On the obligation to make reasonable accommodation for an employee with a disability

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Abstract  
The UN Convention on the Rights of Persons with Disabilities (UNCRPD) features interesting labour law related aspects. The goals of this article are to reconcile horizontal human rights and contract law in the context of reasonable accommodation in working life and to establish guidelines by which to assess the obligation to make accommodation, for example in relation to the EU Employment Equality Directive. This article utilises the framework of just social practice, which makes reference to welfarism in Nordic contract law. Just social practice creates a theoretical framework in which to investigate the rights and obligations attached to reasonable accommodation in working life, because it may be argued that its basic premises correspond to the ultimate justification of the accommodation rights provided for by the UNCRPD: the idea of social inclusion. The first part of the article seeks to identify common features between the UNCRPD and contract law. It sketches the theoretical framework of just social practice, in which contract law and human rights coincide within the context of employment. The second part of the article elaborates what the process of reasonable accommodation within the framework of just social practice constitutes and introduces specific steps that are followed when the right to accommodation is in question. The article also identifies the factors that have an influence on reasonableness evaluations as being either internal or external to the contractual relationship and exemplifies how contract law principles are to be applied when assessing reasonableness. The article argues that reconciliation of the goals of private law and human rights within the framework of just social practice makes it possible to argue that contract law principles can function as a tool for social inclusion.

Keywords  
European Union law, contract law, human rights, UNCRPD, reasonable accommodation, employment contract, disability, inclusive equality, contract law theory, contract law principles

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Introduction

The aim of this article is to present a theoretical framework which reconciles horizontal human rights and contract law in the context of reasonable accommodation in working life and to establish guidelines by which to assess the obligation to make reasonable accommodation under the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Achieving such reconciliation is crucial as the predictability and foreseeability of contractual obligations, which is an inherent goal of contract law, may be diminished due to justified interests stemming from the human rights sphere. These uncertainties may impact negatively upon both employers and employees. Employers cannot fully anticipate what is required of them within their businesses, which may in turn hinder the prospect of employees’ rights being fulfilled. Furthermore, one of the challenges that labour law faces is the pressure of deregulation. The contract law approach can be regarded as an attempt to address this challenge and to pinpoint the practical importance of integrating contract law and human rights in order to protect the vulnerable.

The right to reasonable accommodation in the workplace lies at the very core of the UNCRPD. Article 27, paragraph 1 which concerns work and employment states that: ‘States Parties recognize the right of persons with disabilities to work, on an equal basis with others.’ States parties are to promote the right to work, inter alia, by ensuring that reasonable accommodation is made for persons with disabilities in the workplace. The Convention has mostly been analysed by human rights lawyers from the perspective of the rights it provides. To date, private law scholars have not

1. E.g. T. WILHELMSSON, 1992, pp 78-79.
2. On the deregulatory tendency, see M. FREELAND, ‘Burying Caesar: What was the Standard Employment Contract?’, in K. V.W. STONE and H. ARTHURS (eds), Rethinking Workplace Regulation: Beyond the Standard Contract of Employment, pp 81-94 (Russell Sage Foundation 2013); and Bruno Caruso, ‘The employment Contract is Dead! Hurrah for the Work Contract! A European Perspective’, in K.V.W. STONE and H. ARTHURS (eds), Rethinking Workplace Regulation: Beyond the Standard Contract of Employment, pp 95-111 (Russell Sage Foundation, 2013). Rather than seeking the demise of the employment contract, Caruso argues for its transformation into a ‘work contract’, which denotes a more personalised form of contract that takes into account an individual’s personal needs and capabilities. B. CARUSO 2013, p 101. The principle of the protection of an employee and the idea of fair distribution constitute other points of departure for labour law. See, e.g. G. DAVIDOV and B. LANGILLE (eds), Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work (Hart Publishing, 2006); M. I. VAN JAARSVELD, ‘Contract in Employment: Weathering Storms in Mixed Jurisdictions? Some Comparative Thoughts’, 12.1 Electronic Journal of Comparative Law May 2008, available at www.ejcl.org/121/art121-26.pdf.
3. Article 27 of the Convention provides that States must ensure that the right to work entails ‘the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities’. The principle laid down in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities was enshrined in the Convention. The Rules refer to recognition of the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. See UN of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. UN General Assembly 85th plenary meeting, 20 December 1993 48/96. A/RES/48/98, p 17. On the right to work, see e.g. A. SEN, ‘Work and Rights’, 139 (2) International Labour Review 2000.
4. E.g. A. LAWSON, ‘Reasonable Accommodation in the Convention on the Rights of Persons with Disabilities and Non-Discrimination in Employment: Rising to the Challenges?’, in C. O’Mahony & G. Quinn (eds), Disability Law and Policy: An Analysis of the UN Convention, pp (359-374), at 374 (Clarus Press 2017). M. C. SALEH and S. M. BRUYÈRE, ‘Leveraging Employer Practices in Global Regulatory Frameworks to Improve Employment Outcomes for People with Disabilities’, 6 (1) Social Inclusion 2018, pp (18-28), at 20-21.
been motivated to analyse the rights laid down in the Convention in relation to the obligations that
the effective fulfilment of these rights (for instance, in the labour law context) inevitably requires.
This is the case, despite the fact that the right to reasonable accommodation in working life is in
essence a deeply private law phenomenon.

Arriving at an understanding of the right to reasonable accommodation is a twofold task in
which human rights and private law both play significant roles. The employee’s right to reason-
able accommodation can impose an obligation on the employer to act that may emerge long after
the contractual relationship between the employee and the employer first came into being. As
positive rights, equal treatment and non-discrimination require the employer to take active
measures and are usually not cost-free. Thus, tension may arise between the respective rights
of the employee and employer. The employee may have a right to accommodation, but an
employer has a competing right to conduct its business as well as a right to property, for example,
under the European Charter of Fundamental Rights (Article 17) and the European Convention on
Human Rights (Protocol 1, Article 1). This conflict represents the basic tension involved in
labour law, but in a situation where human rights aspects must be addressed. Evaluating the
reasonableness of the duty to accommodate the needs of the employee in the context of an
employment relationship calls for the striking of a balance between the effectiveness of such
accommodation in terms of enabling the employee to continue with the employment against the
interests of the employer in providing it.

Human rights and the UNCRPD do not offer tools that help assess what is reasonable and what,
on the other hand, constitutes an undue burden on employers. Whether or not an employee with
disabilities in fact has a right to accommodation is a question that must be addressed in the private
law sphere as the reasonableness of this potential right is assessed in that context. Although the
limits are set by mandatory national legislation, the sphere of discretion and interpretation is

5. On the contrary, the more traditional approach of regarding equal treatment and non-discrimination as negative rights
usually only requires that the employer refrain from taking certain actions. See, e.g. N. BAMFORTH, M. MALIK & C.
O’CINNEIDE, Discrimination Law: Theory and Context (Sweet & Maxwell, 2008).
6. Hugh Collins has highlighted the fact that the unfettered right to choose a contractual partner is a two-sided issue. The
general commitment to freedom of the individual and a free market supports an unrestricted right to choose. However,
for marginalised groups the consequences of such choices may entail denial of equal opportunity in the market and social
exclusion. See H. COLLINS, ‘The Vanishing Freedom to Choose a Contractual Partner’, 76 Law and Contemporary
Problems, pp (71-88), at 71.
7. On the inherent tension in labour law, see M. YLHAÎNEN, ‘From Obedience to initiative? Precarious work and
changing subjectivities in labour law discourse’, in A. GRIFFITHS, S. MUSTASAARI & A. MÅKI-PETÄJA-LEI-
NONEN (eds), Subjectivity, Citizenship and Belonging in Law: Identities and Intersections pp (232-252), at 234
(Routledge, 2017). Labour rights are entitlements that are attached to the shared social role as workers/employees and
include both individual and collective rights. Mantouvaloue has argued that three different approaches can be found in
the legal literature on this matter. These are (1) the positivistic approach, which views labour rights as human rights on
the basis of their formal legal status, which they gain from being mentioned in international human rights documents; (2)
the instrumentalist approach, which highlights the nature of labour rights as human rights as a useful strategy in relation
to litigation and their role in promoting these rights within state and international institutions including unions and
NGOs; and (3) the normative approach, which pinpoints the nature of labour rights as human rights as a matter of moral
truth. This line of thought is more theoretical and seeks justification for labour law in the human rights sphere. V.
MANTOUVALOUE, ‘Are labour rights human rights?’, 3 (2) European Labour Law Journal, pp (151-172), at 152-164.
8. See N. BAMFORTH, M. MALIK & C. O’CINNEIDE 2008, p 1078.
9. E.g. M. HELIN, ‘Perusoikeuksilla argumentoinnista’, in T. Iire (ed), Varallisuus, vakuudet ja velkojat. Juhlajulkaisu
Jarmo Tuomisto 1952–9/6–2012, pp 11-30 (Turun yliopiston oikeustieteellisen tiedekunnan julkaisuja. A. Juhaljulk-
aisut N: o 24. Jyväskylä 2012).
We argue that within the private law sphere the right to reasonable accommodation and the obligation to make it are subject to general principles of contract law. This means that an obligation to make reasonable accommodation needs to be assessed in the light of the parties’ reasonable expectations, in particular. In sum, the article turns upside down the idea of contract law being sensitive to fundamental and human rights and argues that in order to protect rights on a horizontal basis, human rights should be contract-law-sensitive.

To understand contract law, this article utilises the framework of just social practice. Juha Pöyhönen refers to the theory of just social practice as accentuating the role of the principle of reliance as well as ideas that relate to the conceptual understanding of contractual relations as process. In our view, this framework makes reference to welfarism in contract law and particularly to person-related-need-rational welfarism. It refers to needs stemming from individual circumstances as well as to the capability or incapability of a contracting party and goes beyond the idea of protection being attached to a certain social role such as consumer or employee. In Thomas Wilhelmsson’s words, ‘in evaluating the rationality of the decision the crucial question is what effects the decision has on the concrete and real needs of the members of the society’.

The article explains and understands just social practice and rights and obligations stemming from employment contracts in the context of the Nordic welfare state. Welfarism in Nordic contract law is closely linked to core thinking in relation to labour law doctrine. The protection of the weaker party, just distribution and substantive equality are the essence of both labour law and of welfarism in contract law. The main concepts and goals of welfarism can also be seen to coincide with certain goals of horizontal human rights that contribute to the idea of social inclusion.

From the perspective of just social practice, a point of departure for both human rights and private law spheres is that members of a community have obligations towards one another.

10. E.g. in Finnish legislation, the regulation addressing the employer’s duty to take into consideration the effect of the working environment on employees’ capability to work is comprehensively covered in the Safety at Work Act.

11. See J. PÖYHÖNEN, Sopimusjärjestelmä ja sopimusten soviteltu (Suomalainen lakimiesyhdistys 1988), pp 168. We evaluate this issue in more detail in the chapter entitled ‘Just social practice and long-term employment contracts’.

12. In this context, the concept of ‘social private law’ is relevant. See, e.g. T. WILHELMSSON, Social Civilrätt. Om behovsorienterade element i kontrakträten allmänna läror (Lakimiesliiton kustannus, 1987) and T. WILHELMSSON, Critical Studies in Private Law, p 14 (Kluwer Academic Publishers, 1992).

13. T. WILHELMSSON, ‘The Philosophy of Welfarism and its Emergence in the Modern Scandinavian Contract Law’, in R. Brownsword, G. Howells & T. Wilhelmsson (eds), Welfarism in Contract Law, pp 86-88 (Dartmouth, 1994). The theory of welfarism in contract law is multidimensional and its substance is dependent on the juridical environment at hand. The idea of person-related-need-rational welfarism represents a means of pushing the boundaries of contract law in seeking the limits of welfarism. The common understanding that links the different approaches can be found in the idea of distributive justice, which builds upon a strong emphasis on redistribution and reallocation of resources. For different perspectives on this issue, see T. WILHELMSSON, ‘Varieties of Welfarism in European Contract Law’, 10 (6) European Law Journal, November 2004, pp (712-733), at 716-723.

14. T. WILHELMSSON 1992, p 69.

15. The basic approach to law, and the structure and legal sources of private law, are so similar in the Nordic countries that using this generalisation in relation to the background for this model is justifiable, despite the fact that the domestic legal material is Finnish. See, e.g. T. WILHELMSSON 1992, pp 16-17.

16. UNCRDP refers to the concept of inclusive equality that resonates with the idea of social inclusion. Inclusive equality means that the social barriers are removed in order to attain social justice including fair distribution. E.g. S. WITCHER, Inclusive Equality: A Vision for Social Justice, p 124 (Policy Press, 2013). C. SHEPHARD, Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada, p 136 (McGill – Queen’s University Press, 2010).
The first part of the article seeks common features between the UNCRPD and contract law. We sketch the theoretical framework of just social practice, in which contract law and human rights coincide within the context of employment. The second part of the article elaborates what the process of reasonable accommodation within the framework of just social practice constitutes and introduces specific steps that must be followed when the right to accommodation is in question. It also identifies the factors that have an influence on reasonableness evaluations as being either internal or external to the contractual relationship and exemplifies how contract law principles are to be applied when assessing reasonableness. In line with the perspective chosen in this article, we locate individual labour law – which concerns individual employment relationships between employers and employees – within the private law sphere and regard it as a special field of contract law. Specific issues concerning the recruitment of new employees are excluded from the scope of this article.

**Just social practice in contractual relationships**

Understanding agency under the framework of just social practice departs from the Rawlsian conception of the equality of individuals and their freedom to contract. In modern societies it is widely accepted that because parties often do not have equal bargaining powers, balancing is needed in order to achieve equality in certain relationships. The contractual fairness makes it possible to take into account both the value of freedom and the policy goal of favouring the weaker party. Mandatory legislation is used for this purpose and seeks to facilitate the weaker party’s contractual freedom. Mandatory legislation protecting employees and consumers offers an example of the means by which equality in contractual relations may be achieved. Labour laws that can be, and often are, conceptualised as interventions in the free markets illustrate well the intention of bringing these conceptions of fairness into the private law sphere. In addition to this idea of equality as achieving power balance in contractual relations built on social roles, there has been a gradual shift towards also taking into consideration individual reasons that may impact upon a person’s agency and thus promote fairness as social inclusion. The impact of non-discrimination laws on horizontal relationships is one key reason for this

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17. The approach here echoes the question that Thomas Wilhelmsson asks in the context of social private law: ‘To what extent can and should parties economic and social position be taken account of as a legal fact in contract law?’. See T. WILHELMSSON 1992, p 15.
18. The right to reasonable accommodation may also be relevant when recruiting an employee with disabilities. Discrimination on the basis of disability can also take place in hiring and recruiting. See Article 27, paragraph 1, section a of the UNCRPD.
19. Similarly, J. PÖYHÖNEN, p 196; T. WILHELMSSON 1987, pp 46-47; M. C. NUSSBAUM, Political Emotions: Why Love Matters for Justice, pp 120-121 (Harvard University Press, 2013).
20. See J. PÖYHÖNEN 1988, pp 168, 382-383; T. WILHELMSSON 1994, p 79.
21. See, e.g. G. DAVIDOV, A Purposive Approach to Labour Law, pp 21-22 (Oxford University Press, 2016). Davidov himself does not fully agree with the definition. He considers that it would also be possible to approach labour law independently, not to conceptualise it as intervention in the free market or be bound to its private law background. He also regards the goals of labour law as differing somewhat from those of the private law from which it derives: ‘[t]he managerial prerogative is based on the laws of contract and property; labour law places limitations on this prerogative based on its protective goals’. Thus, he takes the view that the goals of labour law can be approached – depending on the needs at hand – solely from the perspective of an employee. As the whole point of this article is to build a bridge between labour law and the contractual obligations of employers and employees, we take a different approach in which the interest of employer is also noted.
development. This inserts an additional layer of equality and fairness into contractual relations that accentuates the idea of considering individual characteristics as well as the actors’ social roles.

In a similar manner to traditional contract law, UN human rights Conventions are usually based on Rawls’s conception of the equality of individuals and their rationality as a prerequisite of justice which contributes to equal contractual partnership. What is significant is that this approach does not take into account the diversity of individuals, but is characterised by inherently paternalistic and protective attitudes towards those who are considered to be ‘others’. The UNCRPD, which promotes social inclusion, departs from this tradition.

The approach offered by the framework of just social practice clarifies the coincidence of agency in the human rights and private law spheres. Just social practice recognises the idea that the structures of society and contractual environments need to be flexible in order to ensure that full agency and equal participation are possible for all. The framework of just social practice contains three overlapping dimensions. First, it holds that the safeguarding of agency is a common goal for contract law and human rights that promote agency as the basis of equality. Second, under this framework individual changes in a contracting party’s capabilities can be assessed. Finally, the framework pinpoints that contractual relationships are often long-term and sees them as a flexible process.

22. In this context the ECtHR’s decision in Pla and Puncernau v. Andorra is noteworthy in showing the application of the anti-discrimination principle in the private sphere. As Collins remarks, the majority of the ECtHR emphasised anti-discrimination laws in the cost of private and family life. See ECtHR, 15 December 2004, Pla and Puncernau, v. Andorra, App. No 69498/01. See H. COLLINS 2013, pp 85-87. H. COLLINS 2013, pp 80-82. This development may be regarded as part of a more general approach to constitutionalisation of contract law. See, e.g. in the Finnish context, J. HUSA & J. KARHU, ‘The Constitutionalisation of Contract Law in Finland’, in L. Siliquini and A. Hutchinson (eds), More Constitutional Dimensions of Contract Law, pp (15-40) at 19-20 (Springer 2019).

23. In this context, legal relevance does not depend on belonging to a certain legally protected group, but on a person’s actual needs arising from social circumstances. See T. WILHELMSSON 1992, pp 72-73.

24. Rawls proposes two possible ways of dealing with the problem of prioritising while trying to achieve an understanding of what is just or unjust. It can either be done under the umbrella of a single overall principle, which would require negotiation concerning the weight to be placed on various principles in order to reach a common understanding or by putting the principles in a serial ordering of the plurality of principles. In the latter case, Rawls suggests that the principle of equal liberties takes precedence over other principles, such as those regulating social and economic inequalities. His theory of justice takes for granted the equality of bargaining powers as between the parties. J. RAWLS, A Theory of Justice, pp 42-45, 144-145 (5th printing, Harvard University Press, 1973). Later, Rawls emphasised that his theory presents a political conception of justice. He pinpointed the two moral powers that persons should have: a sense of justice and a conception of good. J. RAWLS, Justice as Fairness: A Restatement, pp 18-19 (Erin Kelly (ed), Harvard University Press, 2001).

25. J. PETMAN, ‘The Special Reaching for the Universal: Why a Special Convention for Persons with Disabilities?’, in (eds) J. Kumpuvuori & M. Scheinin, United Nations Convention on the Rights of Persons with Disabilities, pp 21-25 (Center for Human Rights of Persons with Disabilities in Finland, VIKE 2009); J. PÖYHÖNEN 1988, p 196; S. VEHMAS & N. WATSON, ‘Moral wrongs, disadvantages, and disability: a critique of critical disability studies’, 29:4, 638-650 Disability & Society 2014, pp 643-644.

26. See, e.g. H. MANNAN, M. MACLACHLAN and J. MCVEIGH, ‘Core concepts of human rights and inclusion of vulnerable groups in the United Nations Convention on the Rights of Persons with Disabilities’, 6 European Journal of Disability Research 2012, pp 159-177; O. M. ARNARDÓTTIR, ‘A Future of Multidimensional Disadvantage Equality’, in O. M. Amardóttir & G. Quinn, The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives, pp 43-44, 64 (Martinus Nijhoff, 2009).
The safeguarding of agency: a common feature in contract law and the UNCRPD

Human rights and contract law both play a role in enabling agency and participation in the society. However, the approach is different. The Nordic welfarist approach to contract law seeks to protect agency in circumstances where the contractual relationship is unbalanced. Roger Brownsword refers, *inter alia*, to personal welfarism, in the context of which a contract is not a competitive activity but rather a solidaristic endeavour. Contractors have a duty to deal with one another in good faith and to actively concern themselves with one another’s welfare. According to Brownsword, a contract is result of a transaction in which both sides have weighed their own interests equally with those of the other party. In this sense, a contract may be viewed both as an instrument utilised in the context of a cooperative approach to doing business and as an instrument of social solidarity: the contract represents a joint venture in which each side is concerned that it genuinely further one another’s interests. In the Nordic welfarist tradition of contract law, the safeguarding of agency has been built on the idea of protection of the weaker party. At the system level, an individual’s position on the market is defined by belonging to a certain group and having a certain social role. However, the welfarist tradition makes it possible also to take into consideration individual capabilities. Wilhelmsson identifies a possibility to develop welfarism in contract law in a person-related need-rational manner. He regards the identification of the weaker contracting party in terms of their individual needs, as opposed merely to being a member of a group, as being essential.

The UNCRPD is not based on the prohibition of discrimination, but on acceptance of diversity and human rights. The prohibition of discrimination should be seen as only one of the means available to achieve the Convention’s objectives, which includes full and effective participation in working life as an essential aspect of achieving social inclusion. The UNCRPD recognises the systemic (societal) structures that are built upon assumptions as to what is default and normal and seeks to enable a person to have agency despite their possession of differing characteristics, which, in interaction with the structures of society, might hinder and prevent participation in social life. As

27. Dagmar Schiek writes that contract law ‘lies at the heart of a society which is based upon the market as a distributive and social order. Most important goods and services are contracted for. One’s capacity to enter a contract equals one’s capacity to take part in the cultural, social and economic life of society. Thus, the messages of contract law may well be the most important messages to this society. As long as contract law allows heterophobia free rein and accepts economic profits from its fruits as a basis for contractual choice and terming, a public policy of non-discrimination legislated into criminal or other forms of law is heavily counterbalanced. Stopping contract law from helping accomplish the fruits of heterophobia can thus be seen as an important step towards personal equality and justice.’ D. SCHIEK, ‘Contract Law, Discrimination and European Integration’, in T. Wilhelmsson & S. Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, p 426 (Ashgate, 1999).
28. R. BROWNSWORD, ‘The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’, in R. Brownsword, G. Howells & T. Wilhelmsson (eds), *Welfarism in Contract Law*, pp 21-62, p 36 (Dartmouth, 1994); T. WILHELMSSON 2004, pp 713-714.
29. R. BROWNSWORD 1994, p 36. In his later work, which deals with contract law in the English common law context, Brownsword refers to the option ‘to invoke the standards of fairness recognized by the community. On this view, the legitimate function of contract doctrine is to protect the expectations of transactors relative to the standards of fairness recognized by their community’. R. BROWNSWORD, *Contract Law: Themes for the Twenty-First Century*, p 292 (second edition, Oxford University Press, 2009). See also M. MONONEN, *Sopimuksikeuden materiaalisuudesta*, pp 160-161 (Linarni Oy, 2001).
30. T. WILHELMSSON 1994, pp 86-88.
31. E.g. G. QUINN, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’, in G. Quinn & L. Waddington (Eds), *European Yearbook of Disability Law*, pp 91-92 (Intersentia 2009).
a general principle under the UNCRPD, the application of the principle of equality of opportunity (Article 3) is a significant move away from a formal model of equality towards a substantive model of equality built upon flexible and inclusive social structures. Functional limitations caused by disability are not considered to be individual and person-related problems.

The Convention defines a person with disabilities as a subject of rights and elaborates the following dimensions of equality: redistributive fairness, recognition without stereotyping, participation and social inclusion and accommodation of difference. Social inclusion under the Convention is aimed at, *inter alia*, promoting the labour rights of persons with disabilities. The principle of just distribution of material resources, which is inherently connected to social inclusion, is also one of the core principles that justifies labour law. Fair distribution in labour law has developed from the function of balancing bargaining powers between employers and employees towards the correction of inequalities between different groups of workers by means, for example, of equality laws. It includes, for example, decent remuneration for work and adequate social benefits. Therefore, redistribution by means of labour law entails the fairer redistribution of resources, power and risks between employers and workers but also among workers by reference to their personal capabilities.

As noted above, contract law can aim to provide need-rationalism in individual circumstances and, thus, promote the agency of the disadvantaged in the private law realm. It resonates with the idea of social inclusion in the UNCRPD. It acknowledges the differences between individuals and pinpoints substantive equality and agency. An individual’s capabilities to participate in social life are the core rather than setting up a certain social role that defines the position of the weaker party. The aim is to ensure that specific obstacles to equal participation are removed in order to enable agency and guarantee fairness. Just social practice in contract law can be utilised to give effect to the rights provided for by the UNCRPD in the private law realm.

**Changing capabilities of an employee**

Working and the ability to work are the main contractual obligations of an employee. However, the ability to work can be affected, for example, by disability over the course of employment. The welfarist approach (weaker party protection) and human rights (non-discrimination) offer tools when the employee’s condition has significance in respect of his or her work-related capabilities.

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32. CRPD/C/GC/6, para. 10. Colleen Shephard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada*, McGill – Queen’s University Press 2010 p. 136. She further pinpoints the importance of group solidarity and collective action as well as the responsibility of the state which also are instruments of reinforcing inclusive equality. ibid. p. 137-138.

33. CRPD/C/GC/6, paras. 23-24.

34. The UNCRPD embraces a substantive model of equality and extends, and elaborates on, the content of equality by the following means: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognise the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination* (CRPD/C/GC/6), adopted on 9 March 2018, para. 11.

35. E.g. B. HEPPLE, ‘Factors influencing the making and transformation of labour law in Europe’, in G. Davidov & B. LANGILLE (eds), *The Idea of Labour Law*, pp (30-42), at 31-34 (Oxford University Press, 2013). G. DAVIDOV 2016, p 59.

36. G. DAVIDOV 2016, pp 58-59.
The mandatory rules in (Finnish) labour law are a good example of Nordic welfarism and represent the idea of the protection of the weaker party. These mandatory rules impose obligations on the employer and guide the process of evaluating the employee’s work-related capabilities. The mandatory regulation guiding the process of evaluation may be relatively vague as it makes reference to the process of evaluation instead of the substantive needs of the employee.37 The effect of the relevant norms also depends on how well the mandatory regulation is integrated into the employment contract.38 There are no mandatory guidelines or milestones regarding the material extent to which an employer is obliged to support an employee’s ability to work during his or her employment (the contractual relationship).39 The mandatory rules recognise the evolving character of employment relationships, at least to some extent. They are characterised by weaker party protection and not by enabling agency. However, due to the development of equality rights and the right to non-discrimination it is necessary that they are also evaluated in relation to promoting and supporting the agency of an employee.

Unlike in the mandatory labour rules that support agency, in the UNCRPD enabling agency is not only a result but is the main approach. The key is that the legal concept of disability in the UNCRPD highlights the dynamic nature of disability and interaction between individual capabilities and the environment. The basis of this approach is laid down in the following definition contained in Article 1, paragraph 2 of the Convention: ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’40 Hence, the dynamic character of disability entails long-term impairments, which, in interaction with the environment, hinder participation.

Discrimination in working life on the basis, inter alia, of disability is prohibited under EU law.41 The Convention serves as an interpretive tool for European instruments of non-discrimination. The case law of the ECJ well illustrates the various elements involved in defining disability. As noted in HK Danmark, the origin or cause of disability is not significant.42 In FOA

37. The process of evaluation of a person’s capability to work has been assessed in recent Supreme Court cases in Finland: KKO 2018:39 (18 May 2018), where the employer had failed to evaluate whether the employee was fit for work despite his obesity; and KKO 2018:31 (16 April 2018), where the Court considered that the employer had violated the employee’s rights by failing properly to consider the employee’s state of health.
38. As Mark Freedland, for example, has argued (see M. FREEDLAND 2010, p 88), the concept of (standard) employment contract and the legal understanding of that concept varies considerably with regard both to its adherence to either status or to contract and to the level on which mandatory regulation applies to it. Nonetheless, we find that the framework of just social practice and the contractual principles that we are using here complement and further understanding of the way in which non-discrimination rules operate.
39. See, e.g. R. ROGOWSKI, Reflexive Labour Law in the World Society (Edward Elgar, 2013).
40. The essence of the UNCRPD as a legal source lies precisely in the formulation of disability as a dynamic concept. A similar definition of the concept of disability can be observed in the case law of the ECHR. See ECHR 30 April 2009, Glor v. Switzerland, Application No. 13444/04 and ECHR 23 February 2016, Çam v. Turkey Application no. 51500/08, in which the Court considered that Article 14 of the UNCRDP (right to non-discrimination) reasonable accommodation should be interpreted in the light of the UNCRPD in order to ensure ‘the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’ (Article 2 of the UNCRDP).
41. Most importantly article 21 paragraph 1 of the Charter of Fundamental Rights of the European Union and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p 16-22 (‘Employment Equality Directive’).
42. ECJ 11 April 2003, HK Danmark in joined cases C-335/11 and C-337/11, ECLI: EU: C:2013:222, paras. 29 and 32.
(the ‘Kaltoft case’), disability was defined as a dynamic and organic concept.\textsuperscript{43} Exclusion by the origin of disability would be against the very aim of the Directive, the implementation of equal treatment.\textsuperscript{44} The Court noted that ‘it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness’.\textsuperscript{45}

The interaction between individual capabilities and the environment is further explored in the case of \textit{Z}. In this case the Court stated that the medical condition of the woman who was the subject of the case certainly constituted a limitation resulting from physical, mental or psychological impairment, and that it was of a long-term nature.\textsuperscript{46} However, the Court took the view that the inability to have a child by conventional means did not prevent the woman (albeit that she was a commissioning mother) from having access to, participating in or advancing in employment. It was not in itself a condition that made it impossible to carry out her work or constituted a hindrance to the exercise of her professional activity.\textsuperscript{47}

\textbf{Long-term employment contracts}

In the framework of just social practice, contracts are comprehended as relational, which means that they should be contemplated as ongoing processes. Agency must also be designated in relation to the evolving employment relationship. One must pay attention to the position of the contracting parties as agents in the context of the contract. The contractual circumstances, including interaction and the capabilities of contracting parties, will change over time and must be evaluated in relation to, for example, the tasks that are to be performed. In addition to the changing circumstances, the capabilities of the parties must be recognised and accepted as something that might alter and affect the rights and obligations of the parties. Significantly, pinpointing the nature of the employment contract as a process opens new flexible possibilities in the system of contractual discretion and the issues that affect them.\textsuperscript{48}

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\textsuperscript{43} ECJ 18 December 2014, \textit{FOA}, C-354/13, ECLI: EU: C:2014:2463, in which the Court ruled that ‘obesity of a worker constitutes a “disability” within the meaning of the directive where it entails a limitation resulting from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.’ (para. 64)
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\textsuperscript{44} The question of whether and under what conditions illness can be included in the definition of disability as a ground of discrimination was on the CJEU’s agenda even prior to the advent of the UNCRPD. See judgment of the Court of 11 July 2006, \textit{Chaco Nava\,s}, C-13/05, ECLI: EU: C:2006:456, in which the Court, interpreting the Employment Equality Directive, stated that \textit{illness as such} does not qualify as a disability (para. 52).
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\textsuperscript{45} \textit{HK Danmark}, para. 40.
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\textsuperscript{46} ECJ 18 March 2014, \textit{Z}, C-363/12, ECLI: EU: C:2014:159, para. 79.
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\textsuperscript{47} \textit{Z}, para. 81. Furthermore, in \textit{HK Danmark}, the Court stated that a ‘disability’ includes such state of health that allows the person to work only part-time (para. 43). On ‘full and effective participation in professional life’ in relation to \textit{Z}, see, e.g. L. LOURENCO & P. POHJANKOSKI, ‘Breaking down Barriers? The Judicial Interpretation of “Disability”’, in U. Belavusau & K. Henrard (eds), \textit{EU Anti-Discrimination Law Beyond Gender} pp 321-337, 330-331 (Hart, 2018).
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\textsuperscript{48} J. Pöyhönen refers in this context only to ‘pre-understanding’ of contracts. In his opinion, the fundamental rights system can convert into the necessary ‘pre-understanding’ and general context that can be utilised before using any property rights. Thus, property rights become fundamental and human-rights-sensitive. J. PÖYHÖNEN 2003, p 152. For historical analysis of employment contracts as long-term contracts, see L. NOGLER, ‘The Historical Contribution of Employment Law to General Civil Law – A Lost Dimension’, in L. Nagler & U. Reifner (eds), \textit{Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law}, p 288 (Eleven, 2014).
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An employment contract is often a model example of a contract in which the contractual rights and obligations are relational; evolving over a relatively long period of time. Pöyhönen takes the view that a contract is not finished temporarily, contextually or personally at a specific moment. Throughout the contractual relationship the parties are obliged and must be committed to working towards common goals within the limits of what is reasonable. This flexible approach is an attempt to overcome the perspective under which a specific point in time is pinpointed at which an instrument becomes valid. The specific point in time determines the rights and obligations that stem from the contract, a view that is promoted by will and reliance theories.

The traditional approach tends to recognise relevant facts from the prevailing standpoint at the point in time when the contract is concluded. The change in temporal scope opens up the time horizon over which legally meaningful assessment may occur. Extension of the temporal scope of the contract is a better option than the traditional correcting of imbalances in a contractual relationship with the help of fairness argumentation. It makes it possible to interpret contractual norms and take into consideration different kinds of contextual (external) or material (internal) viewpoints to resolve legal problems arising from changing circumstances. This means that a contract can be characterised as situationally and operationally sensitive. It cannot be viewed solely as a stable area governed by established principles concerning consent, possession and liability for damages, which is how contract law is traditionally understood. To conclude, a contract and its legal consequences form part of a constantly evolving economic environment.

The sensitivity of the interpretation of contracts places emphasis on the fact that changes occur over time throughout an employment relationship. The characteristics of an employment relationship may quite often call for the evaluation of changing circumstances over time. The passing of time may also impact upon the contracting parties’ obligations or their ability to fulfil them. The effect of changing circumstances can clearly be seen in a long-term employment relationship, for example, where evaluation of the conditions of employment may change as a consequence of changing circumstances. These may relate to the employer’s situation, the economic environment, the work itself or the employee’s personal skills.

Viewing a contract as a process calls for the use of anchoring tools in order to achieve legal certainty and predictability. The typical instabilities and uncertainties of contract as a process can be controlled and predictability can be created by recourse to the principles of reliance, transparency and anticipation. In the framework of just social practice these principles must be interpreted using an approach in which reasonableness is understood as the main rule. Reasonableness may take precedence over freedom of contract and such predictability that aims to confirm the stability of the market exchange. Hence, no new principles are created when shifting from one contract law

49. It is worth noting here that ongoing changes in the labour market have challenged the idea that long-term contracts represent something ‘normal’ in the context of work. However, some of the ideas presented in this article go beyond employment contracts and may be applied in a related context to contracts regarding work performance and may also be applicable to long-term self-employed persons.

50. J. PÖYHÖNEN, Uusi varallisuusoikeus, pp 150, 153-154 (Talentum, 2003).

51. J. PÖYHÖNEN 2003, pp 146-147. See also M. RUDANKO, ‘Pohjoismainen sopimusoikeusajattelu ja kansainväliset sopimusvallat’, 7-8 Lakimies 2014, pp 1006-1021.

52. As distinct from the temporal context, the personal context does not relate to internal factors, but to external factors. The personal context is determined when noting the different interest groups that are involved in a contractual relationship. In the employment relationship, the relevant interest groups – in addition to the employee and employer – comprise other employees and contractual partners of the employer. J. PÖYHÖNEN 2003, pp 150-151, 173-175.

53. J. PÖYHÖNEN 2003 p 158.
theory to another, but principles must be positioned and interpreted in a new way. The goal of the framework that is applied must determine how the principles are interpreted.  

Accepting the idea of an employment contract relationship as a process guides us towards approaching the key issues by reference to contract law principles. Instabilities and uncertainties can be avoided in the course of the employment, and legal certainty can be achieved, by means of contract law principles. This means investigating the parties’ legitimate expectations that have been brought into existence during the course of the relationship (principle of reliance), the transparency of the parties’ actions (principle of transparency) and their ability to make provision to support the employee’s future ability to work (principle of anticipation).

In order to interpret contractual obligations in changing circumstances, the aspects of the employment contract should be analysed in their temporal and material dimensions when assessing what amounts to reasonable accommodation. Contract law principles must be utilised when evaluating an employee’s right to accommodation. They are useful in assessing reasonableness and whether accommodation represents an undue burden for the employer. However, they must be interpreted bearing in mind the aim of achieving agency and social inclusion. Section 3 illustrates this issue by means of examples that show how the principles may be analysed when assessing the reasonableness of any accommodation made.

**The right to reasonable accommodation in practice**

The special right to reasonable accommodation that enables agency and social inclusion under the UNCRPD meets the special needs of an individual. This differs from traditional protection of the weaker party under private law, which derives, in principle, from belonging to a certain group or performing a certain role, like the role of an employee.

Accommodation rights ensure the agency of the person in question and therefore function as a tool of social inclusion, which is needed for that person to attain or maintain membership of the group labelled ‘employees’ and to enjoy the rights reserved to that group. However, the reasonableness assessment brings out the true nature of the right to accommodation. Its fulfilment requires interpretation and balancing of conflicting rights, which makes it a discretionary right.

Reasonable accommodation must be made in the workplace. The question of who has the right to reasonable accommodation must be evaluated against the conditions set within the human rights sphere under the UNCRPD. Whether such accommodation is reasonable and what the content of the right is must be answered in the private law sphere. The answer to the first question only partially answers the second – the mode of accommodation depends on the social circumstances of a particular case – since the reasonableness of making an accommodation cannot be assessed solely by reference to human rights.

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54. J. PÖYHÖNEN 1988, pp 143, 185, 195-196.
55. E.g. nowadays Finnish contract law contains, in addition to arguments based on freedom of contract, strong bases for arguments relating to reliance and legitimate expectations that are created by mutual cooperation under the contract. See J. HUSA & J. KARHU 2019, p 29.
56. For example, the report of the Committee on the Rights of Persons with Disabilities contains guidelines. See CRPD/C/GC/6, paras. 26-27. However (understandably, given the context) these guidelines are quite vague and thus not particularly helpful, taken in isolation, as a guide to assessment of the obligation to make and the right to have reasonable accommodation in the context of an employment relationship.
Steps towards the realisation of the right to accommodation

It may be that the evaluation of the right to reasonable accommodation is not required in practice because the a priori accessibility requirements are fulfilled. When this is done properly, it may no longer be necessary to accommodate an individual’s needs.\(^{57}\) Furthermore, it is also possible that the employer’s duty of care under mandatory domestic employment laws in relation to the employee’s work ability is sufficient to maintain the capability to work.\(^{58}\) Only if accessibility or work ability measures including, for example, minor adjustments to work tasks are insufficient must the right to reasonable accommodation be considered, if the employee claims it.

When deciding on the right to reasonable accommodation under the employment contract, one must go through a certain process by means of specific steps. The concept of reasonable accommodation is tightly bound up with the concept of non-discrimination as refusing to make reasonable accommodation is regarded as discrimination.\(^{59}\) Therefore, in order to specify the process and steps involved in evaluating whether reasonable accommodation has been made, it is useful to draw an analogy with the assessment of discrimination and non-discrimination in general. The steps in such an assessment can be set out in the following order:

1. establishing the ground of discrimination;
2. establishing that there is a prima facie suspicion that discrimination on that ground has occurred or is occurring;
3. evaluating the possible justified reasons for the actions in question; and
4. making a decision as to whether discrimination has or has not occurred.

Hence, assessment of the right to reasonable accommodation requires (1-2) evaluation of whether the employee is a person with disabilities under the UNCRPD, which means that she is prima facie entitled to reasonable accommodation; (3) assessing the reasonableness of the accommodation; and (4) making a decision as to whether the refusal of reasonable accommodation amounts to discrimination or not.

The whole assessment process can be described in relation to HK Danmark. In that case the ECJ stated that the evaluation of disability must be carried out prior to the evaluation of reasonable accommodation.\(^{60}\) On this basis, the reasonable accommodation assessment in respect of disability can be conducted in a corresponding manner. First, the employee’s disability and work ability are

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57. On the need to distinguish accessibility and accommodation rights, see A. LAWSON 2016, pp 365-367.
58. E.g. under Finnish labour law legislation, the employer has a general duty of care in respect of the employee’s work ability connected with the specific work of an employee and modifications of that work. Employment Contract Act chapter 2 section 1 stipulates that ‘the employer shall in all respects work to improve employer/employee relations and relations among the employees. The employer shall ensure that employees are able to carry out their work even when the enterprise’s operations, the work to be carried out or the work methods are changed or developed.’ Furthermore, section 8 of the Occupational Safety Act lays down the employer’s general duties to exercise care. Employers are required to exercise care in relation to the safety and health of their employees while at work by taking the necessary measures in relation to work, working conditions and other aspects of the working environment. However, employers also have a duty to consider the circumstances related to employees’ personal capacities. Thus, it may be noted that the employer’s obligation to maintain the employee’s ability to work is relatively weak – despite the mandatory nature of labour law.
59. Employment Equality Directive, Article 2, paragraph b, section ii; Glor v. Switzerland, para. 96.
60. At paragraph 47. The nature of the measures to be taken by the employer is not decisive as to whether that a person’s state of health is covered by that concept.
assessed (step 1). Second, given that the dynamic concept of disability is based on the idea of hindrances and obstacles, which, in interaction with the personal impairment involved, cause impediments to participation in working life, there is a requirement for accommodation being made as a remedy that would enable a person to participate fully in working life. Refusal to make such accommodation leads to an assumption that discrimination is involved (step 2). What constitutes a reasonable accommodation depends on the impairment as well as the hindrances involved. For example, a ‘disability’ might mean a state of health that allows a person to work only part-time. Thus, part-time work might be considered as reasonable accommodation.

Third, the possible justifications for refusal to make accommodation are investigated, i.e. the reasonableness assessment related to accommodation is carried out (step 3). Reasonableness should be considered by the national court by assessing whether an accommodation measure represents a disproportionate burden on the employer. Fourth, the national court decides on whether the refusal to make accommodation is discriminatory or not (step 4).

The actual content of reasonable accommodation in any given case should be assessed by weighing the employee’s right to social inclusion/agency under human rights laws against the burden that making the accommodation involved will cause the employer. The Committee on the Rights of Persons with Disabilities has assessed the right to reasonable accommodation in working life in only one case in which the majority found no violation. In the case, the Committee stated that State parties enjoy a certain margin of appreciation when assessing the reasonableness and proportionality of accommodation measures. The courts of States parties to the Convention can evaluate facts and evidence in specific cases unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice (10.5).

Reasonableness assessment: internal and external factors

The reasonableness assessment in the framework of just social practice pinpoints the special temporal aspect – the long duration of the contract. The right to reasonable accommodation is a way to ensure one contracting party’s right to non-discrimination when the burden is reasonable for the other party. Discrimination clearly cannot be justified per se, but evaluation of reasonableness calls for both parties’ interests to be taken into account. For example, section 15(2) of the Finnish

61. See HK Danmark, para. 43. The interpretation is consistent with the aim of the Directive, which is to enable a person with a disability to have access to or participate in employment (HK Danmark, para. 44).
62. HK Danmark, para. 64.
63. HK Danmark, para. 64.
64. Jungelin v. Sweden, CRPD/C/12/D/5/2011, 02 Oct 2014. The Committee considered that the of Swedish Labour Court thoroughly and objectively assessed all the elements of the case before reaching the conclusion that the support and adaptation measures recommended by the Ombudsman would constitute an undue burden for the employer (10.6) In the case in question the author has had severe sight impairment since birth. She applied to the Social Insurance Agency (Försäkringskassan) to work as an assessor/investigator of sickness benefit and sickness compensation applications but was informed that, although she fulfilled the competence, experience and reference requirements, she had not been considered for that vacant post because the Social Insurance Agency’s internal computer systems could not be adapted for her visual impairment. According to the Agency, its information technology department was of the opinion that neither the hardware nor the software had the tools to convert information in the computer system into Braille. In addition, part of the system could not be made accessible to the author even with the use of various technical aids. All proposals were time-consuming and would require an extremely large financial investment. The Agency also argued that hiring a personal assistant for the author would imply that the author would deal only with the preparation of memoranda prior to a decision regarding the right to payment and that the assistant would carry out 80% of the work.
Non-discrimination Act states that in assessing the reasonableness of the adjustments required, attention must also be paid to the size, financial position, nature and extent of the operations of an actor, as well as the estimated costs of the adjustments and the support available for them.

The section refers to the external factors that are most commonly looked at as part of reasonableness assessment and that are on the employer’s side. The assessment of the reasonableness of the duty to accommodate in employment relationship is, however, twofold. The issue of reasonableness must be resolved at the level of the contractual relationship and therefore evaluated as one aspect of that relationship. Hence, in addition to the external aspects, the internal aspects of a contractual relationship must be noted. This is an essential aspect of the integration of equality rights into private law.

In order to illustrate the complexity of reasonableness evaluation in the context of external and internal factors, we sketch the following example:

Employee A has worked for the same ground engineering company for ten years, mostly driving a front-end loader. Later he loses his driving licence as a result of an impairment of his personal faculties. However, the front-end loader can be driven without a driving licence in a restricted area. A is still perfectly capable of loading trucks in a quarry. He cannot drive the front-end loader from the firm to the quarry in the mornings or return it in the afternoons. The adjustment or accommodation needed in respect of A’s work tasks is the exclusion of driving tasks that require a valid driving licence. On that basis, A could continue his work at the quarry.

Hence, the external factor that would affect the obligation to make accommodation could be financial support from public authorities to which the employer is entitled, in order, for example, to adapt another employee’s work tasks to arrange the necessary transportations. However, despite these arrangements being made inside the company it may be that the client for whom the work is done, the contracting party of the employer, regards A as a safety risk and accordingly refuses to permit him to work at the quarry which calls for further accommodation in the form of reorganisation of the work tasks. This would require evaluation of whether the public support would be enough to make the needed accommodation reasonable or whether accommodation would represent an undue burden and could not be reasonably required of the employer.

However, when the contractual dimension of the duty to reasonable accommodation is properly noted, the internal aspects of the contractual relationship must be considered by balancing the relevant contract law principles. In the framework of just social practice, the principle of reliance promotes reasonableness within the contractual relationship as the main rule. The idea of trust between contracting parties lies at the core of the principle of reliance on contract law. In line with the goal of social inclusion, it requires that both parties play an active role. The parties to a contract must do their utmost to avoid issues that hinder the fulfilment of the purpose of the contract and to minimise damage to the other party. The idea of reliance resembles the view that

65. Avihay Dorfman, ‘Private Law Exceptionalism: Part II: A Basic Difficulty with the Argument from Formal Equality’, Canadian Journal of Law and Jurisprudence 31(1) February 2018.
66. In _HK Danmark_ the Court stated that the possibility of obtaining public funded assistance is one issue that should be taken into account in the context of the evaluation of reasonableness. _HK Danmark_, para. 92.
67. The question of whether the client’s conduct is to be classified as discriminatory in itself is another matter.
68. Interpreted in accordance with the paradigm of just social practice, trust no longer refers to the stability of the contractual relationship (meaning that it should stay as it was at the beginning of the contractual relationship), but it refers to the mutual trust by which both parties seek to achieve common interests. J. PÖYHÖNEN 1988, p 194
a contract denotes long-term cooperation rather than a single and unique phenomenon that takes place between the parties.69

The principle of reliance refers to parties’ legitimate expectations and mutual trust. Whether A has the right to accommodation on the part of the employer should be evaluated in terms of what is reasonable in the particular situation at hand. The burden should not become undue from the employer’s viewpoint. Applying contract law principles in the assessment of an undue burden involves taking into consideration the length of the employment relationship and the extent to which this has created expectations based on trust between the parties.

Justified expectations created by a long-term employment relationship mean that the parties to the contract can expect greater flexibility and adaptivity than in a shorter-term contract in order to continue the contract. The parties are supposed to tolerate changes in their relationship. As both have worked towards common goals together for a long time, there should be more flexibility on both sides to adapt to changing circumstances. It may be that during the employment relationship, the employee has fulfilled the contractual obligations in an exceptionally loyal manner, for example, by showing extra flexibility during difficult or extraordinary circumstances. The employee may also have legitimate expectations based on the employer’s previous conduct in similar cases or due to promises the employer has made in order to influence the employee’s willingness to have his or her work ability assessed.

Application of the principles of transparency and anticipation to the example sketched above would mean that the sooner A had disclosed the deteriorating state of his health to his employer, the greater the onus on the employer to make adjustments to accommodate A’s needs. First, A’s employer might anticipate that adjustments would need to be made for A in the future. For instance, the employer might arrange business functions such a way that, for example, if another suitable position in the firm becomes vacant or a new position opens up, a new employee is not hired, but the employer makes an accommodation for an employee who has a disability by re-arranging work tasks. Second, as the employer has had the opportunity to anticipate the change in circumstances, the financial burden involved in making the necessary adjustments is smaller than might otherwise be the case. In the example given above, the employer may not be burdened with extra costs at all as the necessary accommodation could form part of ordinary business routines.

Applying contract law principles to reasonableness argumentation requires some reciprocity on a voluntary basis in order to create the grounds for accommodation. This is well illustrated by the issue of disclosure of information. Is the employee willing to disclose such personal information in advance even before invoking the right to reasonable accommodation? Anticipating the need for reasonable accommodation in working life requires that an employee provides necessary information on his or her health. For example, under section 5(1) of the Finnish Act on the Protection of Privacy in Working Life (759/2004) an employer has the right to process information concerning the employee’s state of health only if there is a justified reason and the information has been collected from the employee either personally or otherwise with the employee’s written consent. Thus, it is up to the employee as to whether to give information on their state of health and when.

69. R. BROWNSWORD, 1994, p 36. In the following examples we assume that consequences of long-term illnesses are defined as disabilities under the UNCRPD if not otherwise noted.
Conclusions

On the one hand, the right to non-discrimination and the right to reasonable accommodation are individual human rights and as such, an inherent part of human dignity. On the other hand, the idea that a contracting party’s obligations must be predictable and foreseeable lies at the very heart of private law. As discussed above, the framework of just social practice in contract law may help bridge the gap between private law and human rights. The framework shows that contract law inherently includes elements that sufficiently promote the goal of social inclusion, which is also laid down in the UNCRPD. Hence, contract law principles can be of benefit when assessing reasonableness of an accommodation. The assessment of reasonableness within the contractual relationship is a matter of social inclusion but also a matter of the employer’s ability to provide it within the limits of what is reasonable in the context of the contractual relationship.

The predictability and reasonableness of an accommodation obligation are important from an efficiency perspective. Those who are supposed to be protected may end up paying the price collectively if the protective system is designed in such a way that it discourages employers from, for example, hiring elderly employees.\textsuperscript{70} Assessment of the burden imposed in particular cases is therefore of the utmost importance and the tools used to carry out this assessment must ensure that the imposition of this obligation produces consistent outcomes.\textsuperscript{71} To conclude, this supports the idea of finding tools, such as those provided by contract law principles, to bring predictability and foreseeability to reasonableness assessment. The tools by which to achieve social inclusion within the contractual relationship in respect of the issue of reasonable accommodation may be new, but the means used to interpret it in particular cases are old.

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\textsuperscript{70} E.g. T. Wilhelmsson 1992 pp. 161-163.
\textsuperscript{71} This issue does not merely concern the maximisation of profit. Differently, see, e.g. A. LAWSON 2016, p 374. In smaller companies with very few employees or very small profit margins the survival of the business may also be at stake. Naturally, this is not said in order to argue that an employee with disabilities is unprofitable. He or she is often a real asset business-wise and the costs of accommodating their needs can be modest. See, e.g. S. SALEH & M. BRUYÈRE 2018, pp 19-20.