts are capable of deciding. The duty to accommodate under the ADA on the other hand, the authors argued, treat not the above but the failure to redistribute resources in favour of the disabled employee, as discrimination. Thus, rather than equal treatment, the

[18] Samuel Issacharoff and Justin Nelson, 'Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?' *North Carolina Law Review*, 79 (2001) 307

starting point of the ADA is that "differently situated persons should be treated differently". This feature, the authors argued, is akin to preferential treatment and reveals the "fundamentally redistributist command of the ADA".[19] A similar point was also made in another widely cited early article on the duty to accommodate under the ADA, by two prominent US legal academics.[20]

From a different vision of anti-discrimination law, Chicago law professor, Christine Jolls has refuted the above arguments in an important article.[21] Jolls points out that contrary to claims that anti-discrimination and accommodation are distinct issues that require the duty holders to do different things, there is actually an overlap between the demands of accommodation and the liability under disparate impact form of discrimination. The most powerful example of this is provided by pregnancy discrimination cases under Title VII of the Civil Rights Act. Further, Jolls argues that even under traditional anti-discrimination law, in certain situations employers are required to incur additional financial costs in the interest of certain employees. An example of such a situation being, when the employer refuses to hire or keep employed, an employee belonging to a certain group, because of customer or co-worker preference. In these situations, traditional anti-discrimination law prevents the employer from firing such a disfavoured employee, despite the costs that it involves for the employer. Jolls argues that it is the same in case of the duty to accommodate under the ADA, that requires the employer to incur certain costs in the interest of the disabled worker.[22]

[19] Ibid.
[20] Pamela Karlan and George Rutherglen, 'Disabilities, Discrimination and Reasonable Accommodation', *Duke Law Journal*, 46 (1996) 1.
[21] Christine Jolls, 'Antidiscrimination and Accommodation' *Harvard Law Review* 115 (2001) 642.
[22] Ibid.

Thus, to frame the question of justification behind reasonable accommodation in terms of the equal treatment / preferential treatment binary is not helpful. An alternative route to search for justification could be to examine the theoretical foundations of anti-discrimination laws.

1.2. Theoretical Basis of Anti-discrimination Laws

Anti-discrimination laws do not advocate mechanical equality and the absence of any differential treatment whatsoever. Under certain circumstances, all anti-discrimination laws allow or even mandate differential treatment. This is because at their most basic, anti-discrimination laws derive their philosophical basis from Aristotle's idea that justice requires that likes be treated alike and unlikes be treated differently, to the extent that they are differently situated. In an early systematic study of disability and human rights published before the UNCRPD came into existence, Gerard Quinn and Theresa Degener have written that human rights bodies deciding on disability issues relied on this idea of justice to hold that state parties must provide special facilities to disabled prisoners, so that their rights are rendered real.[23]

But beyond this minimal definition, Aristotle's theory does not help in providing a justification for anti-discrimination laws because it does not tell us what are the ultimate objectives behind anti-discrimination laws or in other words, what are their functions. Jurisprudential and philosophical literature on the relevance of equality and non-discrimination suggest three different functions of anti-

[23] Gerard Quinn & Theresa Degener. 2002. Human Rights and Disability: the current use and future potential of United Nations human rights instruments in the context of disability. UN Human Rights Commission, Pg. 5. Prof. Quinn is an important disability rights scholar, but given that his scholarship is primarily on the issue of legal capacity and Article 12 of the UNCRPD, I have not relied on any of his other writings in this thesis.

discrimination laws. The first function is that they seek to eliminate unequal treatment based on irrelevant personal features. Whether a personal feature is relevant or not is determined by the context. For example, if it is in the context of employment, then all those personal features which have no bearing on the job performance are regarded as irrelevant considerations. Prohibiting discrimination based on irrelevant features does not mean that discrimination based on "relevant" features is also prohibited. In fact, this interpretation of the idea of anti-discrimination allows discrimination on the basis of certain features if it can be shown that those features serve certain ends in the given context. Thus, for the employment context, discriminating on the basis of sex is prohibited, but discriminating on the basis of educational qualification is allowed. This also means, that under this function of anti-discrimination, affirmative action is also prohibited, because it seeks to give preference to some people based on their personal features and irrespective of their merit. Under this function of anti-discrimination law, affirmative action is itself discrimination.[24]

The second function of anti-discrimination laws is to eliminate unequal treatment of individuals because of the minority group that they belong to. This function prohibits any classification that is meant to oppress a minority group or that has the effect of imposing disadvantages on a minority group. Unlike the previous function, here classification or unequal treatment is itself not considered wrong, but classification for the purpose of oppressing a minority is a wrong. A prime example of this would be racial segregation. Racial segregation is considered

[24] For examples of this position, see, Abram, Morris. (1986) Affirmative Action: Fair Shakers and Social Engineers, *Harvard Law Review*, 99, 1312; Posner, Richard. (1974) DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, *Supreme Court Review*, 1, 25.

wrong under this interpretation of anti-discrimination, but race based affirmative action is not. The reason is the former is classification with the intent to oppress, but the latter is not. Thus classification on the basis of personal features is allowed under this perspective, as long as it is not used with the intention to oppress a minority group[25].

Finally, the third function of anti-discrimination laws is to eliminate at a larger level, any conduct that has the effect of subordinating and continuing the subordination of minority groups. Here the focus is not the narrow aspect of classification, but any conduct that subordinates a minority group. Additionally, here animus is irrelevant. In this perspective, even those conduct which is not intended to oppress, but which has the effect of subordinating a minority group would be wrong. The objective of anti-discrimination in this perspective is aligned with the broader objective of anti-subordination. This also means, that if neutral conduct preserves the subordinated status of a minority group, then this approach calls for more positive action to undo subordination. In other words, affirmative action is here part and parcel of the idea of anti-discrimination.[26]

Of the three functions of and approaches to understanding anti-discrimination, the last one has the broadest scope, whereby not only acts calculated to harm and oppress, but even neutral acts that have the effect of preserving the status quo are treated as wrongs. Thus this approach to anti-discrimination imposes duty on both state and private parties to take positive action to undo any possibility of

[25] This position is exemplified in, Wasserstrom, Richard. (1977). Racism, Sexism and Preferential Treatment: An Approach to the Topics, *UCLA Law Review*, 24, 581.

[26] For this interpretation of anti-discrimination law, see, Sunstein, Cass. (1994). The Anticaste Principle, *Michigan Law Review*, 92, 2410; Colker, Ruth. (1986). Anti-Subordination Above All: Sex, Race and Equal Protection, *New York University Law Review*, 61, 1003.

subordination. Slightly narrower in scope is the first approach which regards any classification based on irrelevant feature to be a wrong. As long as a classification can be shown to have something to do with a legitimate end in a certain context, it is allowed. The narrowest scope is the second approach which considers only those classifications to be wrong, that are born out of an intention to oppress those belonging to minority groups.

1.3. Reasonable Accommodation as Anti-Subordination

Reasonable accommodation would fall in the third approach to understanding anti-discrimination law, i.e. the anti-subordination approach. There are three reasons why it can be argued that the duty to accommodate performs the anti-subordination function. First, its pursuit of equality is decidedly asymmetric, which not only allows different treatment but also more favourable treatment in order to reduce disadvantage.[27] To elaborate, in the cases of sex discrimination or racial discrimination in the US, UK and Canada, men and women, or Blacks and Whites are considered to be two sides of the same axis. Favouring men means discriminating against women and favouring women means discriminating against men. In other words, the two groups are treated in a symmetrical manner. The idea of reasonable accommodation acknowledges that it is not the same in case of disability and ensuring anti-discrimination in the case of disability essentially requires an asymmetric approach. The asymmetric approach has been acknowledged by courts too as we shall see in chapter three. Second, reasonable accommodation furthers the anti-subordination idea by requiring modification of

[27] Fredman, Sandra. Discrimination Law. 2nd Ed. Oxford University Press. P. 215.

not just particular acts or conduct, but of structural barriers.[28] The thrust of the concept is on changes in the physical environment so that equal access and participation of the disadvantaged person can take place. Third, reasonable accommodation embraces not only anti-discrimination as a negative command, but also as a positive command.[29] In other words, the duty holder is not only prevented from unfairly discriminating against a disabled person, but is also required to take positive steps to remove the immediate sources of the disadvantage. At one level, this is consistent with the general progression of anti-discrimination law in most jurisdictions, whereby the duty holder is required to take positive and specific steps as part of the duty of non-discrimination.

1.4. Conclusion

This chapter has reviewed the different theoretical debates on and justifications behind reasonable accommodation. This chapter has shown that the binary of equal treatment/ preferential treatment is not a helpful framework to understand the nature of reasonable accommodation, and most courts have also held to the same effect. Further this chapter has also shown that there are various theoretical justifications of anti-discrimination law and reasonable accommodation does not 'fit' with all of them in the same way. While at a very broad level, the basis of reasonable accommodation is in the Aristotelian idea that unlikes should be treated differently, it is not enough to account for the different treatment entailed in reasonable accommodation. I have argued in this chapter, that it is best understood as an anti-discrimination measure, when we approach the very idea

[28] Ibid. At 216
[29] Ibid. At 217

of anti-discrimination as one of anti-subordination. There are a number of other aspects of the unequal treatment called for by the idea of reasonable accommodation that are not captured by the Aristotelian idea of justice. As Sandra Fredman has argued, the radical potential of the duty to accommodate is that it performs "the distributive dimension of redressing disadvantage, the transformative dimension of accommodating difference, and the participative dimension of facilitating participation"[30]. It is this multi-dimensional approach to justice towards the disabled that must be kept in mind while analysing the theoretical roots of the duty to provide reasonable accommodation.

[30] Ibid. At 217-218

Chapter 2

Contextualizing Reasonable Accommodation: Evolution of Non-Discrimination law in the United States, Canada and the United Kingdom

This chapter reviews the law on reasonable accommodation in the three jurisdictions considered in this thesis, namely, the United States, the United Kingdom and Canada. The chapter does not merely describe the legal definition and judicial interpretation of reasonable accommodation in these jurisdictions. The basic presumption is that we can make sense of the legal content of the duty to accommodate in any jurisdiction only against the background of the general approach to anti-discrimination law in that particular national legal culture. Consequently, each section below begins with a brief history of anti-discrimination law and principles and tracks their evolution, before describing what the duty of reasonable accommodation entails in that jurisdiction.

2.1. United States: "Title VII-zation of the ADA"[31]

The United States is said to be the country of origin of reasonable accommodation. But it will be more appropriate to say that the US is the first country to make a statutory provision for the duty of reasonable accommodation. The US Congress enacted the Civil Rights Act in 1964. Shortly thereafter, the Equal Employment Opportunities Commission, which was the statutory body responsible for overseeing the enforcement of Title VII of the Civil Rights Act, released Guidelines

[31] This phrase is taken from the title of the article: Marcosson, Samuel. 2004. 'Of Square Pegs and Round Holes: The Supreme Court's ongoing Title VII-zation of the Americans with Disabilities Act', *Journal of Gender, Race and Justice*, 8, 361.

for non-discrimination in employment. The Guidelines directed that employers had the duty to accommodate religious beliefs and preferences of employees or prospective employees, up to the point of undue hardship. This direction was rejected by several courts on the ground that the duty was too broad which was likely to encroach on the rights of the employers and labour organisations.[32] In response, the Congress amended the Civil Rights Act in 1972, to explicitly provide a duty on both public and private employers to accommodate the religious observance and practice of employees and prospective employees, till it does not cause undue hardship to the employer.[33] It is noteworthy, that the duty emerged in the context of non-discrimination at workplace on the basis of religion. Religion in the public sphere has been a contentious issue in the US, particularly owing to the Establishment Clause in the US Constitution, which prohibits the US Congress from "establishing" or preferentially treating any religion. The US courts are typically circumspect while dealing with issues that involve acknowledging religious based differences or factors.[34]

The first important case where the US Supreme Court had the chance to lay down the scope of the reasonable accommodation amendment was *Trans World Airline, Inc. v Hardison*.[35] The case involved a clerk at the airline, who had recently converted to a religious denomination, the Worldwide Church of God, which required its followers to not work during the Sabbath. His religious observance was accommodated by the employer, but when he moved to a senior position, the

[32] Dewey v Reynolds Metal Co, 402 US 689 (1971)
[33] Title VII, Civil Rights Act, Section 701(j)
[34] For a doctrinal history of the Establishment clause and religious freedom more generally, see, Paulsen, Michael. 1986. 'Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication', *Notre Dame Law Review*, 61(3), 1.
[35] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)

employer refused to do so, on the ground that he performed essential functions at the airline. The employer argued that bringing in another employee from another department to replace him on Saturdays or hiring someone else would constitute undue hardship and hence, the employer did not have the duty to accommodate the employee's religious belief. The Supreme Court laid down the duties of the petitioner and the respondent in cases involving reasonable accommodation. In order to succeed with one's claim that discrimination had taken place because of denial of reasonable accommodation, a plaintiff had to establish that a religious commandment of the plaintiff conflicts with a workplace regulation, that the employee had informed the employer of such a conflict and sought accommodation, and finally, that the employee's request was not met. The defendant on the other hand had to establish either that the employer had suggested an accommodation which would enable the employee to meet the religious commandment, which the employee refused or that the cost of accommodating the request would have resulted in undue hardship for the employer's business.

The majority opinion of the Supreme Court held that since the seniority system at the airline was the result of a collective bargaining agreement between the employer and the employee's union, the employer cannot be asked to make any work allocation that is inconsistent with the agreement, as part of the duty to accommodate. The majority further held, that the duty to accommodate only entails *de minimis* costs, and any step which proves costlier to the employer is outside the scope of the statutory duty to accommodate. The dissenting opinion on the other hand pointed out that the majority's understanding of undue

hardship was needlessly strict, and given the facts of the case, the steps requested to accommodate the employee's religious beliefs were indeed, *de minimis*.

The duty to accommodate was thus very narrowly tailored, despite the legislative background and philosophy behind this amendment. Canadian legal scholar Ravi Malhotra argues, that such a restrictive reading of the duty was entirely because of the strong influence of the Establishment clause. Malhotra argues that this tendency had an influence on how the duty to accommodate was developed in the context of disability, twenty years later, under the Americans with Disability Act:

> "The constant fear that any legal rights given to accommodating workers with religious beliefs might illegitimately infringe upon the constitutional dictate that Congress not establish any religion understandably led the Court to act cautiously in delineating the rights of religious workers. Truncated at an early moment of life, the possibility for a comprehensive and sophisticated duty to accommodate jurisprudence that might have influenced later ADA case law on accommodation thus died at birth."[36]

The next major case decided by the Supreme Court on this issue was *Ansonia Board of Education v Philbrook*[37], which involved the case of a school teacher, who was disallowed from taking paid leave for more than three days a year for religious observances. The school teacher claimed that the employer had failed to accommodate his religious commandment, which required observing six holy days in the year, and that there was a violation of Title VII. The lower court found no violation, but the Court of Appeals reversed that decision. The Court of Appeals

[36] Malhotra, Ravi. (2007) 'The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective', Washington University Journal of Law and Policy, 23(1), 2, at 22.
[37] Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).

held that where there was disagreement on proposed accommodations, the employee's preferred accommodation should be chosen, subject to the undue hardship criterion. It was ultimately a matter of fact, whether the preferred accommodation posed undue hardship or not. The US Supreme Court upheld the Court of Appeal verdict, but with a change. The majority of the Supreme Court held that the employer does not have the duty to agree to the employee's preferred accommodation. The Court held that factual determination of undue hardship has to be done with respect to the accommodation offered by the employer, and not necessarily, the one preferred by the employee. As long as the employer provides *any* accommodation, the requirements of the duty is met. This interpretation was not only restrictive, but quite contrary to the objective behind the duty. Thus as per this verdict, an employer could propose an accommodation that does not really resolve the conflict between the workplace requirements and the employee's religious requirements, and yet, would have discharged his duty to accommodate under the law.

Similarly, in *Estate of Thronton v Caldor*[38], the Supreme Court held a law to be unconstitutional, which allowed religious workers the right to refuse work on the Sabbath and claim remedies against any such requirement. The Supreme Court held that such a law placed the interests of religious workers above that of the secular ones, and thereby violated the Establishment clause.

Moving to the specific area of disability discrimination at workplace, Title I of the Americans with Disabilities Act, 1990, provided:

[38] Estate of Thornton v. Caldor, 472 U.S. 703 (1985)

> "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[39]

Further, a "qualified individual" was defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[40] Next, "Discrimination"[41] was defined by Title I of the ADA as

> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

Finally, Title I did not define what is meant by the term reasonable accommodation, but provided an indicative list:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training

[39] 42 U.S.C. § 12112(a)
[40] 42 U.S.C. § 12111(8)
[41] 42 U.S.C. § 12112(b)(5)

materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[42]

Thus, to summarise the above provisions, the ADA 1990 mandated employers to provide reasonable accommodation to both applicants and employees who were qualified for the job in question, unless the accommodation imposed an undue hardship. The duty to accommodate the disabled employee under the ADA was completely separate from the general duty to accommodate under the Civil Rights Act. We have seen in the cases discussed above, that they reflected a narrow interpretation of the duty to accommodate under Title VII. Many US legal scholars commenting on the ADA jurisprudence have argued, that though the legislative intention behind the duty to accommodate under the ADA was meant to be more liberal than the *de minimis* rule adopted by the courts for the purpose of religious accommodation, the courts interpreted the ADA in disregard of this legislative objective. One commentator has called this the "Title VII-zation of the Americans with Disabilities Act".[43] Further, Malhotra's article cited earlier illustrates this trend though lower court decisions that have interpreted the scope of the duty to accommodate. An example of such an approach taken by the US Supreme Court is the *Barnett* decision discussed in detail in the next chapter.

Some of the problems associated with the judicial interpretation of the ADA, particularly the narrowing down of the scope of the definition of disability was remedied by the ADA Amendment Act of 2008 (ADAAA) that came into effect the next year. As a result of the US Supreme Court decisions in *Sutton v United*

[42] 42 U.S.C. § 12111(9).
[43] Marcosson, Samuel. 2004. 'Of Square Pegs and Round Holes: The Supreme Court's ongoing Title VII-zation of the Americans with Disabilities Act', *Journal of Gender, Race and Justice*, 8, 361.

Airlines[44], that held that the eligibility of plaintiff to seek relief under the ADA should be considered post mitigation of disability, and *Toyota Motor Manufacturing v Williams*[45], that held that the standard of determination of eligibility must be a demanding one, the scope of who could seek protection under the ADA was narrowed down. The ADAAA overturned these interpretations and provided that the definition of disability should be broadly defined and the question of eligibility does not depend on the presence of mitigating measures like spectacles, surgery, medication or already existing accommodations. The ADAAA however does not make any changes to the statutory definition or framework of reasonable accommodation. Nonetheless, the clarifications issued by the ADAAA means that the duty to accommodate must be interpreted broadly by the courts.

2.2. United Kingdom: Evolution through Five Generations of Equality Law

The evolution of equality and non-discrimination law in the United Kingdom has mostly been lead by legislation. To describe the evolution of the law in the UK, I shall rely on Bob Hepple's characterization of the process in terms of "five generations". [46] As per Hepple's scheme, the first generation of equality legislations in Britain were based on the idea of formal equality, i.e. likes should be treated alike and unlikes should be treated differently. An example of this was the Race Relations Act, 1965, which prohibited discrimination on the ground of colour, race, ethnic or national origin in public places. The second generation of equality legislations, represented by the amended Race Relations Act, 1968, was also based on formal equality, but the reach was more extensive than the previous

[44] 527 U.S. 471 (1999)
[45] 534 U.S. 184 (2002)
[46] Hepple, Bob. 2010. The New Single Equality Act in Britain. The Equal Rights Review, 5, 11-24

one and covered employment, housing and the provision of goods and services. The third generation of equality laws covered sex discrimination and moved away from the formal equality model. These legislations recognized adverse effect discrimination or indirect discrimination, and provided for positive action. Examples of this were the Equal Pay Act, 1970, the Sex Discrimination Act, 1975 and the Race Relations Act, 1976. A further improvement on the idea of indirect discrimination was made by the Disability Discrimination Act, 1995, which in addition to providing remedies for direct and indirect discrimination, also established the duty to make "reasonable adjustment". It is important to note the shift from formal equality to substantive equality in the UK legislative framework through the categories of race and sex, which made it possible to conceptualize measures like reasonable accommodation in the context of disability.

The fourth generation of equality legislations as per Hepple, were a set of Regulations implementing the Race Directive, the Employment Framework Directive and the Equal Treatment Directive of the European Community. Although the Regulations did not have any far reaching impact because of their very nature, they helped in bringing in more groups of marginalized people within the ambit of non-discrimination law. Hepple argues that this was the beginning of the move towards a comprehensive equality legislation, which was not limited to one or the other identity category. This vision was realized when the comprehensive Equality Act, 2010 was enacted, which also represents the fifth generation of equality law in the UK.

Having described the evolution of equality law in the UK, we now come straight to the manner in which reasonable accommodation is dealt with in the law. I would first discuss the extensive legal framework for reasonable accommodation or

"reasonable adjustment" as it is called in the UK, under the Disability Discrimination Act, 1995 (DDA) and then the same under the Equality Act, 2010, followed by a comparison between the two, representing two "generations" of equality legislations.

Reasonable adjustment did not have a single form, but was defined differently for different purposes in different parts of the DDA. We will focus only on the provisions dealing with reasonable adjustment in the case of employment. English legal scholar Anna Lawson conceptualizes different forms of reasonable adjustment duties in the DDA into three categories: reactive duties, anticipatory duties and facilitative duties.[47] Reactive duties are those where the duty holders are required to take individualized steps as a response to particular needs of disabled people in particular contexts. Anticipatory duties are those where the duty holders are expected to anticipate the likelihood of disabled people encountering barriers and take steps to remove those barriers in advance. The third categories of duties are not directly towards the disabled persons, but these involve the duty to not withhold consent when others take steps to remove barriers for disabled people.

As per Section 4A(1) of the DDA, employers had a duty to make reasonable adjustment if a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of the premises occupied by the employer placed a disabled individual – either an employee or an applicant - at a substantial disadvantage as compared to a non-disabled person. It is clear that the definition

[47] Lawson, Anna. 2008. Disability and Equality Law in Britain: The Role of Reasonable Adjustment. Portland: Hart Publishing.

of the duty is based on an adverse effect discrimination or indirect discrimination model. To activate the duty there had to be a causal link between the factors listed in the definition and the substantial disadvantage faced. It was held in many judicial decisions, that the meaning of the term 'substantial' is something "more than minor or trivial".[48] Also the non-disabled person, who is the comparator for deciding substantial disadvantage does not have to be an actual person. As per Section 4A(3) of the DDA, there was no duty to make adjustment existed if the employer did not know or could not be reasonably expected to know of the employee's or the job applicant's disability or the manner in which a disabled person was likely to be disadvantaged. Thus, the primary duty is of a reactive nature, which comes into play only after the employer has the knowledge of the disability or the disabling feature.

Section 18B(1) of the DDA laid down the factors to be considered in determining whether an accommodation was reasonable or not. The Section required judges to take into account the following factors:

(a) The extent to which the step would address the problem

(b) The extent to which it is practicable for the duty holder to take such a step

(c) The financial and other costs which would be incurred by the step and the extent to which it might disrupt the activities of the duty holder

(d) The extent of the duty holder's financial resources

(e) Financial assistance available to the duty holder for taking the step

(f) Nature of the duty holder's activities and size of undertaking

[48] For instance, *HJ Heinz Co Ltd v Kenrick* [2000] IRLR 144 (EAT).

(g) If the steps are to be taken in a private house, the extent to which it would disrupt the household or disturb any person living there.

The first clause is about the effectiveness of the adjustments, and in an evaluative framework, the most important one in assessing reasonableness. Courts held that in order to be reasonable, a step need not be completely effective in addressing the disadvantage.[49] The second clause refers to practicality of the step, which is not the same as the questions of costs. Cost is dealt with by the third and the fourth clauses; third refers to direct and indirect costs, while fourth refers to the size of pocket of the employer, which implies that employers with more resources will be required to make costlier adjustments. The fifth clause refers to the possibility of support available from the state to carry out certain reasonable adjustments. This factor adds another dimension while assessing the likelihood of burden on the employer. But this also raises the question of under what circumstances should the state share the cost of the adjustment with the employer.

Next, Section 18B(2) of the DDA, contained a non-exhaustive list of possible adjustments that employers may be required to provide depending on the particulars of the case. These included:

(a) Making adjustments to premises

(b) Allocating some of the duties of the disabled person to another person

(c) Transferring the person to fill an existing vacancy

(d) Altering such person's hours of working or training

(e) Assigning such person to a different place of work or training

[49] For instance, *Beart v HM Prison Service* [2003] EWCA Civ 119

(f) Allowing such person to be absent from work/ training for rehabilitation, assessment or treatment

(g) Arranging for training or mentoring of such person or for others

(h) Acquiring or modifying equipment

(i) Modifying instructions or reference manuals

(j) Modifying procedures for testing or assessments

(k) Providing reader or interpreter

(l) Providing supervision or other support

While the DDA contained separate provision for the duty of reasonable adjustment in each part dealing with a different subject, the Equality Act 2010 has consolidated the core elements of the duty in Sections 20 and 21 and the context specific schedules. Section 20 of the new Act provides the content of the duty of reasonable adjustment and Section 21 states that failure to comply with such a duty would amount to unlawful discrimination. The content of the duty in Section 20 contains three requirements: first, the duty to take reasonable steps to avoid disadvantages, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in comparison to persons who are not disabled.[50] Second, the duty to take reasonable steps to avoid disadvantages caused by any physical feature that substantially disadvantages a disabled person in comparison to the others.[51] And third, the duty to take reasonable steps where a disabled person would be substantially disadvantaged relative to others, without the aid of auxiliary aids.[52] Section 20(6) provides that the above duty

[50] Section 20(3)
[51] Section 20(4)
[52] Section 20(5)

applies in the case of provision of information as well. Additionally, Schedule 8 of the Act sets out in detail the steps that could be taken in concrete situations in the employment context to meet the requirements of the duty to accommodate.

In addition to the general direct discrimination, Section 15 of the new Act provides a separate new category of disability specific discrimination. "Discrimination arising from disability" happens when a person treats a disabled person "unfavourably because of something arising as a consequence" of that person's disability and if such person is unable to show that such treatment is a "proportionate means of achieving a legitimate aim".[53] Further, the above liability can be avoided by showing that the person did not know or could not have reasonably known of the disability of the other person.[54] There are two significant fallouts of this definition. First, by using the term "unfavourable" instead of "less favourable", the new Act does away with the requirement of finding an appropriate comparator, which ailed the DDA. Second, instead of having different justification clauses for different types of discrimination, as was the case in the DDA, the new Act streamlines the justification defence. It is the same defence that is applicable in cases involving claims of reasonable adjustment under Sections 20 and 21.

Going back to the classification scheme suggested by Lawson, we can see that the duty in the employment context under the Equality Act is reactive in nature. It only arises in relation to a specific disabled person and only when the employer knows or ought to know the existence of such persons and the substantial disadvantage

[53] Section 15(1)
[54] Section 15(2)

faced by them.[55] However, as Lawson points out in an analysis of the employment provisions in the Equality Act and their congruence with the Employment Equality Directive and the UN standards, in all non-employment areas other than premises, the Equality Act provides for both reactive and anticipatory duty of reasonable adjustment. [56] Arguably, anticipatory duties have more potential to create structural changes, whereas reactive duties are individualistic in nature. Thus, despite the 2010 Act clarifying and simplifying the legal structure of the duty of reasonable adjustment in the UK law, its limited applicability remains a problem.

2.3. Canada: Reasonable Accommodation from an Exception to the Rule

The first major decision by the Canadian Supreme Court on the duty to accommodate was *Ontario Human Rights Commission v Simpson-Sears Ltd.*[57], popularly known as the *O'Malley* case. The case involved Ms. O'Malley, who worked at a large store and who was a follower of the Seventh Day Adventist Church. She informed the employer of her inability to work on the Sabbath and requested the employer to adjust her job duties. But the employer refused the accommodation on the ground that it was the busiest period of business for him. O'Malley alleged discrimination under the provincial human rights code, but all the lower courts rejected her case. The Supreme Court of Canada overturned the lower court verdicts and held that the employer had committed discrimination on the basis of creed, which was prohibited under the Ontario Human Rights Code. Influenced by the US doctrine of adverse effect discrimination, the Court held that

[55] Schedule 8, section 20.
[56] Lawson, Anna. 2011. 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated', Industrial Law Journal, 40(4), 359-383.
[57] Ontario Human Rights Commission v. Simpsons-Sears, Ltd., [1985] 2 S.C.R. 536 (Can.).

there could be discrimination, even if the employer was applying a neutral rule and there was no intention to discriminate. There could be a finding of discrimination, if the neutral rule put a disproportionate burden on a group protected under the Human Rights Code. The Court held that in cases of employment discrimination, the plaintiff did not have to establish discriminatory intent on the part of the employer, but had to simply establish adverse effect of the neutral workplace regulation. Further, to balance such a right with the interests of the employers, the Court held that the defence available to the employers when faced with a claim of adverse discrimination, is to establish that the workplace regulation in question was a bona fide occupational qualification (BFOQ) and dispensing with the same would amount to undue hardship. In this case, the Court found that the employer had not established that the workplace rule requiring employees to work during the Sabbath constituted a BFOQ, and hence, the employee was discriminated against.

While *O'Malley* established a rather broad duty to accommodate religious preferences of the employees, another decision delivered by the Supreme Court around the same time, narrowed down its effect. This was *Bhinder v Canadian National Railway Co*.[58], where a Sikh electrician complained that the workplace rule requiring everybody to mandatorily wear a protective hard hat, went against his religious commandment to wear a turban, and hence, was discriminatory on the basis of religion under the Canadian Human Rights Act, 1985. The Human Rights Tribunal had upheld his claim of discrimination, but the same was reversed by the Court of Appeal. The Canadian Supreme Court upheld the Court of Appeal's

[58] Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561 (Can.).

verdict that there was no discrimination on the basis of religion by the denial of accommodation.

In *Alberta Human Rights Commission v Central Alberta Dairy Pool*[59], the Supreme Court built upon its holding in O'Malley, but at the same time clarified the content of the duty to accommodate and the undue hardship defense. The case involved a worker at the dairy's milk processing plant, who requested the employer to grant him holiday on Sabbath, two days around Easter and the Monday following Easter, as these days were specified for religious observances by his denomination. The employer agreed to the leave on the Sabbath and one day around Easter, but refused the Monday leave on the ground that it was a busy day at the plant. When he failed to turn up for work on the Monday following Easter, he was fired by the employer. The Court of Appeal rejected the employee's claim of discrimination on the basis of the *Bhinder* holding, (discussed above) that if the workplace rule constituted a BFOQ, then there was no duty to accommodate. The Supreme Court reversed the verdict, on the ground that the *Bhinder* rationale was not clear enough and a strict reliance on BFOQ to refuse accommodation goes against the very purpose of the theory of adverse effect discrimination, of which accommodation was a part. The Court held that there was a clear case of adverse effect discrimination as the neutral workplace rule would have disadvantaged religious workers. The Court also clarified the content of undue hardship and identified six features: (a) financial cost; (b) impact on collective bargaining agreement; (c) impact on employee morale; (d) interchangeability of the

[59] [1990] 2 S.C.R. 489 (Can.)

workplace facilities; (e) size of the establishment; and (f) safety. These factors are judged based on the facts of each case.

The six-fold criteria has been applied by the Canadian courts and labour arbitrators in a variety of innovative ways to uphold the employer's duty to accommodate disabled employers. Canadian scholars writing on the subject agree that since the entire Canadian judicial system was familiar with a broad interpretation of the duty to accommodate in the case of religion at workplace, the same broad interpretation was applied in the case of disability discrimination at workplace, without raising questions about its nature and legitimacy.[60]

The six-fold criteria outlined in *Central Alberta Dairy Pool* was the legal framework within which disability (and other) accommodation related cases were decided, till 1999. In that year, the Supreme Court of Canada decided the landmark case, *British Columbia Public Service Employee Relations Commission v B.C.G.S.E.U.*[61] (popularly known as the *Meiorin* case), in which it completely overhauled the legal framework dealing with equality and non-discrimination in Canada. In *Meiorin*, the Court laid down a three fold test to be used in cases dealing with non-discrimination: (1) whether the standard in question was for a purpose rationally connected to the end sought to be achieved; (2) whether the standard was chosen in good faith; (3) whether it is impossible to accommodate the complainant's need into the standard without imposing undue burden on the other party. I shall

[60] Malhotra Ravi. (2007) 'The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective', Washington University Journal of Law and Policy, 23(1), 2; Ginsburg, Marilyn & Catherine Bikeley. Accommodating the Disabled: Emerging Issues under Human Rights Legislations, 1 Canadian Labour Law Journal, 72 (1992); Michael Lynk, Disability and the Duty to Accommodate: An Arbitrator's Perspective in 1 Labour Arbitration Year Book, 51 (2002).

[61] [1999] 3 S.C.R. 3(Can.)

discuss the case in detail in the next chapter. Suffice it to make three points about the *Meiorin* decision at this: first, the decision did away with the distinction traditionally drawn between direct and indirect discrimination, and provided a single unified test for assessing discriminatory treatment; and second, moving away from the six-fold criteria developed earlier, the duty to provide reasonable accommodation was incorporated within this framework; and third, and most importantly, while the duty to accommodate was considered to be an exception to the rule of equal treatment so far, through this decision, the duty was redefined as a natural ingredient to the general understanding of equality.[62]

2.4. Conclusion

In this chapter, I have described the evolution of the framework of anti-discrimination law in each of the three jurisdictions under study and located the current form of the duty to accommodate in these jurisdictions, within the respective anti-discrimination law regime. I have shown in the process, that the nature and breadth of reasonable accommodation in any jurisdiction depends to a large extent, on the pre-existing understandings of anti-discrimination law and its substantive and procedural elements. Finally, we can conclude from this chapter, that on the face of it, the Canadian approach to reasonable accommodation is the most liberal. This is a hypothesis, which I will test in the next chapter.

[62] Immediately after *Meiorin*, the Court decided the case of *British Columbia Superintendent of Motor Vehicles v British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868 (Can.) (popularly known as the *Grismer* case), in which the Meiorin decision was upheld and applied to a question of the duty to accommodate disabled person, though in the non-employment context.

Chapter Three

Adjudicating Reasonable Accommodation: A Comparative Analysis of Judicial Approach in the United States, the United Kingdom and Canada

This chapter analyses in detail, three judgments on the scope of the duty to accommodate, decided by the highest appellate courts of the three jurisdictions under study. To be sure, the UK case that I have chosen for analysis does not interpret the duty to accommodate under the new Equality Act, 2010, but the one under the now repealed Disability Discrimination Act, 1995. I have decided to still use this cases because of two reasons. First, a comparative analysis of judicial approaches can be persuasive only when the samples chosen are pronouncements of the same level of judicial body. The UK Supreme Court however has still not had the occasion to decide a case involving the duty to accommodate a disabled person at workplace under the 2010 Act. Second, even though the case chosen is an old one, the decision is still governs how the duty to accommodate and disability discrimination more broadly is viewed under current UK law.

In this chapter, I will first discuss a UK decision and a US decision. Then I will discuss the Canadian decision in *Meiorin* (referred to in the previous chapter) and the application of the *Meiorin* test in later cases. Finally, I will carry out a comparative assessment of the three models of reasonable accommodation to illustrate Fredman's deliberative approach to comparative law. Through this I hope to answer the second of my research questions.

3.1. US Supreme Court – US Airways, Inc. v Barnett[63]

Barnett – a case decided in 2002 – was the first case to be decided by the US Supreme Court, involving a question about the scope of the duty to accommodate under the Americans with Disabilities Act, 1990 (ADA). The ADA provides that discrimination includes an employer not making reasonable accommodations to the physical or mental limitations of an otherwise qualified employee, unless the employer can show that such accommodation will impose an undue burden on the business of the employer. A "qualified employee" is defined as a disabled person who with or without reasonable accommodation can perform the essential functions of the job. The ADA further provides that reasonable accommodation may include "reassignment to a vacant position".

In 1990, Robert Barnett who was working in cargo handling operations at the US Airways injured his back. He used his seniority rights and got assigned to a less physically strenuous mailroom job at the airlines. As per the company rules, some positions, including the mailroom job became available for seniority based bidding every two years. Thus two years later, in 1992, Barnett had to move to some other position so that others could bid for the mailroom job. Barnett requested the company to make an exception for him considering his disability, and allow him to remain in the mailroom job. The company refused to do so, as a result of which, Barnett lost his job.

Barnett filed a case against his employer arguing that assignment to the mailroom job being a "reasonable accommodation", by refusing the same the employer had unfairly discriminated against him. US Airways argued on the other hand that it

[63] 535 U.S. 391 (2002).

had a well established seniority system, which could not be modified to accommodate Barnett.

The District Court ruled in favour of the employer on the basis that the seniority system had been in place for decades and modifying the same would have imposed "undue burden" on the employer as well as the non-disabled employees. The Court of Appeals for the 9th Circuit reversed the verdict holding that a well established seniority system is just one aspect of the undue burden analysis and whether a job reassignment amounts to undue burden or not has to be examined on a case by case basis. US Airways appealed against this verdict before the US Supreme Court. The Supreme Court therefore had to decide whether the ADA required an employer to reassign a certain job to a disabled employee as reasonable accommodation, even if another employee had a claim to that position under the employer's bona fide seniority system. The employer argued that violation of the seniority system itself meant that the accommodation sought was not reasonable. The employer further argued that allowing the accommodation request to supersede the seniority system would mean giving preferential treatment to the disabled employee, which was not the objective of the ADA. Barnett on the other hand argued that the burden of proof was on the employer to show in a case by case manner that the violation of the seniority system imposed undue burden.

The majority opinion was delivered by Justice Breyer, to which Chief Justice Rehnquist and Justices Stevens, O'Connor and Kennedy joined. Justices Scalia, Thomas, Souter and Ginsburg dissented. I will focus on the reasoning of the majority here under the following heads.

3.1.1. Preferential Treatment

The Court began with rejecting the argument that the ADA insists on absolute equal treatment and no special treatment. The Court pointed out that in some situations, preferential treatment is necessary to achieve the equal opportunity objective of the ADA. Further, any special accommodation for a particular employee would require the employer to treat him/her differently, and hence, preferentially. Neutral workplace rules that do not allow any preferential treatment would not be able to accommodate any difference, and therefore would not achieve the aims of the ADA. The majority concluded that just because an accommodation involves "preferential treatment" does not mean that it is not reasonable.

3.1.2. Burden of Proof

Barnett had argued that under the ADA, it was not his burden to show that the requested accommodation was a reasonable one, despite violating the seniority system, because whether an accommodation is reasonable or not is for the employer to show by claiming undue burden. He argued that the word "reasonable" means "effective", and so the only burden on the plaintiff is to show that the requested accommodation effectively mitigates the limitation. The Court rejected this argument on the following basis: First, "reasonable" does not mean "effective"; rather it is the term "accommodation" which captures the element of effectiveness. Second, effectiveness is not the key issue of analysis, because even an effective accommodation could be unreasonable if it puts excessive burden on the other employees by modifying the workplace rules, employee benefits or resulting in dismissals. Third, prior lower court decisions had established a

"practical way" to distribute the burden of proof between the plaintiff and the employer.

This practical way, which the Supreme Court upheld was as follows: First, the plaintiff should show that the requested accommodation is, on the face of it, a reasonable one. After that, the employer has to show that in the specific circumstances of the case, the requested accommodation would impose undue burden on the business of the employer.

3.1.3. Reasonability of reassignment

Coming to the key question of whether in this case, the request for reassignment was a reasonable one or not, the Supreme Court held, that in ordinary circumstances, such a request will be a reasonable one, since the Act itself refers to it as a possible accommodation. However, in the specific facts of the case it will be presumed to be an unreasonable one, because it violates the seniority system of the company.

The interest of the seniority system was held to be superior to that of accommodation, based on the following reasons. First, the Court held that in the parallel areas of religious discrimination at workplace and under the Rehabilitation Act, courts have consistently held that terms of seniority system, be they outcome of collective bargain agreements or otherwise, would prevail over any accommodation request. Second, a seniority system "provides important employee benefits by creating and fulfilling, employee expectations of fair, uniform treatment". A seniority system offers a crucial element of "due process" at the workplace and hence is an important pillar of employee-employer relations. Third, allowing the employer to modify the seniority system to accommodate a disabled employee would give the employer discretionary decision making power

which will adversely affect employee expectations from a well established system. The Supreme Court thus concluded that there was nothing in the ADA to infer that the Congress intended the employer's duty to accommodate to supersede the seniority system.

3.1.4. Special Circumstances of the Employer

Going a step beyond the burden of proof rule mentioned earlier, the Supreme Court then held that even after the employer has discharged his burden to show undue burden, the plaintiff can show that particular special circumstances of the employer exists which may justify the requested accommodation. For instance, if the employer unilaterally makes exceptions to the seniority system on a regular basis or if the seniority system itself provides for exceptions in some situations, then one more change to accommodate the disabled employee will not make a substantial difference and hence would be a reasonable one.

In this case, the Supreme Court thus held that "ordinarily" the ADA does not require the employer to reassign a job as reasonable accommodation, if it violates the seniority system. And courts can issue a summary judgment in favour of the employer if he simply shows that there will be a violation of the seniority system. But it is also open to the plaintiff to show that there is a special circumstance, which makes the accommodation reasonable. The case was sent back to be tried by applying these principles.

3.2. UK House of Lords – Archibald v Fife Council[64]

This was a case decided by the UK House of Lords in 2004, involving the question of the extent of the employer's duty to accommodate towards a disabled employee. Mrs. Archibald was employed by the Fife Council as a road sweeper since 1997. Due to complications in course of a surgery she became disabled, as a result of which she could not walk or sweep. The medical opinion was that though she may not be able as physically mobile as she was earlier, she was fit for sedentary work. The Council provided her with adequate training facilities to equip her with skills needed for office based work. The office jobs were all in grades higher than that of the manual job that she had been doing prior to her disablement. The Council policy required that for redeployment to a pay grade same or lower than the current one, the candidate did not have to undergo any competitive interview, but for a higher pay grade, a person mulct undergo one along with the other candidates. Mrs. Archibald applied for many office based positions within the Council, but did not succeed. Since she could not get back to her manual job because of her disability, she failed to get an office job because of her inability to pass the competitive interview, and since all the possible steps that could be taken by the employer under the redeployment policy were exhausted, Mrs. Archibald was discharged from service.

Mrs. Archibald filed a complain against the Council making a two pronged argument of discrimination. First, that by dismissing her from service, the Council had treated her less favourably than it treated those without disabilities under

[64] [2004] ICR 954 (HL)

Section 5(1)(a) of the Disability Discrimination Act, 1995 (DDA).[65] And second, that by not transferring her to an existing vacancy without having to undergo a competitive interview, the Council had discriminated against her by failing in its duty to take reasonable steps to accommodate her disability under Section 5(2)(a).[66] The Employment Tribunal rejected the first ground, as it found the less favourable treatment by dismissal to be justified in terms of Section 5(1)(b).[67] As for her second ground of failure to provide reasonable accommodation by transferring, the Tribunal relied on Section 6(7) of the DDA, which provided: "…nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others." The Tribunal concluded that the redeployment rule about competitive interview applied to everybody equally, and hence, waiving the requirement for the complainant would amount to positive discrimination, which the Act disallowed. Therefore the failure to accommodate was justified in terms of Section 5(2)(b). The Employment Appeal Tribunal dismissed her appeal for the same reasons and so did the Court of Sessions.

Mrs. Archibald finally appealed before the House of Lords, where she was represented by the Disability Rights Commission (DRC). The DRC argued that the Council was indeed under a duty to accommodate Mrs. Archibald and the duty was not exhausted simply because she was unable to perform the manual job on account of her disability. It was argued that inability to do the present job did not

[65] "(a) for a reason which relates to the disabled person's disability, he [the employer] treats [her] less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified."
[66] "(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified."
[67] Ibid.

mean that there was no further duty on the part of the employer. In fact, Section 6(3)(c) of the Act provided that one of the things that the employer could do to accommodate the employee was to transfer her to "fill an existing vacancy".[68] The DRC argued that this meant an existing vacancy of another job. Thus the duty to accommodate was not exhausted by all that the employer did to accommodate the disabled employee in the current job only.

The main opinion of the House of Lords was delivered by Baroness Hale, to which Lord Hope and Lord Rodger added their own explanations. All the judges agreed that the employer had no liability under the less favourable treatment arm of the anti-discrimination clause. The employer was justified in dismissing Mrs. Archibald as she was unable to do the job of road sweeping. But the employer still had a liability to discharge under the duty to accommodate arm of the anti-discrimination clause.[69] The task of the House of Lords was to examine whether that duty under Section 6(1) of the DDA had been discharged by the employer before dismissing Mrs. Archibald from service. Thus, the questions for consideration were: whether a duty to accommodate existed; what triggered the

[68] "Section 6 (1) Where –
(a) **any arrangements** made by or on behalf of an employer, or
(b) any physical features of premises occupied by the employer, place the disabled person concerned at a **substantial disadvantage in comparison with persons who are not disabled**, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.
(2) Subsection (1)(a) applies only in relation to -
(a) arrangements for determining to whom employment should be offered;
(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.
(3) The following are examples of steps which an employer may have to take in relation to a disabled person in order to comply with subsection (1) -
(a) making adjustments to premises;
(b) allocating some of the disabled person's duties to another person;
(c) transferring him to fill an existing vacancy;
(d) …"

[69] Ibid.

duty; what was the extent of the duty; and whether the duty was discharged by the employer. For the purpose of analysis of various elements of the duty to accommodate under Section 6 of the DDA, I am dividing the judgment's reasoning into the following sub-headings:

3.2.1. "Any arrangements"

As per the scheme of the Act, the employer's duty to accommodate under Section 6(1) of the Act applied to "any arrangements" relating to the job, made by or on behalf of the employer. But the term "arrangements" itself was not defined in the Act. It could refer to the Council's redeployment policy or it could refer to the terms of the manual job held by Mrs. Archibald. Lord Rodger pointed out in his opinion that "any arrangement" in this case was the workplace rule that if a road sweeper became disabled which prevented him/her from doing the essential features of the job description, then he/she shall be dismissed from service. It is this rule that places a disabled worker at a "substantial disadvantage" as compared to the others in the same position, because such a rule can get the disabled worker dismissed on account of his/her disability, but will not similarly affect the other workers.

The steps that were required to be taken by the employer as per the mandate of Section 6 were to prevent the disabled worker from being disadvantaged in the above manner.

3.2.2. "…in comparison with persons who are not disabled"

Who were the non-disabled people relative to whom the plaintiff was substantially disadvantaged? In other words, in terms of the language of anti-discrimination law, who was the 'comparator' in this case? Just like the term "arrangements", the comparator is not clearly defined in the Act and has to be

logically constructed by the judges. Similar to "arrangements", there are two possibilities in case of the comparator: the non-disabled people in question could either be those who were doing the manual work along with Mrs. Archibald or they could be non-disabled people in general.

Lord Rodger felt that the comparator was the former group of persons, the non-disabled people doing the manual work along with Mrs. Archibald. Since the arrangement that disadvantaged the disabled worker was the workplace rule requiring physical fitness, the comparator necessarily was the group that was not disadvantaged by the same rule. Baroness Hale on the other hand felt that if it was the former, then the plaintiff was not substantially disadvantaged by any arrangement of the Council since it was the disability of the plaintiff rather than any policy of the Council that prevented her from doing the job. In such a case, there would be no duty to accommodate of the employer. On the other hand, if the comparator was all the non-disabled people in general, then the plaintiff would be substantially disadvantaged relative to them irrespective of the terms of the particular job that she was doing and there may be something that the Council may be able to do to relieve her of that disadvantage. One such step envisaged by the Act itself in Section 6(3)(c) was to transfer such person to fill an existing vacancy in the same establishment. Baroness Hale concluded that in view of this Section, it can not be said that the comparator are only those non-disabled people who are doing the same job as the plaintiff. The option of transfer to another vacancy in the establishment as a mechanism to remove the disadvantage, meant that the field to be considered was wider than that comprising of only those in the same job as the plaintiff.

In my opinion, Lord Rodger's opinion on who is the correct comparator is more convincing than Baroness Hale's, because the question of "arrangement" must be considered along with that of the comparator. The two elements make sense only when seen together. In Baroness Hale's analysis, the two elements are separate, which does not seem convincing.

3.2.3. Triggering the duty to accommodate

Despite the difference of opinion on the proper comparator, both Baroness Hale and Lord Rodger agreed that the duty was triggered when a worker became disabled such that he/she was unable to carry out the essential functions of the job description and was thereby substantially disadvantaged.

3.2.4. The extent of the duty

The question of the comparator and the element triggering the duty thus settled, the judgment next turned to the question of extent of the duty. Could it be concluded that the duty to accommodate extended to transferring the disabled worker to another vacancy without having to appear for the competitive interview? Or will doing so amount to positive discrimination, which the Act clearly disallowed. Both Lord Rodger and Baroness Hale agreed that a literal reading of the legal provision would suggest that the Council's duty to accommodate Mrs. Archibald would extend to transferring her to fill an existing vacancy so as to prevent her from being disadvantaged relative to the comparator. Baroness hale reasoned that the term "transfer" was distinct from "promote". While the latter definitely meant movement upwards in the workplace hierarchy, the former could mean movement upwards, downwards and even sideward. Additionally, transferring "to fill" a vacancy was distinct from merely allowing to apply or to be considered for the vacancy.

Further, the Employment Tribunal had relied on Section 6(7) of the Act which contained the words: "nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others".[70] But as all the judges pointed out, the words immediately before this were: "Subject to the provisions of this section, . . .".[71] Which meant that the employer was generally prohibited from treating a disabled person more favourably than others, unless, if it was in furtherance of the duty to accommodate him/her. Thus the Council was not prevented legally from appointing Mrs. Archibald to an existing vacancy without undergoing a competitive interview.

3.2.5. Reasonableness

Once the duty under Section 6(1) was triggered, the employer was under a duty to take "reasonable" steps to prevent the relevant arrangement from having the effect of disadvantaging the disabled worker. Was it reasonable for the Council to do so? Both Lord Rodger and Baroness Hale answered that this would largely depend on the particular circumstances of the case. The following paragraph in the latter's opinion needs to be quoted in full to capture the essence of the holding on reasonableness:

> *An important component in the circumstances must be the council's redeployment policy. This currently distinguishes between transfer to a post at the same or a lower grade and transfer to a post at a higher grade. Generally it must be reasonable for a council to maintain this distinction. But it might be reasonable to expect a small modification either in general or in*

[70] "Subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others."
[71] Ibid.

the particular case to meet the needs of a well-qualified and well-motivated employee who has become disabled. Manual grades are often technically lower than non-manual grades even if the difference in pay is minimal. The possibility of transfer to fill an existing vacancy might become completely illusory for a manual worker who became incapable of manual work but was assessed as very well fitted for low grade sedentary work if that person was always up against the problem presented by her background. We are not talking here of high grade positions where it is not only possible but important to make fine judgments about who will be best for the job. We are talking of positions which a great many people could fill and for which no one candidate may be obviously 'the best'. There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work.

The last sentence is important. Earlier in the judgment, Baroness Hale notes that Mrs. Archibald had told the Employment Tribunal that she failed to get redeployed at the Council, not because of her disability, but because "'they' did not look past the fact that she was a road sweeper"[72]. The above part of the judgment suggests that in considering reasonable steps, employers should take into account factors other than disability too.

All the judges held that the Employment Tribunal had failed to consider the aspect of reasonableness in deciding Mrs. Archibald's appeal. The appeal was allowed by

[72] Para 53, Archibald v Fife Council.

the House of Lords and remitted to the Employment Tribunal to assess whether the Council had taken all those steps that it was reasonably supposed to take to accommodate Mrs. Archibald, under its Section 6(1) duty.

3.3. Supreme Court of Canada – The Meiorin Test and its Applications

As opposed to the US and the UK, in Canada, the duty to accommodate a disabled person at workplace is not a result of legislation, but of judicial interpretation. The Supreme Court of Canada has developed a broad framework within which non-discrimination cases must be decided and applied it thereafter to cases involving disabled plaintiffs and their claims for reasonable accommodation.

The landmark decision that transformed the equality jurisprudence of the SCC was the 1999 case, *British Columbia (Public Service Employee Relations Commission) v B.C.G.E.U.*[73] (also known as the *Meiorin* case), which involved a complain of discrimination on the basis of sex by Tawney Meiorin, a forest firefighter. The British Columbia government adopted a new set of fitness tests for forest firefighters in which one test required the candidate to run 2.5 kilometres within a certain time. Though Meiorin was good at her job, she lost it because in this last test she took 49.4 seconds more than the required time.

She filed a complain of discrimination against the government body. The arbitrator found that there was a case of adverse effect discrimination based on sex since the standard was such that men who have a higher aerobic capacity than women, would be able to meet the standard more easily than women. Though the

[73] [1999] 3 S.C.R. 3 (Can.)

standard appeared to be a neutral one, it effectively excluded more women than men. The arbitrator held that despite failing to meet the fitness standard, there was no safety risk that Meiorin posed. And finally that the government body had failed to accommodate the difference of Meiorin till the point of undue burden and hence her dismissal was discriminatory. The award of the arbitrator was reversed by the British Columbia Court of Appeal.

The Supreme Court of Canada upheld the arbitrator's decision and his legal approach too. But at the same time, the Court pointed out the problematic aspects of the theoretical framework that made a distinction between direct and indirect discrimination. In case of direct discrimination, the defence available was that the rule in question was a bona fide occupational requirement – something essential to the job. In case of indirect or adverse effect discrimination, the defence available was that the affected person cannot be accommodated without incurring undue burden. The Supreme Court pointed out that the above framework allowed for limited analysis of the problem. For instance, in the case of Meiorin, though the arbitrator did find there to be a case of adverse effect discrimination because of failure to accommodate, the legal analysis did not question whether the fitness standard itself was necessary for the safety and efficiency of the job of forest firefighting. Thus, despite the complainant getting legal victory, the basis of the standard remained unquestioned by the legal reasoning. The Court held that there was a need to rethink the distinction between direct and indirect discrimination. It thus provided a unified three-pronged test for equality analysis. Under the new approach once the plaintiff established that the rule or standard in question was discriminatory, the defendant had to establish that it was a BFOR or had a reasonable justification. To do this, the defendant must establish the following:

1. The standard in question is for a purpose rationally connected to the function being performed
2. The standard was adopted in an honest and good faith belief that it was necessary to serve a legitimate job related purpose
3. The standard is reasonably necessary for the achievement of that legitimate purpose. This also requires the defendant to show that it is impossible to accommodate without incurring undue burden.

The Court held that in this case Meiorin had established that the standard was prima facie discriminatory against women, but the government had not established that by using a different fitness standard the government would experience undue hardship.

In the 1999 case, *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*[74] (popularly known as the *Grismer* case), the SCC applied the Meiorin test to the specific context of reasonable accommodation for a disabled plaintiff. Upholding the Meiorin test, the SCC clarified that "exclusion is only justifiable where the employer or the service provider has made every possible accommodation short of undue hardship" [75] and further that, "accommodation refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible".[76] Thus there is a clear direction by the SCC that the Meiorin test must be liberally interpreted. In *Grismer*, the Court held that the Superintendent of Motor Vehicles had met the first two points of the Meiorin test, but had failed to meet the duty to accommodate by

[74] [1999] 3 S.C.R. 868 (Can.)
[75] Para 21
[76] Para 22

refusing driving license to grismer merely on the ground that he had a visual condition that made most people unable to drive. Since the licensing authority did not conduct an individualised test to assess Grismer's ability to drive safely, it had not met its duty to make "every possible accommodation short of undue hardship". The court found that there was a denial of reasonable accommodation, and hence, discrimination.

Finally, the judgment of the Supreme Court in *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* (Hydro-Québec), has further fine-tuned its earlier approach to the question of undue burden of the employer. In this case, an employee of Hydro-Québec was absent from work for about 960 days owing to several physical and mental illnesses. A medical professional had recommended that she should stop working for an indefinite period and the medical assessment conducted by the employer confirmed the same. As she was unable to carry out her job responsibilities, she was dismissed from service. The complainant represented by a trade union brought a case of disability discrimination against the employer. The argument was that the employer had not established that it would have been impossible to accommodate the employee with her physical and mental illnesses and therefore had not met the third step of the *Meiorin* test.

The Supreme Court of Canada in this case pointed out that giving a literal meaning to the word 'impossible' in the Meiorin test makes it extremely rigid and also sets a standard that is unfair to the employers. The Court clarified that an employer does not have to prove that the requested accommodation was impossible but that allowing it would cast an undue burden. The standard for undue hardship must be a subjective and contextual one – "proof of undue hardship … can take as many

forms as there are circumstances" – and not an unattainable standard of impossibility. The Court further clarified that the employer has a duty to make adjustments so that a disabled employee is able to work causing least convenience to the whole set up of the business, but the employer has no duty or obligation under the law to completely change the terms of the employment contract to accommodate an employee. Thus the Court held that:

> "If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. The employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future."[77]

This is where the Meiorin test and its application to reasonable accommodation stands in Canada at the moment. The Canadian solution to the problem of disability discrimination is different from that in the UK and the US. Beside the distinction that the former is a judicially developed approach and the latter two are duties established by statute, the former also seeks to overcome the distinction between direct and indirect discrimination. Further, as can be seen clearly, the Canadian approach is much more liberal than that in the UK and the US. But is it necessarily better than the US or the UK approach in addressing the thorny issues in reasonable accommodation disputes? Would the UK and the US cases discussed earlier in this chapter end in different or better outcomes if we

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solved them through the Canadian approach? The next two sections would test this hypothesis.

3.4. Canadian and US Approaches Compared

Let us look at the *Barnett* case through the lens of the *Meiorin* test. The employer had argued in this case, that accommodating Mr. Barnett in the mailroom position would amount to undue burden, because it would violate the seniority system followed at the company. And since the expectations of the employees from the seniority system was an integral aspect of workplace stability, making an exception to it would affect the smooth functioning of the business. Would this be sufficient to meet the requirement of undue burden under the *Meiorin* test?

In *Grismer*, the Supreme Court of Canada had found the licensing authority to have defaulted the duty to accommodate on two counts. First, the Court found that the enforcement of the highway safety standard by the licensing authority was not a strict one, but a reasonable one. The authority was actually giving license to a lot of people who were not perfect drivers. Thus, the authority was anyway making reasonable exceptions to its stated goal of highway safety. Second, there were Swedish studies that showed that not all persons with the visual condition of Mr. Grismer were incapable of driving, and such a conclusion could only be arrived at after conducting individual assessments. The Court held that the licensing authority had not fully met its duty to accommodate by not conducting individualized assessment of Grismer's driving abilities and it had also not demonstrated that conducting such assessment would cast an undue burden on it. Applying this rationale to Mr. Barnett's case, we can ask two questions: first, whether the seniority system is strictly enforced or does the employer make exceptions to this established system? And second, is the employer able to

demonstrate that accommodating the disabled employee by making an exception to the established system would cast an undue burden? We can see, that the first question is very similar to what the US SC held in Barnett, that ordinarily an established seniority system would trump the interest of accommodation, but if the employer is known to make exceptions in other cases, then the plaintiff can bring in this aspect to defeat the claim of undue burden. As for the second question, that of demonstrable evidence of the prohibitive 'cost' of the accommodation, this case might be more challenging than the *Grismer* case. In *Grismer*, the issue of evidence could be met with individualized assessment of driving capability and the cost of such individualized assessment itself. In a case like Barnett's the evidence of impact on employee morale and productivity might be difficult to quantify. And chances are that even with the Meiorin test, courts faced with similar situations would go by common sense notions that such exceptions to established systems would invariably lower the morale or other employees.

We can conclude therefore, that in difficult cases involving conflict between disability accommodation and seniority system, courts might arrive at the same outcomes as the USSC, even by applying the *Meiorin* test. However there are still advantages of this test over the holding of the USSC in *Barnett*. On the crucial question of burden of proof, the USSC had held in this case that at first, the plaintiff had to establish that the accommodation requested was, *prima facie*, a reasonable one. This is an unfair requirement and might have the impact of throwing out the disabled employee's case at the threshold itself. Under the *Meiorin* test on the other hand, the disabled plaintiff does not have to establish that the

accommodation sought is reasonable, but simply that there is a *prima facie* case of discrimination.

3.5. Canadian and the UK Approaches Compared

Now let us look at the Mrs. Archibald's case through the lens of the Meiorin test. As per the Canadian approach the employer must show that the standard chosen was reasonably necessary to meet the objective and there was no way to meet this objective and accommodate Mrs. Archibald at the same time, without incurring undue burden. Here, as the SCC held in *Meiorin* and repeated in *Grismer*, the burden of proof is on the defendant to show that the standard incorporates all the possible accommodations till the point of undue burden. What did the evidence in Mrs. Archibald's case show? There was objective evidence in the form of medical opinion that Mrs. Archibald was physically unfit for the road sweeping work. Maintaining public cleanliness being the objective of the council, it had to enforce the physical fitness standard for its employees. Could the council not accommodate Mrs. Archibald at all? Yes, it could, by transferring her to a sedentary position for which she had to appear for a competitive interview. Could the council simply not transfer Mrs. Archibald to an existing vacancy without the interview, to accommodate her? If such an accommodation were incorporated into the physical fitness standard, would it amount to an undue burden? To repeat, the burden to show this is on the council and not Mrs. Archibald.

At this stage, the council could argue that it would be an undue burden as it would amount to preferential treatment, which might affect the functioning of the council, as it would then mean that a job is offered to a less than best candidate, without competitive scrutiny. In *Grismer*, the SCC had held the licensing authority to be at

fault, because it denied Grismer the driving license without any individualized assessment of his visual abilities and thus, without any objective proof that allowing him to drive would necessarily affect highway safety. But as clarified in *Hydro-Québec*, the employer is not required to produce objective evidence to show that the requested accommodation would result in undue burden. But any modification of working conditions or the terms of the job contract could be shown as undue burden. Transferring a disabled employee to another vacancy at a slightly higher grade does not amount to modification of working conditions, not does it amount to fundamental altering of the employment contract. It is a procedural accommodation and by adopting it the employee is able to perform the new functions, then it is not an undue burden. Thus, even in the post *Hydro-Québec* legal framework, we reach the same result by applying the *Meorin* test to the facts of the actual case, as did the House of Lords.

However, there are some differences. The House of Lords had to address the question of whether this was direct or indirect discrimination, before proceeding with the claim of accommodation. Further, the Lords struggled to locate the relevant standard to be analysed and the correct comparator group. These issues could be bypassed in the *Meorin* test.

3.6. Conclusion

The objective of this chapter was to describe and compare different methods of reasoning adopted by the judiciaries of the three jurisdictions under study in claims involving the reasonable accommodation. I have discussed two decisions delivered by the highest appellate court in the UK and the US, and then compared each of them with the approach developed by the Canadian Supreme Court (the *Meiorin* test). I have shown in my analysis that although we arrive at the same

outcome, the method used by the national courts in arriving at the outcome, matters. Though we arrive at the same outcome even with the *Meiorin* test, there are important advantages. I have shown that the *Meiorin* test allows the decision maker to bypass the problematic question of who is the correct comparator in the UK approach and instead, focuses on the disabling arrangement at issue. Similarly, as opposed to the US approach, the *Meiorin* test establishes a fair distribution of the burden of proof between the petitioner and the defendant.

Conclusion

Reasonable accommodation is the most radical development in the area of anti-discrimination law, since the advent of the idea of indirect discrimination. But what distinguishes Reasonable accommodation from other radical legal ideas is that it is both a legal instrument, and a philosophy and a value. Its relevance for the disabled people cannot be emphasised enough; it is one of the pillars of the UN Convention on the Rights of Persons with Disabilities.

In this thesis, I have traced the evolution and operation of the duty to accommodate in three Common Law jurisdictions – the United Kingdom, the United States and Canada – where this concept has been used to protect the rights of disabled workers, for more than two decades. The thesis sought to answer two questions. First, despite being considered a universal value, why does reasonable accommodation assume different forms in different jurisdictions. I have answered this in chapter two of the thesis by showing how the nature and scope of the remedy of reasonable accommodation always depends on pre-existing ideas about anti-discrimination law and its substantive ingredients and procedural formats.

I also noted in chapter two that on the face of it, the Canadian approach seems more liberal than that of the other two country's. The second question that the thesis sought to answer was related to this. My question was if the comparative method could be used to demonstrate that the Canadian approach was better than the UK or the US approach. I have answered this question in chapter three of the thesis and showed that even after applying the Meiorin test to the facts of the US and the UK cases, we arrive at the same outcome. However, despite the outcomes

of the cases being the same as before, as I have showed, there are important substantive and procedural benefits of the Canadian approach.

Finally, in this thesis I have adopted the comparative method, being aware of the criticisms of functional comparative law. Instead of reproducing the biases of the functional comparative method, I have relied on Sandra Fredman's proposal of a comparative approach to human rights questions as deliberative reasoning. The comparative exercise conducted in chapter three is one such example of deliberative reasoning applied to the concept of reasonable accommodation.

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