

Mid-semester Writing Assignment Memo: Question 1
Caroline Bradley: Spring 2016

General Comments:

If you are assigned a 4 page paper it should be a 4 page paper and not a five and a half page paper. Part of the exercise is to figure out how to use the allocated space effectively to answer the question. Sometimes an examiner will decide not to read past the length limit. The 4 page length limit is quite short so I think it would make sense not to include an introductory paragraph that doesn't really say anything.

If you are turning in a written assignment like this one you should check it before handing it in. Ideally the document should not contain spelling mistakes (check the spelling of case names), plurals should be written with an s and not with an apostrophe (rights rather than right's) and if you use a phrase like "with respect to" please only use it once in a sentence.

Question 1 [35 responses]

Beata is an employee whose employment has been terminated on the basis that she is not capable of full time employment due to illness. The question states that the Court of Justice has held that sickness such as Beata's should be accommodated as a disability under Directive 2000/78. The Disabilities Council of Arcadia wants to support Beata in her claims that her dismissal violated EU law. The facts of the question suggest that the rights that Arcadian Courts give to employees who are ill are more limited than the rights the employees are supposed to have under EU law. Ideally Beata would like to enforce her rights under the directive to obtain reinstatement. I think that a good answer to this question could focus solely on the ideas in Mangold and Küçükdeveci. Although Beata's rights are set out in the Equal Treatment Directive and directives do not normally provide horizontal direct effects such that Beata could not enforce those rights against a non-state actor the facts here track pretty well with those in the 2 cases. It is the same directive which has been treated as giving effect to a general principle of non-discrimination with respect to age. I don't think disability discrimination should be treated any differently. It is true that in the directive there are provisions which seem to give discretion to the Member States but they are subject to control by the Court of Justice which has the ability to interpret limits on Member State discretion (in a preliminary reference application or enforcement action). And we know from the question that the Court has expressed some views on how the disability provisions should be interpreted, which Beata can look to (the question states that the Court has said situations like Beata's are situations of disability which must be accommodated if possible under the directive, thus he has a right to have her disability accommodated under EU law.) As in Mangold and Küçükdeveci Beata would be seeking to have EU law applied in a way that disapplies a rule of Arcadian law that is a barrier to her right to equal treatment. The question states that "Arcadian law allowed them to terminate employees who had missed a significant period of work ((defined by the Arcadian Courts to be a period of over 6 months) due to illness." This is similar to the laws in the 2 cases that the Court of Justice says must be disapplied by the national courts.

Art 4(1) of the directive states that Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1

shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The question does not provide any facts from which we can assess proportionality.

Seemingly Beata does have an EU right to reasonable accommodations for her disability. She can go to court in Arcadia to try to persuade the court to give effect to her right by changing the position they have taken in the past and she can for a reference to the Court of Justice for a preliminary ruling/reference. If her application is denied and the Arcadian court does not give effect to her rights under the directive, then she could sue state for damages with respect to Arcadia's failure to give effect to EU law (Francovich, Kobler, TDM) or she can complain to the Commission and ask it to bring enforcement proceedings.

It would not be wrong to look at other ways of getting round the lack of horizontal direct effect of directives here. An employee's rights under a directive are only directly effective against a Member State or a state entity under *Foster v British Gas* (directives do not produce horizontal direct effects). It is not clear from the facts of the question whether or not Security Solutions is an emanation of the State under *Foster*. It works exclusively for a government department and is performing functions which seem to be of a public nature. Therefore the facts could be analyzed based on 1. SS as an emanation of the state and 2. SS as a non-state entity.

If SS is an emanation of the state, Beata can enforce directly effective rights under the directive against it (we would apply the test for direct effect to the relevant provisions of the directive: clear and unconditional, precise, no need for implementing measures or at least no discretion with respect to implementation).

If SS is not an emanation of the state there are some different options to consider. One would be whether the doctrine of indirect effects could be used to interpret Arcadian law to be consistent with the requirements of the directive. We don't know enough about Arcadian law here (whether there is a relevant statute that can be interpreted to be consistent with the requirements of the directive).