REASONABLE ACCOMMODATION
Time to Extend the Duty to Accommodate Beyond Disability?

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Summary | This article discusses the merits of extending the duty to make a reasonable accommodation beyond disability, to include other grounds such as religious belief and old age. The author identifies a number of drawbacks with such an approach, and concludes that, if interpreted dynamically, the obligation not to indirectly discriminate can also provide for a de facto accommodation duty in many cases. The author notes that such a duty can also be read into the ECHR at times.

Key words | Reasonable accommodation; Indirect discrimination; Disability; Religious belief; Age.

1 Introduction

The obligation to provide a reasonable accommodation to disabled individuals was propelled onto the European legal landscape by the EC Employment Equality Directive of 2000.1 Article 5 of that Directive provides:

‘In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.’

As a result of this Directive, all Member States were required to introduce an obligation to provide a reasonable accommodation for disabled individuals in the context of employment and training. In a limited number of Member States, the duty has been extended beyond employment. However, no Member State has opted to establish a specific duty to accommodate for other grounds or groups, and there is certainly no obligation to do so under EU law. In the Netherlands the reasonable accommodation obligation is currently found in Article 2 of the Act on Equal Treatment on the Grounds of Disability or Chronic Illness 2003 (WGBh/cz). No such duty exists with regard to other groups under Dutch law. Moreover, the proposed Integrated General Equal Treatment Act also confines the duty to accommodate to disabled people. However, it does propose that the current duty to make an effective accommodation (‘doeltreffende aanpassingen’ or ‘redelijke aanpassingen’) is reformulated, and the proposal refers instead to a duty to make a reasonable accommodation (‘redelijke aanpassingen’). Elsewhere I have praised the Dutch legislation for establishing that the required accommodation must be ‘effective’, meaning that it must be both suitable and appropriate, and necessary, rather than using the more confusing notion (in this

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It is submitted that it would be a backward step to change the wording found in the WGBh/cz and to move to a requirement to make a ‘reasonable’ accommodation. However, further reflection on this point is beyond the scope of this article.

The purpose of this paper is to consider to what extent the duty to accommodate lends itself to a more general application to other grounds of discrimination, in light of the planned revision of Dutch law. Section two introduces the concept of reasonable accommodation with regard to disability, and reflects on what disability-related ‘special’ characteristics have led legislators to establish a duty to accommodate on this ground. Section three examines two non-European jurisdictions, the United States and Canada, which have established reasonable accommodation duties extending beyond disability. Section four reflects on the case for extending the duty to accommodate to cover the grounds of religion and belief and old age. The last two sections attempt to bring these points together, and reflect on the desirability, or not, of extending the duty to accommodate to cover other non-discrimination grounds, and the extent to which existing obligations already provide for a de facto accommodation duty.

2 The Concept of Reasonable Accommodation and Disability

The obligation to make a reasonable accommodation on the grounds of disability is based on the recognition that, on occasions, the interaction between an individual’s impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner. The characteristic of impairment is relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment or other opportunity that is open to others who do not share that characteristic.

However, non-discrimination law is traditionally underpinned by the idea that the protected characteristic, such as race or gender, is rarely relevant to the employment or other decision, and only in exceptional circumstances, such as the bona fide occupation qualification situation, does it allow for different or unequal treatment. Therefore the protected characteristic should be ignored. However, ignoring, by failing to accommodate, the characteristic of impairment, can result in denying an individual equal opportunity. In this respect, Fredman has argued:

‘Characterising disability as an irrelevant characteristic removes the underlying justification for detrimental treatment, but insisting on similar treatment simply reinforces a particular norm and perpetuates disadvantage.’

A reasonable accommodation requirement in the employment context therefore prohibits an employer from denying an individual with a disability an employment opportunity by failing to take account of the individual’s impairment, when taking account of it – in terms of changing tasks or the physical environment of the workplace – would enable the individual to do the work. Clearly, this requires an individualised analysis, both in terms of the abilities of the recipient of the accommodation, and the work-related skills and activities that are required. In this sense, the reasonable accommodation requirement differs from the obligation not to indirectly discriminate, which prohibits an ‘apparently neutral’ provision which (is likely to) disproportionately disadvantage members of a particular group, such as women or Muslims. A provision which disadvantages one particular woman would not, as such, amount to indirect discrimination, unless that disadvantage was also likely to effect a broader group of women. In contrast, a provision which disadvantaged one particular person with a disability could trigger a duty to reasonably accommodate.

Lastly, it is worth noting that the reasonable accommodation duty is quite complex and requires, for example, an understanding of what amounts to an ‘accommodation’, when that accommodation will be regarded as ‘reasonable’ or not, and when the duty to ‘accommodate’ is not owed because it would lead to a ‘disproportionate burden’. Indeed, in spite of the fact that all EU Member States have transposed the Employment Equality Directive some years ago, it is submitted that, in many Member States, there is confusion and uncertainty about the nature of the duty to provide a reasonable accommodation, and this confusion often extends to the judiciary, as well as employers and disabled persons.

3 (Reasonable) Accommodation Beyond Disability: Canadian and US Law

Whilst EU law confines the duty to accommodate to people with disabilities, and the obligation is, on the whole, similarly restricted in the laws of the Member States, this is not the case for some non-European jurisdictions.

In Canada s. 15 of the Charter of Rights and Freedoms, which is the main constitutional guarantee of equality and non-discrimination, entails a ‘duty to accommodate difference’. Section 15(1) provides that:

‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’

The Canadian Supreme Court has long embraced a substantive concept of equality when interpreting and applying s. 15. In the early case of Andrews7 (1989) the Court asserted that ‘the accommodation of differences … is the essence of true equality’.8 Moreover, since identical

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6 The similarities and differences between the obligation to accommodate and the prohibition of indirect discrimination are explored further below.
8 Ibid, para. 169.
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treatment can result in inequality, substantive equality can require different treatment. Ten years later, in *Law*9 (1999), the Court stated that equality aims to provide equal treatment in a ‘substantive sense’ and a failure to provide substantive equality can flow both from a formal legislative distinction, or from a failure to take into account the underlying differences between individuals.11 To that extent, substantive equality entails a ‘duty to accommodate difference’, meaning that differential treatment is sometimes necessary within the context of s. 15 of the Charter.

In addition to the Charter, separate human rights legislation, consisting of the federal Human Rights Act and various provincial acts, determine the framework within which accommodations are required. These acts generally apply to both private and public parties. As with s. 15, the Courts have recognised that the purpose of these human rights acts is to achieve substantive equality, and that they establish a duty to accommodate which applies to numerous covered grounds and in many different fields.

With regard to these human rights acts, the concept of reasonable accommodation was first recognised and applied in the context of discrimination relating to religion.12 However, in 1999, in the *Meiorin* judgment,13 the Canadian Supreme Court embraced what has been called the ‘unified’ approach to non-discrimination. Under the *Meiorin* test, a measure which is *prima facie* discriminatory, can only be justified, *inter alia*, if it is demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the complainant, without imposing an undue hardship on the employer.14 As a consequence, employers are required to accommodate the characteristics of individuals as far as reasonably possible, and a strict approach is taken to allowing exceptions or exemptions from the duty not to discriminate.

In conclusion, Canadian courts have recognised duties to accommodate not only with regard to disability,15 but also *inter alia* religion, pregnancy,16 national origin,17 family status,18 and sex.19 Such duties have been recognised for both public and private parties.

Turning briefly to US law, it is worth noting that, whilst the reasonable accommodation provisions of the Americans with Disabilities Act (ADA) arguably have provided the model for many comparable provisions throughout the world, including Article 5 of the Employment Equality Directive, US law first addressed reasonable accommodation in the context of religion, and only later established the duty in the context of disability. The US Civil Rights Act20 establishes a duty to provide a reasonable accommodation with regard to religion and employ-

9 Ibid, paras. 165 and 169.
11 Ibid, para. 25.
16 E.g. *Québec (Société de l’assurance automobile)* v. *Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2004 CanLIi46419 (QC C.A.).
ment. However, the duty is only owed in so far as it does not cause undue hardship, meaning that there must be no more than a de minimis cost,\(^2\) either in terms of financial cost or disruption. This is a much weaker standard than the comparable requirement found in the ADA, and consequently it is much easier to justify a failure to make an accommodation on religious grounds than on the grounds of disability.

This section has demonstrated that some non-European jurisdictions have extended the duty to accommodate beyond disability. In Canada the duty to accommodate flows from the substantive nature of equality law and is built into the test to determine whether a measure amounts to discrimination or not. In the US, a similar (but not identical) approach is used for both disability and religion (a duty to provide a reasonable accommodation up to the point of undue hardship). The following section reflects on arguments for extending the duty to accommodate to two additional grounds within Europe.

4 The Case for Extending Reasonable Accommodation Beyond Disability: Religious Belief and Age

Religious Belief
Lucy Vickers has noted that the ‘a duty to accommodate religion can be viewed as an essential element of protection against religious discrimination’.\(^2\) Referring to US legislation, Vickers has commented that the duty to provide a reasonable accommodation was established ‘in recognition of the fact that religious freedom requires the protection of religious practice or observance, as well as protection of the belief itself’.\(^2\) In this context, common forms of accommodation can be allowing breaks or time off work so that the employee can worship at appropriate times or go on a pilgrimage, and adaptations to dress codes to accommodate religious beliefs. More controversial are accommodations allowing employees to obviate from usual standards of behaviours, such as permitting an employee not to shake the hands of a member of the opposite sex,\(^2\) or rearranging tasks, such as by allowing a civil servant not to officiate at same-sex marriages.\(^2\) Seen from this perspective, some may argue that an accommodation for one employee amounts to condoning discrimination against others.\(^2\) This is a potentially problematic element of any duty to accommodate on the ground of religion. Moreover, alterations to working time granted for religious reasons, such as being exempted from working on Saturday or permission to take an extended leave, can also be of great benefit to other employees, albeit for reasons which are unrelated to religious belief. The granting of such accommodations to workers for religious reasons, may imply that other employees have a disproportionately reduced

\(^{23}\) Ibid.
chance to receive such benefits. Perhaps for these reasons, the duty to accommodate on grounds of religion in the US is much less far-reaching than is the case for disability.27

It is submitted that whilst the argument that the duty to accommodate on grounds of religion certainly has some merits, there are also disadvantages associated with it, linked to the need to balance the interests of different groups, and to the need to ensure legal clarity. With regard to the former point, it does not seem that the disproportionate burden test easily lends itself to a balancing of interests. Indeed, the resentment or opposition of other workers to the granting of an accommodation should never justify a failure to accommodate when those emotions are based on the kind of prejudice which equality law aims to combat. However, on occasions, the opposition of other employees to religious accommodations, related to an exemption from the requirement to work at the weekend, or permission to take extended leave, will be based on the fact that such accommodations result in additional burdens or limitations on non-exempt workers, and are not related to prejudice. Nevertheless, it is submitted that such complaints from other workers are unlikely to amount to a disproportionate burden, even though they may be legitimate. With regard to the latter point (legal certainty), differing reasonable accommodation duties, with a stronger standard applying in the case of disability, and a weaker standard with regard to religion, may create a situation of confusion and lack of clarity.28 Nevertheless, it is recognised that this is the approach that is followed in the US.

Older People
Malcom Sargeant29 has argued that the duty to make a reasonable accommodation should be extended to cover older workers. He stresses the similarities between older people and people with disabilities, including the fact that they are both likely to face stereotypical assumptions from employers about their abilities.30 Sargeant acknowledges that if an older person actually acquires a disability, they will be protected by the reasonable accommodation duty, however he argues that ‘there is no protection during the process of decline’.31 For this reason he feels that the reasonable accommodation duty should be extended to cover older workers who ‘suffer from an ailment, a disadvantage linked to age or who are on the margins of disability that need protection’.32 In short, Sargeant argues for age-related accommodations to compensate for natural decline related to age that does not amount to a disability, and submits that this will help to combat the discrimination older people face in the labour market, and increase the participation rate of older workers.

Sargeant presents an interesting case in favour of extending the duty to accommodate. In making his argument, he notes barriers faced by older people on the labour market, including employers’ assumptions that younger workers are more efficient and cheaper. However, it is

27 Although note the argument of Chai Feldblum, who submits that the US Supreme Court, which has interpreted the ‘undue hardship’ clause in the context of religious discrimination to involve no more than a ‘de minimis’ cost, did not correctly discern the intention of Congress when doing so. Chai R. Feldblum 2002 (supra footnote 2), p.177.
28 As far as the author is aware, this has not been the subject of any research (in the US), meaning that this is a supposition on the part of the author.
30 Ibid, p. 177.
not clear how a reasonable accommodation duty will help to address such assumptions, and may even reinforce them. Moreover, since ageing is an inevitable process, a (future) duty to accommodate an older worker may discourage employers from taking on middle-aged and older workers, who do not yet require an accommodation, but may do so in the future. In that sense, the duty may lead to more discrimination against such workers, although Sargeant does not share this view. Lastly, where a workers’ decline in function amounts to a disability, a duty to accommodate will already exist, and it is not clear how to distinguish between an age-related decline in function which does not require an accommodation; one that does require an accommodation; and a disability-related accommodation.33

5 Does a De Facto Duty to Reasonably Accommodate beyond Disability already exist?

Having reflected on the case for explicitly extending the reasonable accommodation duty to cover two new grounds, this section of the paper will reflect on the extent to which existing obligations, found in international or Dutch law, already provide for an (indirect) duty to accommodate on grounds other than disability.

Prohibition of Indirect Discrimination

EU (and Dutch) law already prohibit indirect discrimination on a number of grounds and in a variety of fields. To what extent can the prohibition of indirect discrimination do the same job as a reasonable accommodation duty?

Under EU law, indirect discrimination ‘shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having [certain specific characteristics LW] … at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. In a number of cases, courts have found that a measure will not pass the above mentioned ‘proportionality’ test, and specifically that it will not be regarded as a ‘necessary’ measure, if a de facto accommodation could be made to meet the needs of members of the protected group which would otherwise be disadvantaged. An example of such a case is London Underground Ltd. v. Edwards (No. 2) (1998).34 Ms. Edwards, who was a train driver and a single mother, challenged a new shift system that made it far more difficult for her to combine her work and childcare responsibilities than had previously been the case. She alleged that the new system was harder for single parents to comply with than was the case for other workers, and that the system amounted to indirect sex discrimination, given that women were far more likely than men to be single parents.

33 However, see the proposal at the end of this paper to extend the duty to accommodate to cover the ground of ‘disability plus any other ground’, and the paper by A. Hendriks and A. Terlouw in this volume on multiple discrimination.

Ultimately the case turned on whether the new shift system created requirements that ‘is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it’.35

Simon Brown LJ, concurring with Potter LJ of the Court of Appeal, found that

‘… it would seem to me wrong to ignore entirely the striking fact here that not a single man was disadvantaged by this requirement despite the vast preponderance of men within the group. Looked at in the round, this requirement clearly bore disproportionately as between men and women, even though only one woman was affected by it.’36

In essence, the Court found that the employer had been obliged to accommodate Ms. Edwards by offering her a shift system that would have enabled her to combine her work and childcare responsibilities, and had indirectly discriminated against her by not doing this.

The above discussion reveals two pertinent facts. First, a claim for indirect discrimination can only succeed if the challenged measure has the potential to disadvantage a group of people who have a protected characteristic (such as a particular gender, religious belief or age), and to whom the complainant belongs. In reality only one such individual may be disadvantaged, as seems to have been the case in *Edwards*, but that individual must be disadvantaged because he or she shares characteristics with a wider group of people who are protected by equality law. In contrast, the reasonable accommodation duty is owed to individuals, and is based on an individual assessment of their needs. Whilst the need for the accommodation must in some way be linked to a protected characteristic, e.g. to a specific consequence flowing from a particular impairment or disability, there is no need to establish that a wider group of people are, or potentially would be, disadvantaged by the challenged measure.

Second, if the employer in *Edwards* had been able to justify the need to apply its new shift system to all workers, including single parents, in line with the requirements found in EU and UK law (objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary), Ms. Edwards would not have been successful in her claim. Herein lies the weakness of a claim of indirect discrimination: even where it is established that a measure ‘indirectly discriminates’ against a group of women, or another covered group, the employer can still refer to an objective justification37 which allows it to ‘trump’ any claim of discrimination, and continue with the measure. Meanwhile, a failure to make a reasonable accommodation can also be justified, but on the grounds that making such an accommodation would amount to a disproportionate burden.

It was noted above that the disproportionate burden test may be ill-equipped for determining how to respond to reasonable accommodation requests which (potentially) discriminate against, or disadvantage others. It is submitted that the objective justification test, which applies with regard to indirect discrimination, is more flexible in this respect, and can allow for a balancing of interests. For example, a measure that potentially indirectly discriminates against some

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35 This was a requirement for the establishment of indirect discrimination against women under the Sex Discrimination Act s. 1(1)(b).


37 Leading to a measure that is also appropriate and necessary.
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believers, because it requires employees to work every other weekend, may be regarded as pursuing a legitimate aim of ensuring continuous production at the workplace and spreading the burden of weekend work evenly over all employees. The means used could also be regarded as appropriate and necessary, because granting exemptions to believers (or others), would lead to discontentment amongst other workers, as well as imposing extra burdens on them.38

It can be concluded that a de facto duty to accommodate can, on occasions, be read into the duty not to indirectly discriminate, and there is evidence of courts interpreting the duty in this way. It is submitted that an active stance by courts and, in the Netherlands, the Equal Treatment Commission, with regard to the obligation not to indirectly discriminate, could go a long way to providing for the making of de facto reasonable accommodations beyond the context of disability. Where individuals who are followers of (minority) religions, women and older or younger people experience disadvantage as a result of ‘an apparently neutral provision, criterion or practice’ it is submitted that this will usually be because of characteristics they share with members of the wider group, and not because of a characteristic which is particular to them. For example, Muslims as a group may be potentially disadvantaged by a work-related requirement which limits their freedom to pray at certain times of the day; and, as noted above, rules relating to working time can potentially disadvantage the group of single mothers. In such situations a potential claim for indirect discrimination arises, and, assuming that the relevant work-related requirement pursues a legitimate aim and is necessary and appropriate, a potential defence to the claim (or the potential judgment of the court) is that the individuals in question are to be accommodated.

However, it is also acknowledged that it is not clear if the concept of indirect discrimination can be used to create a duty to accommodate for each e.g. religious individual or older person, since the concept is defined in terms of group disadvantage. In reality the question as to whether a measure disadvantages only one individual per se, or potentially disadvantages a group of people with a protected characteristic, including the individual complainant, may not be easy to answer, meaning that the question of whether a measure amounts to indirect discrimination or not can be disputed. A further potential problem with this approach is that it may create uncertainty.39 The prohibition of indirect discrimination does not clearly enunciate a duty to accommodate, and this may only be recognised or understood by (specialist equality) lawyers and judges. Employers and other parties may be unaware that the prohibition to indirectly discriminate can include within it a positive duty to accommodate. Moreover, judges may also not share this understanding of indirect discrimination – although is it submitted that, in the Netherlands at least, the Equal Treatment Commission, (and its successor?), do have sufficient expertise in this area. The author therefore recognises that it is unclear if the approach advanced above is adequate to provide accommodations in all appropriate cases. If evidence or research reveals problems (in practice), the author acknowledges that additional reflection will be required.

Lastly, while this section has focussed on indirect discrimination, one should note that, in some instances, the division between direct discrimination and the reasonable accommodation duty is also blurred. The law can impose requirements on employers that are designed to protect

38 Of course, an analysis of the specific facts of any case is necessary to determine if these requirements would be met in practice.
39 Although some may also make this criticism of the reasonable accommodation duty, on the grounds, for example, that is not be clear what amounts to a ‘disproportionate burden’.
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(or accommodate) the particular needs of specific groups of workers, such as pregnant women and nursing mothers. Failure to comply with these de facto accommodation duties can amount to direct discrimination.

European Convention on Human Rights

A second potential source of a de facto accommodation duty is the ECHR. The European Court of Human Rights (ECtHR) has had to rule in a number of cases in which, in essence, claims for reasonable accommodation were at stake. Prominent amongst such cases in Thlimmenos, which concerned a Jehovah’s Witness who had been denied an appointment as a chartered accountant on the ground that he had a criminal conviction for having refused to carry out military service due to his religious belief. The Greek authorities refused to waive the general rule that a prior criminal conviction barred individuals from taking up such posts. The ECtHR responded by expanding its concept of discrimination:

'The right not to be discriminated against … is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'

The Court went on to find a breach of Article 14, and held ‘by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants’, the Greek state had violated the applicant’s right not to be discriminated on the grounds of his religion. Emmanuelle Bribosia et al have argued ‘[e]ven though these terms are not explicitly used, this … principle [that the state can be asked to modify a general rule] can be matched with the duty of reasonable accommodation’.

The Court has also implicitly returned to the concept of reasonable accommodation in another Article 14 case relating to disability. In Glor v. Switzerland the applicant challenged a Swiss rule which obliged him to pay an additional military-service exemption tax because he had been declared unfit to serve on the grounds that he had a minor disability (diabetes). Individuals with a more severe disability who were declared unfit were exempt from paying this tax. The Court suggested that it would have been possible to have provided for forms of military service compatible with the applicant’s condition or for alternative forms of service. Such an adaptation can also be regarded as a form of reasonable accommodation. The Court went on to find a breach of the right not to be discriminated against combined with the right to privacy.

40 At issue was Article 14 (prohibition of discrimination with respect to any of the rights and freedoms guaranteed by the Convention).
42 Ibid, para. 48.
45 ECHR 30 April 2009 (Glor v. Switzerland), no. 13444/04, EHRC 2009, 79.
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One additional ‘reasonable accommodation’ case in which Article 14 was at issue, this time in the context of religious belief, was Milanović. In this case a prominent Serbian follower of the Hare Krishna religion was repeatedly subject to violent attacks by unknown persons. After several years, the police had still not identified the perpetrators, and the police had been investigation ineffective and accompanied by comments that revealed prejudice towards the applicant’s religious beliefs. The Court found that there had been a breach of Article 3 (freedom from torture or cruel and degrading treatment or punishment), in combination with Article 14. With regard to the latter article, the Court held:

‘State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events. … Treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.’

Lastly, a number of other cases, relating to detention in prison or by police authorities, also provide evidence of the way in which the ECtHR’s judgments can lean in favour of de facto accommodations. In Price v. UK the Court held that detaining severely disabled individuals in conditions unsuited to their needs breaches Article 3 (freedom from inhuman or degrading treatment). In this respect, the Court, in considering whether the conditions of detention are adequate, is willing to take into account the particular situation of the detainee, and require that accommodations are made to meet the needs of the specific individual where necessary. More recently, in Jasinskis, the Court found that authorities had breached Article 2 (right to life) following the death of a ‘deaf and mute’ man who was in police detention. Article 2 requires the authorities to take appropriate steps to safeguard the lives of those within its jurisdiction. In the case at hand, the detainee had suffered injuries in a fall. The police did not call an ambulance when they first detained him, and did not give him the opportunity to provide information about his state of health, even though he was knocking on the doors of his cell. His health subsequently deteriorated, and he later died in hospital. Referring to Price, the Court noted:

‘Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability.’

46 ECHR 14 December 2010 (Milanović v. Serbia), no. 44614/07. However, note that the ruling was not final at time this article was completed.
47 Ibid, paras. 96 and 97.
49 ECHR 21 December 2010 (Jasinskis v. Latvia), no. 45744/08. However, note that the ruling was not final at time this article was completed.
50 Ibid, para. 59.
In the context of specific accommodations that should have been made, the Court stated:

'Taking into account that the applicant’s son was deaf and mute, the police had a clear obligation to at least provide him with a pen and a piece of paper to enable him to communicate his concerns.'51

In a further prison-related case, *Jakóbski*,52 the Court held that Article 9, which guarantees freedom of religion, had been breached when prison authorities failed to provide a detainee with a meat-free diet, contrary to the dietary rules of his faith. The Court thereby read a *de facto* duty to accommodate religious belief into Article 9 in this specific setting.

**Conclusion**

My position is that all individuals who are protected by non-discrimination law should be able to benefit from an accommodation when required. However, the establishment of a (separate and slightly different) reasonable accommodation duty for all grounds or groups is not necessarily the best way to achieve this. The ‘unified’ approach found in Canadian law, under which a measure which is *prima facie* discriminatory can be justified only if it is demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the complainant without this amounting to an undue hardship, is appealing. It applies across all grounds in the same way and seems to be sufficiently flexible. However, such an approach would, *inter alia*, involve abolishing the distinction between direct and indirect discrimination / differentiation, and the separate justifications related thereto, which form the basis of EU (and Dutch) equality law. For pragmatic reasons, such an approach does not lend itself to the current regime of EU or Dutch equality law.

An alternative way of extending the duty is to establish a specific reasonable accommodation obligation for a number of different grounds, as occurs in the US in the context of disability and religious belief. However, related but slightly different accommodation duties can create confusion and misunderstanding, and arguably this is not to be encouraged, particularly given the complexity of the existing disability-related reasonable accommodation duty.

It has been argued here that, if interpreted dynamically, the obligation not to indirectly discriminate can also provide for a *de facto* accommodation duty in many cases. Whilst this approach would not be adequate in the context of disability, given the very individualised nature of some of the accommodations required by people with disabilities, it is submitted that it does lend itself to providing for *de facto* accommodations in situations where a measure is likely to lead to disadvantage for a group of people who share a characteristic protected by non-discrimination law, even if only one individual is disadvantaged in practice. The *Edwards* case reveals how such an approach can work in practice. In addition, in some instances an accommodation duty can flow from obligations found in the ECHR.

Nevertheless, it is submitted that the reasonable accommodation duty should be extended to cover one group. In line with the recognition that intersectional characteristics can lead to

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51 Ibid, para. 66.
52 ECHR 07 December 2010 (*Jakóbski v. Poland*), no. 18429/06. However, note that the ruling was not final at time this article was completed.
an individual being faced with discrimination, it is submitted that, on occasions, an individual can require an accommodation because of a combination of their disability and another ground protected by equality law. For example, a woman may require an accommodation because she is both disabled and pregnant.\textsuperscript{53} An individual with only one of these characteristics would not require an accommodation, and so the accommodation cannot be regarded, \textit{stricto sensu}, as being based on the individual’s disability. It is therefore submitted that the accommodation duty should be extended to protect people who require an accommodation because they are disabled, in combination with another ground or characteristic protected by equality law.

\textsuperscript{53} I am grateful to Prof. Theresia Degener for raising this in discussions with me.