Revista Derecho Social y Empresa

"El derecho al trabajo de la personas con discapacidad: Experiencias nacionales en la Unión Europea y en el contexto Internacional"

"The Right to Work of Persons with Disabilities: National Experiencies in the EU and International Context"

Suplemento número 1, Abril 2015

ISSN: 2341-135X

FUNDACIÓNSAGARDOY

Cátedra UNESCO PROMOCIÓN SOCIO-LABORAL FUNDACIÓN SAGARDOY

Fundación ONCE

UNIÓN EUROPEA
FONDO SOCIAL EUROPEO
El Fondo Social Europeo invierte en tu futuro

ENTIDAD EDITORA:

Dykinson, S.L.

ADQUISICIÓN Y SUSCRIPCIONES

Dykinson, S.L.

Suscripción versión electrónica (Revista en PDF).

Compra directa a través de nuestra web:www.dykinson.com

© Copyright by

Editorial DYKINSON, S.L. Meléndez Valdés, 61 - 28015 Madrid

Teléfono (+34) 91 544 28 46 - (+34) 91 544 28 69

e-mail: info@dykinson.com

http://www.dykinson.es

http://www.dykinson.com

ISSN: 2341-135X

Revista Derecho Social y Empresa

El objetivo de esta Revista es conseguir los máximos índices de calidad, y está indexada en las siguientes bases de datos:

Nota editorial:

Los estudios publicados en esta edición -actualizado a noviembre de 2014- se han preparado bajo el Proyecto de Investigación de Derecho Comparado "Davide Auircchio", co-finaciado por la Oficina de Discapacidad de la Universidad de Bari "Aldo Moro" y la Fonzacione Guiseppe Pera, Italia.

Editorial Note:

The studies published in this issue -updated to November 2014- have been prepared under the Comparative Research Project entitled to "Davide Auricchio", co-funded by the Disability Office of the University of Bari "Aldo Moro" and the Fondazione Giuseppe Pera, Italy.

Revista Derecho Social y Empresa

CÁTEDRA UNESCO PROMOCIÓN SOCIO LABORAL

FUNDACIÓN SAGARDOY

EDITORIAL DYKINSON

COMITÉ EDITORIAL

EVALUADORES EXTERNOS

REVISTA DERECHO SOCIAL Y EMPRESA

ÍNDICE SUPLEMENTO Nº 1, ABRIL 2015

CONTRIBUCIÓN ESPECIAL DE LA ONCE

PROYECTO DE INVESTIGACIÓN «EL DERECHO AL TRABAJO DE LAS PERSONAS CON DISCAPACIDAD: EXPERIENCIAS NACIONALES EN LA UNIÓN EUROPEA Y EN EL CONTEXTO INTERNACIONAL»

RESEARCH PROJECT «THE RIGHT TO WORK OF PERSONS WITH DISABILITIES: NATIONAL EXPERIENCES IN THE EU AND INTERNATIONAL CONTEXT»

INTRODUCCIÓN (INTRODUCTION)

INFORME INTERNACIONAL Y SUPRANACIONAL (INTERNATIONAL AND SUPRANATIONAL REPORT)

INFORME FRANCÉS (FRENCH REPORT)

INFORME ALEMÁN (GERMAN REPORT)

INFORME POLACO (POLISH REPORT)

INFORME ITALIANO (ITALIAN REPORT)

CONTRIBUCIÓN ESPECIAL DE LA ONCE

LA FUNDACIÓN ONCE Y EL FONDO SOCIAL EUROPEO: 14 AÑOS DE ALIANZA POR EL EMPLEO DE PERSONAS CON DISCAPACIDAD EN ESPAÑA

MARÍA TUSSY FLORES
Jefa de la Unidad de Programas Europeos
de la Fundación ONCE

Fecha de recepción: 26-11-2014
Fecha de aceptación: 01-12-2014

RESUMEN: Como una iniciativa pionera y única en la UE, la Fundación ONCE es uno de los Organismos Intermedios del Programa Operativo del FSE de Lucha contra la Discriminación tanto en el periodo 2000-2006 como en el 2007-2013. Gracias a esta alianza, ha logrado con una gestión financiera de 400 millones de euros, de los que el Fondo Social Europeo ha aportado cerca del 70%, que cerca de 55.000 personas con discapacidad hayan firmado un contrato de trabajo y que cerca de 220.000 hayan mejorado su empleabilidad. El objetivo es reforzar esta alianza en este nuevo periodo de programación 2014-2020 que ahora se inicia, con el fin de contribuir a la construcción y consolidación de una Europa mejor para todas las personas.

ABSTRACT: As an innovative and exceptional initiative within the European Union, *Fundación ONCE* has been one of the Intermediate Bodies of the Spanish ESF Operational Programme "Fight Against Discrimination", both in the financial period 2000-2006, as well as from 2007 to 2013. Thanks to this partnership, with an inversion of 400 million euros, of which the European Social Fund has contributed about 70%, about 55,000 persons with disabilities have signed a work contract, and almost 220,000 have seen their employability improved. The goal is to reinforce this alliance in the new programming period 2014-2020, in order to contribute to the construction and strengthening of a better Europe for all people.

PALABRAS CLAVE: discapacidad, Fondo Social Europeo, alianza, empleo, inclusión, talento.

KEYWORDS: disability, European Social Fund, partnership, employment, inclusion, talent.

1. INTRODUCCIÓN

La Política Regional de la Unión Europea es uno de los principales instrumentos para la cohesión económica y social y de solidaridad financiera, y una poderosa herramienta de cohesión e integración económica.

España habrá recibido más de 150.000 Millones € de la Política Europea de Cohesión (FEDER, Fondo de Cohesión y Fondo Social Europeo) desde su adhesión en 1986 hasta 2013, convirtiéndose desde 1988 en el principal receptor de dichas ayudas del presupuesto comunitario en términos absolutos.

En este contexto, los Fondos Estructurales y de Inversión Europeos en general, y el Fondo Social Europeo en particular, son la herramienta clave para la reducción de desigualdades, la creación de empleo y el fomento de la economía social, y por ello, una excelente ocasión para promover la igualdad de oportunidades para las Personas con Discapacidad y sus familias, por medio de la accesibilidad y la mejora de la empleabilidad.

En el año 2000, los Fondos Estructurales, que en la práctica durante muchos años se centraron principalmente en el desarrollo económico, la creación de infraestructuras y la formación para el empleo, optaron por un enfoque más inclusivo y abierto, en línea con las nuevas tendencias de la UE.

Ello posibilitó en el caso español que por primera vez un Estado miembro aprobase un Programa Operativo temático, dirigido a la lucha contra la discriminación de colectivos en riesgo de exclusión, entre los que se encuentran las personas con discapacidad y que, también con carácter absolutamente innovador y único en toda la UE, se designase como entidades gestoras a entidades privadas con amplia experiencia en el trabajo con grupos especialmente vulnerables. Una de esas Entidades fue la Fundación ONCE, que por su buen hacer como gestora de ayudas en periodos precedentes, fue depositaria de la confianza del Gobierno español y el comunitario, para desarrollar actuaciones en pro de la inclusión social por medio del empleo de las Personas con Discapacidad.

Este programa, denominado Programa Operativo de Lucha contra la Discriminación, ha sido reconocido por la Comisión Europea como un ejemplo de buenas prácticas, cuyo modelo es susceptible de ser exportado a otros Estados miembros.

2. EL VALOR AÑADIDO DE LA ALIANZA ENTRE LA UNIÓN EUROPEA Y LA FUNDACIÓN ONCE

2.1. El Programa Operativo del FSE de lucha contra la discriminación 2007-2013

El Programa Operativo de Lucha contra la Discriminación es uno de los veintidós Programas Operativos que se desarrollan en España en el periodo 2007-2013 con la ayuda financiera del Fondo Social Europeo.

En sus dos periodos presupuestarios de ejecución, 2000-2006 y 2007-2013, el programa se ha caracterizado por una filosofía y un modelo de gestión singulares en la UE. Por una parte, es un programa plurirregional cuyo objetivo es luchar contra la discriminación, es decir, sus beneficiarios son personas desempleadas que, además, cuentan con unos rasgos sociales que les hacen susceptibles de ser discriminados en el mercado de trabajo –más allá de las dificultades relativas a estos mismos mercados (nivel de demanda, cualificación, empleabilidad, etc.)–. Ello exige la utilización de instrumentos más precisos, dirigidos a fortalecer la igualdad de oportunidades de los colectivos a los que se dirige el programa: mujeres, personas con discapacidad, inmigrantes, reclusos, gitanos y otros colectivos en desventaja, entendida ésta en sentido muy amplio.

El Programa Operativo se concibió en España como una inversión en un proyecto de empleo, en el que un colectivo tradicionalmente discriminado pudiese contar con herramientas para su inserción laboral, y a cargo de una organización que conociera lo bastante a su público como para luchar contra la inercia de la falta de actividad, y actuara de puente con el mundo de la empresa, la Administración y la Sociedad para desarrollar una estrategia adaptada a las características del colectivo.

Por ello, la Fundación ONCE es uno de sus Organismos Intermedios y, como tal, desarrolla a través de su Asociación para el Empleo y la Formación, FSC Inserta, una estrategia basada en los denominados itinerarios de inserción sociolaboral. El itinerario comienza con la acogida de la persona que, directamente o mediante un proceso de captación previo, necesita informarse y recibir orientación acerca de sus posibilidades para poder insertarse en el mercado laboral. El aspecto más importante es la orientación profesionalizada en la búsqueda de empleo, por la cual se diseña de acuerdo con la persona un plan personalizado adaptado a su perfil. En función de la entrevista ocupacional se detectan las necesidades del participante y, si está preparado

para su incorporación directa a la vida laboral. En la mayoría de los casos no es así, por lo que se desarrollan otras acciones, principalmente formación u otras de mejora de la empleabilidad, como talleres de habilidades sociolaborales, de búsqueda de empleo, etc.

El itinerario se completa con el soporte para el acceso al empleo, que puede ser por medio de la intermediación laboral en el mercado ordinario y en la Economía Social para acceder a un empleo por cuenta ajena –lo cual implica el envío de candidatos a ofertas de empleo–, o a través del contacto permanente con empresas, así como mediante el apoyo al autoempleo y el emprendimiento social.

Porque en la misión y valores de la Fundación ONCE, plasmados en nuestros fines fundacionales, consideramos que el empleo es la puerta de la inclusión social. La pobreza y la exclusión están profundamente relacionadas con el nivel educativo y las oportunidades de formación, por lo que hay que trabajar en la inserción laboral de las personas, pero teniendo en cuenta que al mismo tiempo es necesario fortalecer e invertir esa posición, es decir, luchar contra el prejuicio y el desánimo y contra las barreras físicas y mentales contra las que se enfrentan en su día a día las personas con discapacidad.

Esta teoría de la inclusión social basada en el empleo coincide plenamente con las Estrategias europeas y con los objetivos del Fondo Social Europeo.

2.2. El empleo de las personas con discapacidad: una fuente de talento

De acuerdo con el Informe Cero del Observatorio sobre Discapacidad y Mercado de Trabajo en España, Odismet[1], solo una de cada cuatro Personas con Discapacidad está actualmente ocupada, lo que representa la mitad de la población sin discapacidad.

Por otra parte, la tasa de empleo de las Personas con Discapacidad es de un 24'5%, frente al 57'8% de la población sin discapacidad y a su vez, la tasa de paro fue del 33,1% en 2012, 8'1 puntos superior a la de la población sin discapacidad. [2]

De acuerdo con estas mismas fuentes, el nivel educativo, clave para la inclusión laboral y las posibilidades de encontrar y mantenerse en empleos de calidad, aun en este mercado laboral precario en el que nos movemos en España, también presenta unos resultados de desigualdad y discriminación de las Personas con Discapacidad frente a las que no la tienen. Así, solo un 15% de las personas con discapacidad

[1] www.odismet.es

[2] http://www.ine.es/prensa/np821.pdf

alcanzan la educación superior, frente al 30% de los que no tienen discapacidad, y un 43% abandonan precozmente la educación, frente al 25%. Pero como indica el propio Observatorio, el 70% de las personas con discapacidad indica experimentar barreras en el acceso a la educación, lo cual demuestra es que es preciso trabajar en aspectos como la sensibilización en todos los ámbitos; desde el educativo, hasta el mundo empresarial, pasando por las Administraciones Públicas y finalizando con la Sociedad en General.

Por ello, el Programa Operativo ha supuesto un revulsivo y ha permitido trabajar en varios de esos aspectos (activación, formación, búsqueda de empleos de mayor cualificación, etc.), además de suponer un importante efecto multiplicador para alcanzar nuestros fines de creación de empleo, compartidos con los del Fondo Social Europeo, que de otro modo no habrían sido posibles.

Así, desde el año 2000 y hasta diciembre de 2014, cerca de 220.000 Personas con Discapacidad han sido orientadas para el empleo, más de 66.000 han sido formadas y cerca de 55.000 han sido contratadas.

Todo ello con una gestión financiera desde el año 2000 de 400 millones de euros, de los cuales cerca de un 70% han sido aportados por el Fondo Social Europeo y el 30% restante lo aporta la Fundación ONCE de sus recursos propios, procedentes de la solidaridad de los ciudadanos españoles que compran el juego social de nuestro fundador, la ONCE.

El valor de esta alianza no descansa únicamente en que nuestros fines estén alineados con los del Fondo Social Europeo, sino en que el enfoque estratégico y en el largo plazo, así como el desarrollo de actividades complementarias a los propios itinerarios, nos ha permitido llegar mucho más allá de los resultados sociales.

En la mayoría de los casos, los éxitos en la inserción de personas en riesgo de exclusión, como son las personas con discapacidad, se miden a largo plazo, obteniéndose los cambios e impactos a veces tras varios años de trabajo, tanto con la persona como con el entorno.

De acuerdo con las conclusiones de la evaluación externa e independiente efectuada en el año 2011 sobre el valor añadido comunitario de los Programas Operativos del FSE gestionados por la Fundación ONCE[3], "en ausencia de cofinanciación del Fondo Social Europeo se ha estimado que el programa hubiese supuesto una cobertura del 16%", es decir, la relación entre las personas beneficiarias del programa y la población que teóricamente podría serlo (personas con discapacidad

[3] Red2Red Consultores, 2011. Depósito legal: M-44639-2011 http://www.google.es/url?url=http://www.fundacionONCE.es/sites/default/files/docs/Evaluacion%252520completa%252520ES_2.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=vPt1VIumHJT1aojsgvAO&ved=0CBQQFjAA&usg=AFQjCNHKTsUxWlkqKXz6bU4PHNWuMV9Pxw

certificada y potencialmente activas) frente al 44'5% que se ha alcanzado gracias al mismo (según resultados de 2011). Como señalan los propios evaluadores, existe un efecto de volumen importante.

Además, como muestra la propia evaluación, los efectos de la participación en el programa no se limitan a la inserción laboral, sino que permiten mantener activas a personas que de otro modo abandonarían el mercado laboral, ofreciendo experiencias de empleo, aunque sean temporales, prácticas o formativas, que ayudan a la inclusión.

Pero queda mucho por hacer, y aunque estas cifras no son nada desdeñables, máxime en el contexto de crisis y de destrucción de empleo en el que hemos tenido que navegar en los últimos 5 años, son historias de personas a las que haberse podido beneficiar de un programa como este les ha cambiado en muchos casos la vida. Pero como señalábamos al inicio de este apartado, todavía las estadísticas arrojan unos resultados que nos animan a seguir trabajando en pro del empleo de las Personas con Discapacidad, fuente de talento, ilusión y motivación, que aporta al mercado de trabajo un plus del que no puede ni debe privarse.

2.3. Un uso estratégico, eficaz y eficiente de los recursos de la UE

El tamaño (por los recursos) y la estabilidad (plurianual a 7/8 años) del programa, han logrado crear un modelo de intervención homogéneo en el tiempo y el territorio, y apostar por las tecnologías para una utilización más eficaz y eficiente de los recursos, siendo prueba de ello la plataforma de gestión de empleo y formación para personas con discapacidad "Portalento.es"[4].

Pero la gestión del Programa no solo ha permitido intervenir con las personas, sino desarrollar una estrategia global, incluyendo acuerdos con grandes empresas, como es el Foro Inserta[5]; realizar prospecciones del mercado de trabajo, de las profesiones emergentes, de la realidad sociolaboral de las localidades en las que se desarrolla el programa, por medio de estudios, entre otros, sobre las oportunidades para las personas con discapacidad en los empleos verdes, el empleo de jóvenes con discapacidad, las oportunidades de empleo en la Economía Social, el pasado, presente y futuro de los Centros Especiales de Empleo, Guías sobre igualdad de género, etc.; así como generar y consolidar alianzas y redes de cooperación transnacionales con socios

[4] https://www.portalento.es/Paginas/Inicio.aspx
[5] http://www.foroinserta.es/

de otros Estados miembro y en materias estratégicas como la Educación inclusiva[6], o la RSE[7], en la que contamos con socios de la talla de multinacionales como Telefónica en España o L'Oréal en Francia.

Por último, la Fundación ONCE es un socio de confianza que ha venido gestionando estos fondos con plena transparencia como demuestran las cerca de 50 auditorías externas superadas con éxito desde el año 2000 y ha reforzado el papel de liderazgo en el mundo de la discapacidad que la Fundación ONCE ya cumplía, no solo desde el punto de vista de la legitimidad, al ser capaz de cumplir con la misión encomendada, sino de la eficacia, como actor al que se pueden confiar tareas que posiblemente otros no habrían podido asumir en las mismas condiciones.

3. TRABAJANDO EN EL PRESENTE POR EL FUTURO

3.1. La discapacidad, una prioridad de inversión de los Fondos EIE 2014-2020

La misión estratégica de la Fundación ONCE es que el empleo de las personas con discapacidad sea una prioridad no solo en España sino en la Unión Europea

El Consejo de la Unión Europea aprobó formalmente el 21 de diciembre de 2013 las nuevas normas y la legislación que regirán la siguiente ronda de inversión de la política de cohesión de la UE para el período 2014-2020.[8]

Desde septiembre de 2010, se establecieron contactos con los servicios pertinentes de la Comisión europea (en especial de la DG Regio y la DG Empleo) con el fin de incluir disposiciones de apoyo en los borradores de los Reglamentos de los Fondos estructurales para el periodo 2014-2020. Dichos borradores se hicieron públicos el 6 de octubre de 2011.

Desde entonces, y en estrecha colaboración con el Foro Europeo de la Discapacidad (EDF), así como con otras plataformas sociales, se desarrolló una campaña de defensa de intereses para con el Parlamento europeo y el Consejo de la UE, cuyo objetivo fue, desde sus inicios, reforzar la dimensión de la discapacidad en los Reglamentos

[6] http://www.includ-ed.eu/es/la-red
[7] http://www.csr-d.eu/es/
[8] (L 347, 20 de diciembre de 2013)

Gracias a la campaña se reforzaron disposiciones clave para la discapacidad, aportando claras mejoras al actual Reglamento para el periodo 2007-2013, de las que cabe reseñar las siguientes:

Se refuerza a los organismos que representan a la sociedad civil y las organizaciones no gubernamentales y los organismos encargados de promover la inclusión social, la igualdad y la no discriminación como socios reconocidos en el principio de Asociación.

El refuerzo el principio de no discriminación basada en la discapacidad, enmendado para reconocer la accesibilidad para las personas con discapacidad como principio horizontal de todos los Fondos

La especial importancia de la accesibilidad para las personas con discapacidad (Evaluaciones ex ante, Informes, Programas operativos, Comités de seguimiento)

La existencia de capacidad administrativa por parte de los Estados miembros para poner en práctica la Convención de las Naciones Unidas sobre los Derechos de las personas con discapacidad (así como de otras muchas políticas de apoyo para los grupos en riesgo de exclusión, incluidas las personas con discapacidad) será condicionantes para el acceso a los Fondos para ciertos Programas.

Por primera vez, se establece que el FSE debe fomentar el cumplimiento de las obligaciones derivadas de la aplicación de la Convención de las Naciones Unidas sobre los Derechos de las Personas con Discapacidad por lo que se refiere, entre otras cosas, a la educación, el trabajo y el empleo y la accesibilidad.

Todas las prioridades de inversión del FSE perseguirán luchar contra todo tipo de discriminación, así como mejorar la accesibilidad de las personas con discapacidad, con el fin de mejorar su integración en el empleo, la educación y la formación, reforzando así su inclusión social.

Estos logros se han visto a su vez reflejados en España, cuando tras arduas negociaciones y un proceso participativo y receptivo, animado y promovido desde el Ministerio de Hacienda y Administraciones Públicas, el pasado 30 de octubre, España y la Comisión Europea firmaron el Acuerdo de Asociación, documento que marca las prioridades y la aplicación de los Fondos EIE en nuestro país para los próximos 9 años y que ahora se deben traducir en los Programas Operativos, que deberían ver la luz en los próximos meses.

4. CONCLUSIONES

La implicación de la sociedad civil organizada no solo en la concepción estratégica, sino en la ejecución y de los programas del Fondo Social Europeo, es rentable tanto desde el punto de vista social como económico. Así quedó demostrado en un estudio realizado por parte de los Operadores del actual Programa Operativo del FSE de Lucha contra la Discriminación 2007-2013, donde se concluía que por cada euro invertido, el Estado obtenía 1,5 en retornos económicos.[9]

Todos estos logros que se han alcanzado en la normativa y con el fin de que las personas con discapacidad se puedan empezar a beneficiar de estas ayudas, deben ver ahora cuanto antes su aplicación práctica, en la aprobación de los Programas Operativos del FSE y, en particular del Programa Operativo de Inclusión Social y la Economía Social, del que Fundación ONCE espera seguir siendo uno de sus Organismos Intermedios, como Corporación de Derecho Público que es, como así lo regula y reconoce la Ley 5/2011, de 29 de marzo, de Economía Social.

El efecto multiplicador de las ayudas de la Unión Europea, en particular de los Fondos Estructurales es ahora si cabe aun más importante, por cuanto son el mayor instrumento financiero para lograr los objetivos de la Europa 2020, es decir, lograr un crecimiento inteligente, sostenible e integrador. El talento de las personas con discapacidad es un poderoso impulsor para contribuir al crecimiento económico de nuestro país y de los citados objetivos.

La Fundación ONCE quiere seguir participando de este proceso y mantener la alianza que inició en el año 2000 con la Unión Europea y el Gobierno de España, siendo uno de los actores principales y uno de los motores de la inclusión activa por medio de la formación y el empleo de la "minoría mayoritaria", que son las personas con discapacidad.

Somos conscientes de que este nuevo periodo abre oportunidades pero también supone desafíos y que debemos afrontarlos de manera innovadora, tanto en los contenidos y actuaciones, como en la manera de articular la gestión y ejecución de las mismas.

Todo ello, con el objetivo final de colaborar con el Gobierno de España, a través de su Ministerio de Empleo y Seguridad Social, a mejorar las tasas de empleo y la productividad de nuestro país en los próximos años.

---

9 http://www.fundacionONCE.es/es/publicacion/el-empleo-de-las-personas-vulnerables-una-inversion-rentable

Contar con las Personas con Discapacidad para el empleo no es una cuestión únicamente de derechos humanos, sino de ventaja competitiva y de rentabilidad económica y social, donde todas las partes ganan: La Administración, las empresas, las Entidades de la Discapacidad, las Personas con Discapacidad y sus Familias y la Sociedad.

María Tussy Flores
Jefa de la Unidad de Programas Europeos
de la Fundación ONCE
mtussy@fundacionONCE.es

PROYECTO DE INVESTIGACIÓN

«EL DERECHO AL TRABAJO DE LAS PERSONAS CON DISCAPACIDAD: EXPERIENCIAS NACIONALES EN LA UNIÓN EUROPEA Y EN EL CONTEXTO INTERNACIONAL»

RESEARCH PROJECT

«THE RIGHT TO WORK OF PERSONS WITH DISABILITIES: NATIONAL EXPERIENCES IN THE EU AND INTERNATIONAL CONTEXT»

INTRODUCCIÓN

(INTRODUCTION)

INTRODUCCIÓN

PAOLO PONZIO
Full Professor of History of Philosophy
Rector's Delegate for Social Policies
University of Bari «Aldo Moro», Italy

Fecha de recepción: 09-4-2015
Fecha de aceptación: 13-4-2015

Con la ley de 17 del 28 enero 1999 se aprueba en Italia un conjunto de directivas especificas a todas las universidades para la puesta en marcha de servicios a favor de estudiantes con discapacidad, obligando al rector de cada universidad a nombrar un docente como delegado para la discapacidad. Con esta regulación (Italia fue en este momento una de las primeras naciones a adoptar normas comunes) se ha querido garantizar a los estudiantes discapacitados: 1) subsidios técnicos y didácticos específicos e individuales; 2) un soporte de servicios adecuados y de tutoría especializada; 3) la institución de un docente delegado del Rector en cada universidad con funciones de coordinación, gestión y soporte de cada iniciativa concerniente la integración en el ámbito del Ateneo; y 4) el establecimiento de una cuota adecuada sobre el fondo ministerial de financiación ordinaria de las universidades.

En cierto sentido, esta ley ha garantizado que cada universidad tendría similares servicios y una política de inclusión común inspirada en los a principios de igualdad, integración y autonomía de los estudiantes con problemas de discapacidad; principios que pueden ser reasumidos en los siguientes puntos:

Favorecer una participación activa en la vida universitaria en todos los aspectos académicos, culturales y sociales;

Realizar políticas para favorecer la asistencia a clases (es más importante atraer a los estudiantes hacia dentro de la universidad y no lo contrario. Es en la universidad donde se puede hacer la experiencia irrepetible de contactos humanos y de relaciones que son típicas de los años universitarios);

Favorecer la autonomía e integración del estudiante con discapacidad, valorizando su diversidad y estableciendo ritmos y condiciones de estudio personales;

Ofrecer a los estudiantes con discapacidad similares oportunidades en la formación, en el estudio y en la investigación, a través la remoción de los obstáculos materiales y no-materiales;

Promover la cultura de la alteridad en todos los académicos, del personal docente, personal técnico y administrativo, así como de los estudiantes.

En desarrollo de estos principios, cada universidad ofrece servicios didácticos, de orientación en entrada, de auxilios tecnológicos, de acompañamiento a las estructuras didácticas, de interprete de la comunicación, de peer tutoring.

Pero la universidad no solo deberá garantizar los servicios sino también favorecer la promoción y difusión de una cultura de la discapacidad en la institución universitaria, a través de una sensibilización del estudiante, del cuerpo docente y del personal técnico administrativo, y mediante un desarrollo de las actividades y buenas prácticas en todos los Ateneos italianos. En estos años, podemos decir que hemos ciertamente creado una competitividad entre las universidades también por lo que concierne la admisión y hospitalidad hacia el discapacitado. Si las universidades no están ad adecuadamente preparadas en este sentido, merecen todo el rechazo. Es por ello que un cierto nivel de competitividad entre universidades conducirá a mejorar los servicios ofrecidos.

Todavía, permanecen muchos factores que exigen reflexiones, progresos e iniciativas concretas. Tenemos que mejorar la relación entre escuela secundaria y universidad: a pesar de los datos confortantes, no siempre el estudiante con discapacidad ve la universidad como una opción real. Pero, sobre todo, cada universidad tiene la exigencia de favorecer una conexión esencial entre ella y mundo del trabajo: en efecto, el peligro es que la universidad se convierta en una zona de estacionamiento para alumnos discapacitados durante un elevado número de años.

1. POLÍTICAS DE INTEGRACIÓN ENTRE UNIVERSIDAD Y MUNDO DE TRABAJO: RECOMENDACIONES GENERALES

En realidad el número de estudiantes con discapacidad que se gradúan se ha ido consolidando en estos últimos años, y su distribución entre los programas de grado es diferentemente generalizada. En este contexto, la graduación es una gran meta, pero lo

que sigue es, cada vez, más complicado. Las perspectivas de futuro son, casi siempre, muy complejas en un contexto en el cual la legislación, las políticas, las reformas educativas y las condiciones económicas y sociales han cambiado sustancialmente. Según el ISTAT (en una encuesta del 2009), sólo el 3 por ciento de las personas con discapacidad (de 24 a 44 años) tiene el trabajo como su principal fuente de sustento. El 66 por ciento de las personas con discapacidad están fuera del mercado de trabajo; el 43,9 por ciento son jubilados y el 21,8 por ciento son incapaces de trabajar, mientras que sólo el 3,5 por ciento está ocupado y solo el 0, 9 por ciento está buscando un empleo.

Además, los graduados con discapacidad son discriminados en base a la aplicación de la ley sobre el empleo obligatorio que no tiene en cuenta la diferenciación para el acceso a la alta calificación profesional. Podemos constatar que, básicamente, las discapacidades físicas, sensoriales y cognitivo-relacionales son discriminados en el mundo del trabajo o colocados en «contenedores estáticos» en los cuales las personas puedan obtener toda la ayuda que necesita, pero, sin ser capaz de realizar las tareas por las cuales han invertido años de estudio.

Es necesario, por lo tanto, activar estrategias concretas con el fin de dar un apoyo adecuado a los estudiantes universitarios con discapacidad en el momento de la transición a la edad adulta y al mundo del trabajo. La atención a este problema, por las universidades, se ha desarrollado gradualmente a través de formas de promoción hacia el mundo empresarial, la creación de un *matching* entre oferta y solicitud de empleo en aplicación a la Ley 68/99 «Normas para el derecho al empleo de los discapacitados», evidenciando las oportunidades que los graduados con discapacidades pueden encontrar un trabajo adecuado a sus profesionalidades.

Este compromiso no puede ser visto por separado del trabajo que se realiza en el contexto universitario, desde la colaboración entre los compañeros, a las relaciones con las familias y con el territorio. Por lo tanto, las iniciativas deben tener en cuenta no sólo el medio ambiente físico, sino también el contexto personal, social, económico, político, etc., sin olvidar el enfoque actual sobre las capacitaciones, centradas en la persona y en su autonomía, mediante la conexión a los principios de la Clasificación Internacional del Funcionamiento, de la Discapacidad y la Salud (CIF) en términos de participación y accesibilidad.

A la luz de estas perspectivas es oportuno planificar, desde el inicio de la trayectoria académica, una evaluación inicial de los objetivos, de las necesidades y del desarrollo de cada estudiante, teniendo en cuenta su proyecto de vida; promover la relación entre el estudiante y el mundo del trabajo a través actividades de *stage* (pre y posgrado) y de formación relacionadas con su profesionalidad y aspiraciones; estimular la participación en el programa Sócrates/Erasmus (habilidades lingüísticas) y en el

Programa Leonardo da Vinci (experiencia de trabajo en extranjero); organizar actividades que permitan a los estudiantes adquirir habilidades específicas relacionadas con su *curriculum vitae*; hacer un eficaz *matching* cruzando demanda y solicitud de empleo, en función del perfil de cada estudiante.

2. LA COMPARACIÓN ENTRE MODELOS DE EMPLEO POR PERSONAS CON DISCAPACIDAD

A la luz de estas recomendaciones generales, la Universidad de Bari ha querido desarrollar un proyecto de investigación comparativa, cuyos resultados presentamos en esta prestigiosa revista, con el fin de ampliar la oferta de servicios por una mejor inclusión de los graduados con discapacidad en el mundo del trabajo.

El desarrollo de esta idea proyectual ha sido posible gracias a la cofinanciación de la Fundación «Giuseppe Pera», que siempre está interesada a promover estudios sobre políticas e instrumentos de integración laboral de personas con discapacidad en Europa.

Desde esta perspectiva se planteó el objetivo de investigar algunas experiencias nacionales, seleccionando los sistemas jurídicos de los siguientes países: Francia, Alemania, España, Reino Unido, Dinamarca, Suecia, Polonia, y, por supuesto, Italia; en razón de los diferentes modelos de *welfare* presentes en Europa, también determinados por el ámbito geográfico. En concreto, se ha decidido de asumir Francia y Alemania como la expresión de un modelo continental, Italia y España como modelo del sur de Europa, Dinamarca y Suecia como aquello del norte de Europa y, para completar el cuadro, el modelo anglosajón de la Gran Bretaña y de la Polonia en cuanto modelo de *welfare* de la Europa del Este.

La presente investigación quiere, ante todo, identificar y estudiar las normas nacionales sobre el empleo de personas con discapacidad; analizando las medidas contra la discriminación dentro y fuera del mercado de trabajo, a través del examen de las orientaciones jurídicas actuales.

A continuación, han sido examinadas las políticas de empleo adoptadas por los Estados miembros de la Comunidad Europea para fomentar la contratación de personas con discapacidad y, finalmente, se ha realizado una encuesta practica sobre las medidas de orientación al empleo dirigida a los estudiantes con discapacidad, adoptada en algunas universidades italianas y extranjeras con el fin de lograr la identificación de buenas prácticas.

La investigación se ha desarrollado utilizando el método comparativo, en dos fases: 1) la redacción de informes nacionales y 2) la comparación de sistemas jurídicos por puntos específicos.

Para la redacción de los informes nacionales se procedió sobre la base de un cuestionario preparado por mutuo acuerdo entre los investigadores, lo que permitió obtener materiales comparables y homogéneos por contenido y estructura.

La segunda fase pretende comparar, con referencia a las áreas temáticas que son de mayor importancia e interés, las diferentes realidades examinadas, teniendo en cuenta también de la incidencia de las normas internacionales y europeas.

Finalmente, agradecemos el trabajo del equipo de la Dra. Carla Spinelli, de la Universidad de Bari, que coordinó toda la investigación; a la Oficina de la Universidad de Bari que se ocupa de la inclusión de los estudiantes universitarios; a los investigadores de diferentes países que participaron en el Seminario Internacional realizado de la Universidad de Bari el 30 noviembre 2012 y que han visto publicado los resultados de sus investigaciones en este suplemento de la Revista Derecho Social y Empresa.

Paolo Ponzio
Full Professor of History of Philosophy
Rector's Delegate for Social Policies
University of Bari «Aldo Moro», Italy

INFORME INTERNACIONAL Y SUPRANACIONAL

(INTERNATIONAL AND SUPRANATIONAL REPORT)

DISABILITY AND WORK: THE INTERNATIONAL AND SUPRANATIONAL LEGAL FRAMEWORK

VINCENZO PIETROGIOVANNI
Post-doc Researcher at Lund University

Fecha de recepción: 18–10–2014
Fecha de aceptación: 06–11–2014

SUMARIO: 1. INTRODUCTION. 2. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES. 2.1. Disability and Rights. 2.2. The Promotion of Employment. 3. THE EUROPEAN UNION'S FRAMEWORK. 3.1. The Meaning of "Disability" and "Reasonable Accommodation" according to the ECJ. 4. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS INSTITUTIONAL FRAMEWORK. 5. CONCLUSIONS.

RESUMEN: Este artículo se centra en la promoción del empleo de personas con discapacidad en el marco legal internacional y supranacional (Unión Europea y Consejo de Europa). A partir de la definición de discapacidad y cómo ha cambiado en las últimas décadas, el capítulo define la protección del derecho al trabajo de las personas con discapacidad y los instrumentos jurídicos para su promoción, teniendo también en cuenta la jurisprudencia reciente.

ABSTRACT: This chapter focuses on the promotion of employment of persons with disabilities provided by international and supranational (id. European Union and Council of Europe) legal framework. Starting with the definition of disability and how it has changed in the last decades, the chapter defines the protection of the right to work of disabled people and the legal tools to promote it, also taking into account recent case law.

PALABRAS CLAVE: discapacidad, derechos, empleo, ajustes razonables.

KEYWORDS: disability, rights, employment, reasonable accommodation.

> *"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".*
>
> Declaration of Philadelphia, International Labour Conference, 1944

1. INTRODUCTION

People experiencing disabilities represent around 15% of the world's population (about 1 billion people)[1], one of the largest minority groups in the world. According to the International Labour Organization (ILO), in the world an estimated 470 million people in working-age live with some type of disability[2].

Despite the relevance and the size of the phenomenon, persons with disabilities have not always been object of direct interest for international law, in particular during the first three decades after the birth of United Nations. The *Universal Declaration of Human Rights* of 1948, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* of 1966 do not mention explicitly persons with disability among the protected categories, indeed. Only starting in the 1970s, disability has become a specific international issue related to human rights.

After a long history of tragedies "hidden in the collective unconscious"[3], disabled people had been considered as objects of charity and care; but since the 1970's the human rights perspective has started to change the legal scenario. This process began

---

[1] World Report on Disability, 2011, World Health Organization, document available at www.who.int/disabilities.

[2] Facts on Disability World of Work, International Labour Organization, November 2007, document available at www.ilo.org/employment/disability.

[3] G. LOY, "La disabilità nelle fonti internazionali", in C. LA MACCHIA (ed.), *Disabilità e lavoro*, Ediesse, Roma, 2009, pp. 33-35, referring to R. TARDITI, "L'olocausto delle diversità, un passato poco conosciuto", *La rivista psichiatrica/informazione*, Vol. 1/2007, num. 32, 2005.

with the very first UN Declarations[4] and was completed with the approval of the Convention on the Rights of Persons with Disabilities (UNCRPD), adopted by the General Assembly with Resolution 61/106, on 13 December 2006, which came into force on 3 May 2008, the same year of the 60th anniversary of the Universal Declaration of Human Rights (UDHR).

Not only the United Nations but also other international organizations, such as the European Union for instance, have developed norms or standards about disability which, even though different in contents, approaches and scopes, are all meant to promote the human rights of persons with disabilities and to fight against their discrimination or social exclusion which could involve restrictions (or even denial) of opportunities in education, housing, transport, cultural life and access to public places and services and, for what concerns this research, employment, because of physical or social barriers. All these situations are now considered violations of the human rights of persons with disabilities.

The path towards the UNCRPD has been long and has changed in terms of concepts and language over the years. Traditionally, the starting point for legislation and policies was the assumption that disability was an individual obstacle to the exercise of the same rights as non-disabled persons; consequently the situation of persons with disabilities was often addressed in terms of rehabilitation and social services. Now that assumption has radically changed.

Appropriate measures[5] are now required to promote the rights of persons with disabilities, and to participate in social life and development on the basis of equality.

As the recent history of disability could tell, international legislation is one of the most powerful tools of change, progress and development in society. International norms concerning disability are useful for setting common standards that need to be appropriately reflected in policies and programmes in order to effect positive changes in the lives of disabled persons.

The most important international sources of law are treaties that are legally binding to States parties, creating legal obligations for them. All international human rights instruments protect also persons with disabilities, because they include the

[4] Declaration on the Rights of Mentally Retarded Persons of 1971, adopted by the General Assembly with the Resolution 2856 on 20 December 1971, and Declaration on the Rights of Disabled Persons of 1975, adopted by the General Assembly with the Resolution 3447 on 9 December 1975.

[5] This expression often occurs in the UNCRPD.

principle of universality together with the principles of equality and non-discrimination[6].

Some international and regional human rights conventions are addressed directly to the protection of the rights of disabled people or have some provisions regarding them, such as the ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) of 1983, the European Social Charter (article 15) of 1961 revised in 1996, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities of 1999, the African Charter of Human and People's Rights [art. 18(4)] of 1981, the African Charter on the Rights and Welfare of the Child (article 13) of 1990, the Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights) (art. 6 e 9) of 1988.

Some international human rights treaties, such as the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, and some of their specific provisions, such as the principle of non-discrimination, have become part of customary international law and are considered as legally binding on all States, even those that have not ratified these treaties.

Then there are also international soft law instruments, such as resolutions, principles, declarations, guidelines and rules which are not legally binding but are generally accepted as a moral and political commitment by the States, in order to enact and empower legislations or policies about protection of disabled people, such as the Declaration of the Rights of Mentally-Retarded Persons of 1971, the Declaration on the Rights of Disabled Persons of 1975, the World Programme of Action concerning Disabled Persons of 1982, the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability of 1990, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care of 1991, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 1993. Then, in 1994 the Committee on Economic, Social

[6] The most relevant United Nations human rights conventions are: the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, the Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, the Convention on the Rights of the Child of 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.

and Cultural Rights adopted a General Comment on persons with disabilities[7], an authoritative statement of the Committee understanding of rights enshrined in the International Covenant on Economic, Social and Cultural Rights, which is useful to guide States in the implementation of international human rights norms and to measure the level of compliance of States Parties with regard to the specific rights contained in human rights conventions.

Translation from international conventions, standards or norms to national law, and then to local implementation, is slow and complex but fundamental. States are primarily responsible for adapting legislative, administrative and judicial practices in order to empower persons with disabilities to exercise their human rights.

This chapter focuses on the international and supranational law framework, considering thus the main provisions and legal principles on employment promotion of persons with disabilities of the UNCRPD and, then, those ones set by the European Union's institutions and by the European Court of Human Rights.

2. THE UN CONVENTION ON RIGHTS OF PERSONS WITH DISABILITIES

The State parties of the UNCRPD, in the preamble, recall the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, as well as the principle whereby everyone is entitled to all the rights and freedoms set in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, without distinction of any kind. The preamble is also the opportunity to put the new provisions in line with the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, ensuring that persons with disabilities can fully enjoy these rights.

The preamble underlines also the importance of the principles and policy guidelines contained in two different documents: the World Programme of Action

[7] General Comment n. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003).

concerning Disabled Persons[8], and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities[9]; these tools have the purpose of promoting at national, regional and international level all the necessary policies, plans, programmes and actions to further equalize opportunities for persons with disabilities.

As others international organizations or institutions had already done, the UNCRPD aims to accelerate the process of mainstreaming of disability issues, detecting them as an integral part of relevant strategies of sustainable development[10].

For the purposes of this research, it is necessary to analyse, as far as it is possible in this brief chapter, the two key concepts for the promotion of the right to work of persons with disabilities: firstly, the notion of "persons with disability", which is useful to define the scope of the UNCRPD, and then, the notion of "reasonable accommodation", the real legal "crowbar" system through which employers are obliged to intervene in their organization in order to facilitate the working inclusion of people with disabilities.

2.1. Disability and Rights

According to art. 1 of UNCRPD, «persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others». This definition is evidently wider than that one given by ILO Convention 159 of 1983, according to which «the term disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment».

---

[8] This Programme has been adopted by the General Assembly on 3 December 1982, by its resolution 37/52 - United Nations document A/37/51, Official Records of the General Assembly, Thirty-seventh Session Supplement No. 51. Visit the web: http://www.un.org/disabilities/default.asp?id=23.

[9] The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been adopted by the United Nations General Assembly, forty-eighth session, Resolution 48/96, annex, of 20 December 1993. Visit the website: http://www.un.org/disabilities/default.asp?id=26.

[10] Concerning the World Bank, see R. L. METTS, "Disability issues, trends and recommendations for the World Bank, 2000. The document is accessible to the following website: http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172606907476/DisabilityIssuesMetts.pdf.

In the latter definition indeed, the formal recognition of the impairment and the substantial reduction of opportunities in labour market are very restrictive in terms of identification of the category. The UNCRPD, on the contrary, has brought a great innovation: it does not require a formal recognition of the impairment which in turn does not necessarily imply the outbreak of a handicap, which emerges definitely only facing some social barriers. This definition aligns itself with the recent tendencies of the World Health Organisation[11].

In order to achieve the fundamental principles of dignity, equality, non-discrimination, individual autonomy, participation and inclusion in society, the Convention establishes some instrumental principles, like the accessibility of every right or need to everyone, the adoption of reasonable accommodation, the strengthening of the role of representative organizations and the mainstreaming of disability in the overall process of development. Undoubtfully UNCRPD promotes the acceptance of disability as part of human diversity.

Like women, migrants, children and other vulnerable groups, persons with disabilities are thus protected by a binding legal instrument that does not merely prohibit discrimination but requires a proactive protection. According to the new model of disability introduced by the Convention, the elimination of barriers for people with disabilities is no longer perceived only in terms of social security measures but requires also to work on the social perception of disability.

The traditional medical model which means disability as a deficiency or deviation from normality, located in the individual who encounters difficulties to participate in social, cultural or economic life is now denied by the social model which focuses the experience of disability within the social dynamics and their barriers[12]. In this way, disability is considered a form of social oppression.

---

[11] According to the International Classification of Functioning, Disability and Health (ICIDH-2) of 1999, which represents a revision of the International Classification of Impairments, Disabilities, and Handicaps (ICIDH), first published by the World Health Organization for trial purposes in 1980, disability is considered in terms of activities and participation, *id est*: activity limitations and participation restrictions. This version has been developed after systematic field trials and international consultation over the last five years and is to be considered by WHO governing bodies for approval for international use.

[12] For further studies on this topic, *see* C. BARNES, G. MERCER, "Theorising and Researching Disability from a Social Model Perspective", in C. BARNES, G. MERCER, *Implementing the Social Model of Disability: Theory and Research*, The Disability Press, Leeds, 2004, pp. 1-17.

The affirmation of the social model approach to disability is strictly linked to the affirmation of the rights-based approach, according to which the condition of disability is due to the violation of human rights, and therefore States are asked to remove all sorts of barriers that preclude disabled people to fully participate in social, cultural, political and economic life.

The principle of the need considers the impairment of the persons with disabilities not as a failure but as a positive dimension, a richness of human diversity.

The general principles underlying the Convention can be divided in two main groups: the first group includes founding principles of the approach to disability and the person with disabilities, like respect for the inherent dignity of the person, non-discrimination, full and effective participation and inclusion in society, respect for the differences of people with disabilities as part of human diversity, and respect for the evolving capacities of children with disabilities and their identity.

The second group concerns the general conception of the fundamental principles of human rights upheld in the Convention: the principle of universality, indivisibility and interdependence of human rights above all, as well as the recognition of disability issues as an integral part of the strategies for the promotion of sustainable development, and the need to pay particular attention to international cooperation for improving the living conditions of persons with disabilities in every country, especially in developing countries.

The overall objective of the Convention is to promote, protect and ensure full and equal enjoyment of all human rights by all persons with disabilities and to promote respect for their inherent dignity[13].

The correlative obligations entered into by States parties in the ratification of the Convention concern both negative obligations of non-interference (related to the profile of non-discrimination) and the positive obligations of active promotion of the rights listed therein.

The rights focus primarily on the removal of all forms of discrimination. The term "discrimination" is defined indeed as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of reducing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights" (Art. 2).

In this context, the idea of “reasonable accommodation”, or the request to modify and adapt the treatments (mainly in the workplace, identifying the tasks best suited to each individual disabled person), to ensure to persons with disabilities the

[13] P. HARPUR, “Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities”, *Disability & Society*, 27:1, 2012, pp. 1-14.

enjoyment or exercise of human rights on an equal basis, assume great importance. It requires that the difference is taken into account in order to avoid indirect discrimination. Note that, while positive action measures are general and not tailored on the individual, the concept of reasonable accommodation, however, is essentially individual[14]. It means that the person is in interactive dialogue with the employer to find the right kind of placement required by the circumstances of the case.

The obligation for reasonable accommodation creates in the worker's legal sphere a right to ask for it and protects workers when the employer fails to fulfil this particular duty.

The rights of persons with disabilities have radically changed their shape with the new approach emerging in the international arena: the UNCRPD, which is clearly the biggest result of this pathway, and indeed offers an integrated view in which non-discrimination and autonomy of people with disabilities are mutually integrated with active engagement in the removal of social, economic and cultural obstacles to their full participation in the social and economic life.

The UNCRPD contains, therefore, also new and wider formulations of traditional human rights, as in the case of rights related to the development of self-awareness, the reduction of poverty, the aim to better ensure the rights of persons with disabilities where other negative conditions are present at the same time, like in the case of indigent persons with a disability, for instance.

Reading trough the lines of the UNCRPD, the justiciability of both negative and positive rights seems to overcome the dichotomy between them thanks to an innovative fusion between civil and social rights in a perspective of genuine interdependence and indivisibility.

2.2. The Promotion of Employment

Together with other social rights, the UNCRPD affirms the centrality of the right to work, essential key so that persons with disabilities could earn a living as individuals and part of their families, and realize other human rights. States Parties shall guarantee persons with disabilities do not suffer from slavery or servitude, as well as from forced or compulsory labour, as the second paragraph expressly states.

First of all, the State Parties establish the promotion of the skills and merits of people with disabilities as well as their specific contribution in the workplace (art. 8).

[14] For a wider focus on reasonable accommodation, *see* the next paragraph 2.2.

This principle is fundamental to ensure the substantive equality of disabled people through the development of tools for the realization of equal opportunities, applying the minority rights approach.

The core of the issue is represented by art. 2, where the right of persons with disabilities to work is recognized to all persons with disability, even those who acquire a disability during the course of employment: the right to achieve a life by an employment freely chosen or accepted, within a labour market and work environment which must be open, inclusive and accessible.

State parties are required to guarantee the effectiveness of this right, through different levels of protection. The first level refers to antidiscrimination measures, which could concern all aspects of working conditions, from recruitment to dismissal, including continuance of employment, career advancement and safety and health at workplace, equal opportunities and equal remuneration for work of equal value, and finally protection from harassment and the redress of grievances. The effectiveness of the right to work is closely linked also to the promotion of the right to exercise labour and trade union rights on an equal basis with others. State parties are also required to promote the employment of persons with disabilities in the public and the private sector, through affirmative action programmes, incentives and every other appropriate policy or measure. A relevant importance is given to the acquisition of work experience on the one hand, also through vocational and professional training, and on the other hand, the recovery of working capabilities through the vocational and professional rehabilitation, job retention and return-to-work programmes.

In a huge definition of work, obviously self-employment and entrepreneurship are included. Therefore, State parties should promote also this other way to achieve social and economic inclusion of persons with disability.

The success of any kind of measure to promote the employment of disabled persons is strictly linked with the implementation of effective reasonable accommodations.

According to UNCRPD, reasonable accommodations are all "necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (art. 2).

This expression is not new, but is perfectly in line with similar notions already present in domestic antidiscrimination legislations, such as "reasonable adjustment or adaptation, and effective or suitable modifications or measures"[15].

The reasonable accommodations are a result of the principle of equality, viewed in a substantial and active way: treating equal situations in an equal way and the different situations in a different way. The persons with disabilities are a minority to be protected, and therefore to be treated not only in a different way, compared to the majority, but in their case it is necessary to use non-majoritarian measures which deploy their anti-discrimination effects. In this way, any appearance of privilege these measures can show are indeed denied by the fact that they represent precisely the application of the principle of equality for disabled people who, on the contrary, when subjected to normal rules, would be undermined, marginalized or even oppressed[16]. The reasonable accommodation may consist of any tailored or tailorable device, which can also be generated from a negotiation between the parties; it clearly represents the tendency towards a "particular" legislation, and, by its nature, can be anything but the result of a legislative measure, which on the contrary has a general and universal vocation. As it has been told properly, "in terms of right at workplace, the concept of reasonable accommodation entails that legal measures requiring employers to provide reasonable accommodation of the impairment and disability related need of employees and prospective employees should be put into place, so as to permit to preserve this right and also to allow employers to ask for funding when accommodations imply substantial, not foreseen, financial costs"[17].

The employers, therefore, are asked to set up an accessible and enabling working environment, according to the type and quality of the impairment suffered by workers. In particular, the employers could arrange adjustments and modifications to the enterprise organisation (from the assignment of tasks to the revision of working time, leave and rests systems) to the physical changes of workstations or the adoption of new tools and devices. Of course, special training and some tailored management

---

[15] P. WELLER, "Developing Law and Ethics – The Convention on the Right of Persons with Disabilities", *Alternative Law Journal*, Vol. 35:1, 2010, pp. 8–12.

[16] D. LOPRIENO, S. GAMBINO, "L'obbligo di "accomodamento ragionevole" nel sistema multiculturale canadese", in G. ROLLA, *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Giuffré Editore, Milano, 2008, pp. 217-240.

[17] S. FERRAINA, "Analysis of the legal meaning of Article 27 of the UN CRPD – Key challenges for adapted work settings", Working Paper, European Association of Service Providers for Persons with Disabilities, p. 15. Visit the website: www.easpd.eu.

supervision could be also very helpful in reshaping the working environment in a more empowering way.

The UNCRPD's purposes are very relevant, so the phase of implementation and enforcement plays an important role. For that reason, the monitoring of the Convention is assigned to a very well structured group of different subjects. By the way, the most important body is the Committee, "endowed with several notable innovations of significant potential"[18]; among its tasks, indeed, it can activate and lead reporting and investigative procedures, collaborating in an active way with the other bodies established in the UNCRPD[19].

3. THE EUROPEAN UNION'S FRAMEWORK

The European Community has adopted many instruments to address the issue of persons with disabilities since the mid-1970s, and above all from the mid-1980s to the mid-1990s. For instance, in 1986, on the basis of Article 235 of the Treaty establishing the European Economic Community, the Council of the European Communities delivered a recommendation[20] to the Member States to take "all appropriate measures to promote fair opportunities for disabled people in the field of employment and vocational training, including initial training and employment as well as rehabilitation and resettlement". To this end, Member States should have eliminated all the legal causes of negative discrimination and implemented positive actions for persons with disabilities. This recommendation, in its "whereas", refers to the Council Resolution of 21 January 1974 on a social action programme providing the implementation of a programme for the vocational and social integration of handicapped persons, the following Council Resolution of 27 June 1974 establishing the initial Community action programme, and then to the Resolution of the Council and of the Representatives of the Governments of the Member States of 21 December 1981 on the social integration of handicapped people and the Resolution of European Parliament of 11 March 1981. For the purpose of this Recommendation, the Council

[18] M. A. STEIN, J. E. LORD, "Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities and Future Potential", Human Rights Quarterly, Vol. 32:3, 2010, pp. 689-728.

[19] For a particular focus on the Committee, *see* J. E. LORD, M. A. STEIN, "The Committee on the Rights of Persons with Disabilities", in P. ALSTON, F. MÉGRET, The United Nations and Human Rights: A Critical Appraisal, Oxford University Press, New York, 2013.

[20] Council Recommendation of 24 July 1986 on the Employment of Disabled People in the Community (86/379/EEC).

has also the opportunity to specify that the definition of "disabled people" includes all persons with serious disabilities which result from physical, mental or psychological impairments. In 1994, the European Commission approved a White Paper, European Social Policy – A Way Forward for the Union, in which there is a part expressly addressed to the promotion of social integration of persons with disabilities[21]. In 1996, the European Commission issued a Communication on equality of opportunity for people with disabilities, A New European Community Disability Strategy[22], followed by the Resolution of the Council of 20 December 1996 on equality of opportunity for people with disabilities.

[21] The Commission states: "22. More than 10% of the total population of the European Union have disabilities. The needs of individual disabled people may vary considerably depending on the nature of their disability, coupled with factors such as their previous experience, their level of skill and their personal circumstances. Assistance often needs to be tailored to the severity of a disability. However, as a group, people with disabilities undoubtedly face a wide range of obstacles which prevent them from achieving full economic and social integration, and there is therefore a need to build the fundamental right to equal opportunities into Union policies. 23. Considerable help has been given from the European Social Fund, the HORIZON Initiative and the HELIOS Action Programme including the Handynet system, to support and promote the training of disabled people so as to enable them to enter or re-enter the labour market. The aim of this assistance is to demonstrate that enabling people to develop their abilities is beneficial not only to themselves but also to society as a whole. This work will continue. In addition, the Commission will: build on the positive experience of the European Disability Forum to ensure through appropriate mechanisms that the needs of disabled people are taken into account in relevant legislation programmes and initiatives. This includes ensuring that to the maximum extent possible Union programmes are accessible to disabled people and that they are actively encouraged to participate in them; prepare an appropriate instrument endorsing the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities; as part of a process to encourage model employers, prepare code good practice in relation to its own personnel policies and practices, and encourage discussions within the framework of the social dialogue on how such model could be extended more widely. 24. It will also examine how Union action could contribute to the key issue of improved access to means of transport and public buildings, and press for the adoption of the proposed Directive on the travel conditions of workers with motor disabilities".

[22] 30 July 1996, COM(96) 406 final, not published in the Official Journal.

But only with the Treaty of Amsterdam[23], the European institutions made the deciding qualitative leap, even though "what was finally approved [...] in 1997, however, was a watered-down version of what had been agreed at the IGC"[24].

The EU Charter of Fundamental Rights, proclaimed at the Nice European Council on 7 December 2000 and legally binding as EU Treaties since 1 December 2009, with the entry into force of the Treaty of Lisbon, recognises in Article 26 the right of persons with disabilities to "benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". The major aim should be to enable them to fulfil the roles and responsibilities of citizenship and have the same individual choices and control over their lives as non-disabled people.

According to Article 151 TFEU (ex Article 136 TEC), the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. In order to achieve the objectives of Article 151 TFEU, Article 153 (1) and (2) TFEU (ex Article 137 TEC) confers on the Union the power to support and complement the activities of the Member States in the fields of integrating persons excluded from the labour market and combating social exclusion, among the others.

In 2000, on the basis of former Article 13 EC, now Article 19 TFEU, the Council on the EU adopted one of the most important regulatory acts, *id est*, Directive 2000/78, also known as the "EU Framework Directive on Employment", whose purpose is to put into effect in the Member States the principle of equal treatment, laying down a general framework for combating discrimination in employment and occupation with regard to a number of several grounds, including disability together with religion or belief, age or sexual orientation.

---

[23] Article 6a of the Treaty establishing European Community: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[24] A. O'REALLY, "The Right to Decent Work of Persons with Disabilities", International Labour Office, Geneva, 2007, p. 42.

According to Article 2 of the Directive, the "principle of equal treatment" means that there shall be no direct or indirect discrimination[25] whatsoever on any of the grounds referred to in Article 1.

Under this principle, with regard to persons with a particular disability, the employer is obliged, under national legislation, to take appropriate measures in order to eliminate disadvantages.

According to Article 5, the compliance with the principle of equal treatment in relation to persons with disabilities could be guaranteed through the provision of reasonable accommodations. The Directive 2000/78, where needed in a particular case, introduces a real obligation to the employers who shall take "appropriate measures" to enable a disabled worker to have access to, participate in, or advance in employment, or to undergo training; this obligation finds a limit in what the Directive calls a "disproportionate burden" on the employer. Article 5 ends clarifying that this burden is not disproportionate "when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned". These appropriate measures could be effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance, as Recitals 20 and 21 in the preamble to the directive affirm. Anyway, these two aspects will be further analysed in the next paragraph.

The European Commission crystallized its commitments in the European Disability Strategy for 2010-2020[26] which, adopted on 15 November 2010, is a comprehensive framework, showing a wide-range approach and taking into account

---

[25] *See inter alia*, L. VENTURA, *Il principio di uguaglianza nel diritto del lavoro*, Milano, 1984, L. ISEMBURG, *Divieti di discriminazione nel rapporto di lavoro*, Giuffré Editore, Milano, 1984; D. IZZI, *Eguaglianze e differenze nei rapporti di lavoro*, Jovene, Napoli, 2005; A. LASSANDARI, *Le discriminazioni nel lavoro: nozioni, interessi, tutele*, Cedam, Padova, 2010; S. FORSHAW, M. PILGERSTORFER 2008. "Direct and Indirect Discrimination: Is there something in between?" *Industrial Law Journal*, 2008, n. 4, PP. 347-364; K. LIPPERT-RASMUSSEN, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*, Oxford University Press, New York, 2013.

[26] COM(2010) 636 final, Communication from the Commission to the European Parliament, the Council, The European and Social Committee and the Committee of the Regions.

both soft and hard law measures in order to accomplish its eight objectives, which could include from non-discrimination to social protection, education, training and above all the promotion of employment: it states indeed that "quality jobs ensure economic independence, foster personal achievement, and offer the best protection against poverty"[27]. The European Disability Strategy 2010-2020 is accompanied by a List of Actions 2010-2015[28], that sets a series of key-actions *inter alia* on employment of persons with disabilities, like for instance increasing knowledge on employment situation of people with disabilities, identifying challenges and proposing remedies, optimizing the use of the new strategy for jobs and growth, "Europe 2020", for the benefit of people with disabilities or giving special attention to difficulties of young people with disabilities in transition from education to employment and address intra job mobility including those working in sheltered workshops. The latter key-action foresees the involvement of Public Employment Services (PES) at EU level, by accessibility of actions and material, dialogue with temporary and special agencies or specific disability oriented seminar in the PES Peer review, for example.

In December 2007, the European Commission created the Academic Network of European Disability Experts (ANED)[29], whose purpose is to create a European network of researchers in the field of disability studies, which could join the Disability Unit and support the design of appropriate policies. One of the most relevant documents issued by ANED is "Targeting and mainstreaming disability in the context of EU2020 and the 2012 Annual Growth Survey"[30], of June 2012, in which the experts have monitored and provided input to EU2020 Strategy co-ordination.

Within the European Employment Strategy (EES)[31], each Member State has to yearly report back to the European Commission on national plans on employment, regarding the disability issue as well as other related issues.

Since European Union concluded the UNCRPD, under Article 44, on 22 January 2011, EU is in duty bound to implement its provisions. To this purpose, European Commission issued a Report on the Implementation of the UN Convention

---

[27] COM(2010) 636 final, p. 7.

[28] SEC(2010) 1324 final.

[29] Visit the website: www.disability-europe.net.

[30] A synthesis report of the document, prepared by Mark Priestley on behalf of the ANED is accessible at the following link: http://www.disability-europe.net/theme/employment/reports-employment.

[31] It is a "soft law" mechanism, which aims to coordinate the employment policies of the EU Member States. At EU level are decided only goals and priorities, whilst the implementation of the necessary policies is up to the each country.

on the Rights of Persons with Disability by the European Union[32], in which the state of the art is defined. In the section dedicated to the implementation of Article 27 UNCRPD, all the legal tools used by European institutions are listed. One of the most significant tools for employment inclusion of disabled people is the faculty of public authorities, by virtue of Directive 2004/17/EC and Directive 2009/81/EC, to reserve the "right to participate in contract award procedures to sheltered workshops and specify that such contracts should be carried out in the sheltered employment context, where 50% of the workers have a disability" (paragraph. 144 of the Report). Then, the revised public procurement Directives should extend the possibility to reserve public contracts not only to sheltered workshops but also to "economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, and 30% of whose employees are disabled or disadvantaged". This kind of measures could be really effective to ensure persons with disability their right to work.

3.1. The Meaning of "Disability" and "Reasonable Accommodation" according to the ECJ

Since the Treaties and the Directive 2000/78 did not give the definition of "disability", they left open space to the intervention of the European Court of Justice on the prohibition of dismissal and disability discrimination, enshrined in Art. 2, n. 1 and 3, n. 1, letter c) of the Directive 2000/78 with the Chacón Navas Sonia Case[33].

The Court said that the concept of "disability" for the purpose of Directive 2000/78 "must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

So, defining the concept of disability, the Court defined also the scope of the Directive and its protections; the judgment, indeed, marked the difference between "disability" and "sickness", two concepts that cannot therefore simply be treated as being the same.

As far as the Directive 2000/78 does not state that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness, according to the judges of Luxembourg, the importance which the European legislator attaches to measures for adapting the workplace to the disability

[32] SWD(2014) 182 final, of 5 May 2014.

[33] C–13/05 of 11 July 2006, ECLI:EU:C:2006:456.

demonstrates that only situations which last for a long period of time could be relevant.

In accordance with Article 5 of Directive 2000/78, reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. That provision means that employers are to 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, unless such measures would impose a disproportionate burden on the employer. The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post. Thus, the ECJ has stated: "a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78". On the other hand, there is an obligation to provide reasonable accommodation for people with disabilities and, always according to Articles 2(1) and 3(1)(c) of Directive 2000/78, dismissal could not be justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his/her post.

In this case of 2006, the ECJ adopted evidently the medical model of disability, although the Directive 2000/78 could have been interpreted as a result of the approach based on the social model, as all the major European Institutions had already shown before[34].

With the HK Danmark case35, the ECJ returned to disability in 2013 trying to keep the track on the previous judgment, but it finally expanded the definition of disability, expressly towards the social model as held by the UNCRPD: the judge of Luxembourg concluded that "if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the

[34] It is enough to consider among others the Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 final and, more recently, EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan, COM (2003) 650 final), for the European Commission, and the Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, Official Journal C 12, 13 January 1997, 1 for the Council.

[35] Joined cases C–335/11 and C-337/11 of 11 April 2013, ECLI:EU:C:2013:222.

person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of «disability» within the meaning of Directive 2000/78". It is a concept that strives to keep a certain balance between the two different models.

But the judges of Luxembourg have also affirmed that a disability does not necessarily imply complete exclusion from work or professional life, so an illness which affects the working ability of a person only to a limited extent is not an obstacle to the application of the Directive 2000/78: "the concept of «disability» as defined in paragraph 38 above must be understood as referring to a hindrance to the exercise of a professional activity, not, as DAB and Pro Display submit, to the impossibility of exercising such an activity. The state of health of a person with a disability who is fit to work, albeit only part-time, is thus capable of being covered by the concept of «disability»". Then, the ECJ affirmed that the nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by "disability" concept.

In accordance with the second paragraph of Article 2 of the UN Convention, and with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. So, Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

Always about the obligation under Article 5 of Directive 2000/78, the ECJ stated that the circumstance that an employer has failed to take those measures might imply that the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability. Conclusively, the judges of Luxembourg consequently have stated that a national legislation, like Danish law in this case, that allows an employer to reduce an employee's notice period after a prolonged period of absence where that absence was caused by "the employer's failure to take the appropriate measures" is unlawful, unless that legislation is necessary to pursue a legitimate aim.

Finally, the ECJ has returned to the concept of disability with a very recent case[36], concerning Ms. Z., employed as a post-primary school teacher in a school

[36] Case C–363/12 of 18 March 2014, ECLI:EU:C:2014:159.

managed by the *Board of Management*, who had a baby through a surrogacy arrangement in California, USA. Ms. Z. brought an action against the Government department, responsible for her employment conditions, because her application of leave equivalent to adoptive leave had been refused. The judges of Luxembourg have ruled, among other issues, that Directive 2000/78 "must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability".

In this case, the ECJ, even though it has recalled the principles stated in *HK Danmark*, seems to adopt a narrow concept of "disability", joining the Opinion of Advocate General[37]: Ms. Z's impairment (the lack of uterus) is surely a condition of limitation, but within the meaning of Directive 2000/78, it does not represent an obstacle to her full and effective participation in professional life on an equal basis with other workers.

---

[37] "95. I do not think that the condition from which Ms. Z suffers hinders, within the meaning of the Court's case-law, 'in interaction with various barriers […] the full and effective participation of the person concerned in professional life on an equal basis with other workers' (emphasis added). Indeed, as the Court has observed, the concept of 'disability' within the meaning of Directive 2000/78 is to be understood in relation to the possibilities for that person to work, and to exercise a professional activity. (60) This approach appears to be consistent with the aims pursued by the directive, namely, to combat discrimination in the specific context of employment and, consequently, to enable a person with a disability to have access to and participate in employment. 96. In other words, because of the inherently contextual nature of disability, the issue of what constitutes a disability for the purposes of Directive 2000/78 ought to be examined on a case-by-case basis in light of the rationale underlying that legal instrument. In consequence, the issue is whether the impairment in question constitutes –in interaction with specific barriers, be they physical, attitudinal or organisational– a hindrance to exercising a professional activity. 97. As profoundly unjust as the inability to have a child by conventional means may be perceived to be by a person who wishes to have a child of his or her own, I cannot interpret the existing EU legislative framework as covering situations which are not linked to the capacity of the person concerned to work. (61) In that respect, it is necessary to highlight the inherently functional nature of the concept of disability under Directive 2000/78. In my view, in order for a limitation to fall within the scope of that directive, an interrelationship must be established between that limitation and the capacity of the person concerned to work. That link appears to be missing in circumstances such as those of the case before the referring court. (62) It does not appear from the case-file that the limitation from which Ms. Z suffers would have prevented her from participating in professional life. 98. I therefore take the view that the less favourable treatment of which Ms Z complains cannot be construed as falling within the scope of Article 5 of Directive 2000/78", Opinion of Mr. Advocate General Whal of 23 September 2013, ECLI:EU:C:2013:604.

The ECJ has had also the opportunity to express itself on the relationships between UNCRPD and EU legislation: indeed it has stated that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention, because its provisions are not unconditional and sufficiently precise (according, for example, to *Intertanko and Others*[38] and *Air Transport Association of America and Others*[39]) and consequently they do not have direct effect in EU law. Following the opinion of Advocate General, the ECJ has considered the obligations imposed by UNCRPD to Contracting Parties as merely "programmatic".

4. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS INSTITUTIONAL FRAMEWORK

All members of the European Union also belong to the Council of Europe, which is a regional intergovernmental organization, made up by 45 countries that have signed up the European Convention on Human Rights, aiming to defend human rights, parliamentary democracy and the rule of law. The Convention does not expressly refer to disability –and even less about employment issue–, with the only exception of Article 5(1) in which it refers to the lawful detention of persons of "unsound mind". Anyway, all the rights set up in the Convention belong to all individuals, including those with disabilities, so it is meant nevertheless as a relevant tool for the promotion of the rights of persons with disabilities.

According to the principle of prohibition of discrimination, as stated in Article 14 of the European Convention on Human Rights, the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The list is not meant to be exhaustive, and disability has become a relevant ground for discriminatory acts or behaviours.

The European Court of Human Rights has for the first time found a violation of the right to non-discrimination on the basis of the applicant's disability, referred to the United Nations Convention on the Rights of Persons with Disabilities, in the case of Glor v. Switzerland[40]: Mr. Glor argued that he had been subjected to discrimination on the basis of his disability because he had been prohibited from carrying out his

[38] C–308/2006, ECLI:EU:C:2008:312.

[39] C–366/2010, ECLI:EU:C:2011:864.

[40] ECtHR, Glor v. Switzerland (No. 13444/04), of 30 April 2009.

military service, and consequently was obliged to pay the exemption tax –as Swiss legislation provided– as his disability was not judged severe enough to be excepted from the payment. The applicant had offered to perform the "civil service" instead, but this was refused.

In its judgement, the ECHR has restated that Article 14 contains a non-exhaustive list of prohibited grounds, which also includes discrimination based on disability and found that the State had treated the applicant comparably with those who had failed to complete their military service without valid justification. This treatment has been judged discriminatory[41].

Echoing Article 2 of the UN Convention on the Rights of Persons with Disabilities, which defines –as seen before– reasonable accommodation, ECHR has stated that the Swiss authorities failed to provide an equitable solution which could have responded to Mr. Glor's circumstances by, for example, filling posts in the armed forces which require less physical effort by persons with disabilities. In highlighting the failure of the Swiss authorities, the Court points to legislation in other countries which ensure the recruitment of persons with disabilities to posts which are adapted to both the person's (dis)ability and to the person's set of professional skills.

In April 2006, the Council of Europe adopted a Disability Action Plan 2006-2015[42], which contains fifteen action lines, including participation in political, public and cultural life, education, information and communication, accessibility of the built environment, transport and, of course, employment. With a call for Member States, action line n. 5 of this Plan indeed aims, *inter alia*, to mainstream issues relating to the employment of people with disabilities in general employment policies, ensuring them, for instance, an "access to an objective and individual assessment which: identifies their options regarding potential occupations; shifts the focus from assessing disabilities to assessing abilities and relating them to specific job requirements; provides the basis for their programme of vocational training; and helps them find appropriate employment or re-employment" (p. 3.5.3, lett. i and ii).

The Plan also calls for actions to ensure people with disabilities an effective and efficient access to vocational guidance, training and employment-related services at the

[41] See *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011, p. 101.

[42] Recommendation Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

highest possible qualification level, making reasonable adjustments where necessary (p. 3.5.3. lett. iii)[43].

5. CONCLUSIONS

Employment is one of the most important ways to ensure social inclusion and economic independence for all citizens. The right to work, thus, is strictly related to fundamental social and human rights[44].

---

[43] The other specific by Member State provided in the Action line n. 5 are: " iv. to ensure protection against discrimination in all stages of employment, including selection and recruitment, as well as in all measures related to career progression; v. to encourage employers to employ people with disabilities by: – applying recruitment procedures (for example advertising, interview, assessment, selection) which ensure that job opportunities are positively made available to people with disabilities; – making reasonable adjustments to the workplace or working conditions, including telecommuting, part-time work and work from home, in order to accommodate the special requirements of employees with disabilities; – increasing the disability awareness of management and staff through relevant training; vi. to ensure that general self-employment schemes are accessible and supportive to people with disabilities; vii. to ensure that support measures, such as sheltered or supported employment, are in place for those people whose needs cannot be met without personal support in the open labour market; viii. to support people with disabilities to progress from sheltered and supported employment to open employment; ix. to remove disincentives to work in disability benefit systems and encourage beneficiaries to work when they can; x. to consider the needs of women with disabilities when devising programmes and policies related to equal opportunities for women in employment, including childcare; xi. to ensure that employees with disabilities enjoy the same rights as other employees in relation to consultation on employment conditions and membership and active participation in trade unions; xii. to provide effective measures to encourage the employment of people with disabilities; xiii. to ensure that health and safety legislation and regulations include the needs of persons with disabilities and do not discriminate against them; xiv. to promote measures, including legislative and integration management, that enable persons who become disabled while employed to stay within the labour market; xv. to ensure that especially young disabled people can benefit from employment internships and traineeships in order to build skills and from information on employment practices; xvi. to consider, where appropriate, signing and ratifying the European Social Charter (revised) (ETS No. 163), in particular Article 15; xvii. to implement Resolution ResAP(95)3 on a charter on the vocational assessment of people with disabilities".

[44] *See*, *inter alia*, J. FUDGE, "The New Discourse of Labor Rights: From Social to Fundamental Rights?", *Comp. Lab. L. & Pol'Y J., 29, 30*, 2007; P. ALSTON, *Labour Rights as Human Rights*, Oxford Univerity Press, New York, 2005.

Internationally, the situation of persons with disabilities in the labour market is dramatic: their employment and activity rates are always (and in every country) lower than those ones of non-disabled persons.

Social policy innovation could evidently bring new energy to increase the activity rate and empower the employment potential of disabled people, overcoming all the barriers to participation in the workforce. But first of all, stronger efforts should be addressed towards the implementation of international and supranational provisions by National States and their effective enforcement in courts, not only domestic ones but also supranational like the European Court of Justice, which sometimes seems not to translate correctly these principles into real cases.

The promotion of the employment of people with disabilities would not only benefit the single individuals with disabilities and their families but also employers and society; in other words, if the situation does not change for the best as soon as possible, this enormous waste of human richness and working energy which lays behind the social exclusion of disabled people will bring not only negative effects in terms of social justice but it could also affects the economic and, in some ways, democratic health of our civilisation.

Vincenzo Pietrogiovanni
Post-doc Researcher at Lund University
vincenzo.pietrogiovanni@har.lu.se

INFORME FRANCÉS

(FRENCH REPORT)

THE RIGHT TO WORK FOR DISABLED WORKERS IN FRANCE

SYLVAINE LAULOM
Professor of Private Law, Institut d'Etudes du Travail de Lyon, Université Lumière Lyon 2, CERCRID (UMR 5137)

Fecha de recepción: 23–09–2014
Fecha de aceptación: 02–10–2014

SUMMARY: 1. PROMOTING THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: THE LEGAL FRAMEWORK. 2. THE DEFINITION OF DISABLED WORKERS. 3. THE OBLIGATION TO EMPLOY DISABLED WORKERS: THE QUOTA POLICY. 4. DISCRIMINATION ON GROUNDS OF DISABILITY AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT. 5. UNIVERSITIES.

RESUMEN: Las políticas francesas de discapacidad y empleo se basan en dos pilares complementarios: la obligación de las empresas de que la plantilla incluya al menos un 6% de trabajadores con discapacidad, y la prohibición de cualquier discriminación directa o indirecta por causa de discapacidad. Sin embargo, aunque la Ley de 2005 ha contribuido sin duda a mejorar la situación de los trabajadores con discapacidad en el mercado laboral, las personas con discapacidad siguen expuestas al riesgo de exclusión del mercado laboral. En términos de discriminación, el concepto de "ajustes razonables" se ha incorporado a la legislación francesa. Hasta la fecha hay poca jurisprudencia sobre este asunto, y por lo tanto no es posible todavía analizar cómo pueden pronunciarse los jueces sobre esta cuestión y, particularmente, sobre lo que puede constituir una carga desproporcionada para el empleador.

ABSTRACT: The French disability and employment policy is based on two complementary pillars: the obligation for companies to ensure their workforce includes no less than 6% of disabled workers, and the prohibition of any direct or indirect discrimination on the grounds of disability. However, although the 2005 Act has certainly contributed to improving the labour market situation of disabled workers, disabled people continue to be exposed to the risk of exclusion from the labour market. In terms of discrimination, the concept of 'reasonable accommodation' has been transposed into French law. To date, there have been very few cases on this issue, and it is therefore not yet possible to analyse how judges may rule on this issue and, particularly, what may constitute a disproportionate burden for employers.

PALABRAS CLAVE: discapacidad, empleo, discriminación, Francia.

KEYWORDS: disability, employment, discrimination, France.

1. PROMOTING THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: THE LEGAL FRAMEWORK

According to the French Constitution, "all people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society".[1] This provision establishes the State's duty of solidarity towards people with disabilities, and is the constitutional foundation for the legal framework on disability. Over time, this legal framework has been further refined, aiming to promote the labour market integration of disabled people.

Act No. 57-1223 of 23 November 1957 was the first step towards establishing a recruitment policy for disabled people as recognised by the State. Some 20 years on, the failure to implement this policy was to lead to the adoption of a new Act, Act No. 75-534 of 30 June 1975 (Framework Law for People with Disabilities). The Act aims to establish a new, comprehensive approach to disability, looking at the social integration of disabled persons regardless of age and whatever their disability. The Act made education, training and career guidance for disabled children and adults a national obligation. The State and local government are responsible for ensuring the maximum level of autonomy for disabled individuals and, where possible, to ensure disabled people are integrated into the mainstream environment, both at school and at work. French employment policy continues to be based on these two pillars: the guarantee of a minimum income and the promotion of social and vocational integration of disabled workers. The Act also highlights the transition from an assistance-based approach to one based on solidarity.[2]

Since 1975, several other legislative initiatives have pursued the same goal of improving the effectiveness of the provisions adopted. For example, the 1975 Act was amended by Act No. 87-517 of 10 July 1987 on the employment of people with disabilities, which redefines the obligation for companies with more than 20 employees to employ disabled workers. Other important laws include Act No. 89-486 of 10 July 1989 on educational reforms which addresses integration of young disabled

[1] Paragraph 11 of the Preamble to the Constitution of 27 October 1946, which has constitutional status in France.

[2] P. Didier-Courbin, P. Gilbert, 'Eléments d'information sur la législation en faveur des personnes handicapées en France: de la loi de 1975 à celle de 2005', *Revue française des affaires sociales*, 2005/2 p. 207.

people in schools; Act No. 90-602 of 12 July 1990 on the protection of individuals against discrimination on the grounds of their state of health or disability, as amended by Act No. 2001-1066 of 16 November 2001; Act No. 91-663 of 13 July 1991, which includes several measures aimed at improving disabled access to housing, workplaces and public buildings; and Act No. 2002-73 of 17 January 2002, the Social Modernisation Act, which enshrines the right of disabled people to compensation for the consequences of their disability, regardless of the cause and nature of their impairment, age or lifestyle, and guarantees a minimum income to cover all the essentials of everyday life.

This legal framework was thoroughly updated by Act No. 2005-102 of 11 February 2005 on equal rights and opportunities, citizenship and participation of persons with disabilities. This Act marked a turning point in the understanding of disability in France. It emphasises the definition of a life plan by disabled people encompassing all aspects of their social life and establishes a right to compensation by introducing a compensatory disability benefit. The Act brings together, in an overarching legal text, some new provisions with many revised elements of the earlier laws on disability. The new policy is defined according to two major aims: accessibility and compensation. Thus, the Law set 2015 as the deadline for ensuring accessibility to all buildings which are open to the public as well as community facilities and workplaces. However, it now appears that the timescale was too short and that, unfortunately, this level of accessibility will not be achieved by 2015. The economic crisis may provide a partial explanation for this delay.

Article 1 of the Act, codified in Articles L.114-1 and L.114-1-1 of the Family and Social Action Code, expresses the idea of the law: *"All disabled people have the right to the support of the entire national community, ensuring them access to all basic rights recognised for all citizens, as well as to full exercise of their citizenship*". In this context, the term "basic rights" includes education, health, employment, citizenship, freedom of movement, and cultural and social life.

Adoption of the 2005 Act also provided the opportunity to implement European Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, in particular, its provisions on the prohibition of discrimination on the grounds of disability. In particular, the 2005 Act transposes Article 5 of the Directive, according to which employers must 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*'.

It should be noted that overall transposition of this Directive through Act No. 2008-496 of 27 May 2008 has also influenced the French law of disability. For

example, the general definition of direct and indirect discrimination and the burden of proof of discrimination apply to discrimination on the grounds of disability. The High Authority to Combat Discrimination and Promote Equality (HALDE), an independent public body established by Act No. 2004-1486 of 30 December 2004, now replaced by the Defender of Rights ('*Défenseur des droits*'), is also competent to address all forms of direct and indirect discrimination prohibited by law including discrimination on the grounds of disability.[3] In this regard, the HALDE, and now, the Defender of Rights, have certainly played an important role in combating discrimination on the grounds of disability.

The International Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, was ratified by France on 18 February 2010 and came into force on 20 March 2010, to a relatively indifferent reception. Parliamentary reports, presented during adoption of the Act granting consent for ratification of the Convention, underlined the consistency between the provisions of the Convention and existing French legal provisions. They also pointed out that French law already complied with most of the provisions of the Convention.[4] Nevertheless, in the past texts which purportedly were in line with French law went on to have an impact on the French legal system. It is, therefore, by no means certain that the Convention will not influence the evolution of French law. Indeed, one of the most recent annual

[3] The Defender of Rights has been given various powers to combat discrimination. Complaints may be submitted to the Defender either directly or through a Member of Parliament, by any person who considers him or herself a victim of discrimination. All complaints submitted in writing will receive a written response. The Defender may also, upon his or her own initiative, investigate cases of direct or indirect discrimination brought to his or her knowledge, providing the victim, where identified, has been informed to this effect and has no objection. The Defender investigates the claims received using the investigative powers at his or her disposal and may ask any individual, legal entity or public body for explanations, information or documents. He or she may also conduct on-site inspections and take evidence from any person whose testimony is deemed necessary or helpful. The Defender helps alleged victims of discrimination compile their cases and informs them of the appropriate procedures. At the request of the Parties, or upon their own initiative, civil, criminal and administrative courts may request the Defender to present observations on cases of discrimination submitted to them. The Defender may also request to submit evidence to such courts; in such circumstances the right to submit evidence is automatic. The Defender also carries out communication and information campaigns designed to promote equality and encourages the implementation of training programmes.

[4] M. BACACHE, 'Droit des handicapés – Convention des Nations Unies', *Revue Trimestrielle de droit civil*, 2010, p. 162.

reports from the Defender states that the Defender will contribute to developing a legal culture for implementation of the International Convention on the Rights of Persons with Disabilities so that the Convention becomes the benchmark reference.[5]

To conclude, it can be said that in the field of employment, French policy is based on two complementary pillars: the obligation for companies to employ disabled workers and the prohibition of any direct and indirect discrimination on the grounds of disability (Article L.1132-1 of the Labour Code), strongly influenced by the EC Directive.

2. THE DEFINITION OF DISABLED WORKER

In France, the definition of a disabled worker, first given by the Act of 11 February 2005,[6] was inspired by the new international classification of function, disability and health developed by the World Health Organization. Article L.5213-1 of the Labour Code defines the term 'disabled worker' as any person whose ability to obtain or maintain employment is effectively reduced as a result of an alteration of one or more physical, sensory or mental functions. The French definition is very close to that given by the ECJ in the HK Danmark case.[7] Although not identical, both definitions involve a limitation resulting from physical, mental or psychological impairments and which hinders the individual's participation in professional life. French legislation thus sought to adopt a functional approach towards disability with a two-fold standard: limitation of an individual's abilities and the resulting consequences.[8] A similar definition can be found in Article L.114 of the Family and Social Action Code, according to which a disability *"constitutes any limitation or restriction upon participation in life in society which a person may experience in her or his*

[5] Rapport annuel, 2012, Défenseur des droits. http://www.defenseurdesdroits.fr/sites/default/files/upload/raa-ddd-2012_press02.pdf , last accessed 30 July 2014.
The Defender of Rights was appointed in July 2011 as the independent authority responsible for monitoring the Convention, as provided for by the Convention itself.

[6] Act No. 2005-112, of 11 February 2005 on Equal rights and Opportunities, Citizenship and Participation of People with Disabilities.

[7] ECJ, 11 April 2013, cases C-335/11 and C-337/11 and CJCE, 11 July 2006, case C-13/05.

[8] F. Heas, 'Le contentieux de l'inaptitude à l'emploi en cas de handicap', *Revue de droit sanitaire et social*, 2011, p. 849.

environment, due to a significant, lasting or permanent impairment of one or more physical, sensory, mental, cognitive or psychological functions, multiple disabilities or disabling health condition". This definition clearly stresses the relative nature of disability, based on a social model of disability which recognises that people are not disabled by their impairment alone, but by the environment and society in which they live.[9] The wider context is taken into account, which is not limited to a disability or impairment in itself, but also encompasses the social disadvantages that result from a functional disability or impairment, aggravated by the social, material, human and technical environment. The ECJ case HK Danmark, on discrimination on the grounds of disability, ruled that illness, as such, cannot be regarded as a ground in addition to those prohibited by Directive 2000/78. The ECJ thus made a distinction between illness and disability, although the Court recognised *"that if a curable or incurable illness entails a limitation which results in particular from 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, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78"*. The French definition meets this European concept of disability. Moreover, French law also directly prohibits discrimination on the grounds of state of health. It may therefore be less important in the French context to differentiate between the two states. However, the definition of disability remains important in terms of recognition of disabled worker status.

Generally, recognition of the status of a disabled person is the subject of various procedures, depending on the context: the disabled adults' allowance, access to specific social centres for disabled people (adults or children), the disabled children's education allowance, the disability card, or the disability rate. The competent authority for deciding upon disabled status is the Commission for the Rights and Autonomy of Disabled Persons (CDAPH, Article L.5213-2 of the Labour Code). This Commission assesses incapacity levels, and it is at that moment that disputes may arise, and the decisions of the Commission may be appealed against before administrative courts.

The Commission grants the status of disabled worker on the basis of an assessment of the individual's state of health and an assessment of the person's ability to carry out a professional activity.[10] It is important for the Commission to verify the

[9] S. Milano, 'La loi du 11 février 2005: pourquoi avoir réformé la loi de 1975', *Revue de droit sanitaire et social*, 2005, p. 361.
[10] F. Heas, *op.cit.*

worker's actual abilities. For example, the Council of State has ruled that the Commission could not refuse to recognise the status of disabled worker simply because the worker, who had already been recognised as an injured worker, already fell within the compulsory employment measures (see below). This did not mean that he could not benefit from other rights granted to disabled workers.[11] Medical condition and the ability to work are decisive factors in the Commission's assessment. The Commission must analyse the person's employability in the labour market and assess his or her ability to integrate into that market. Taking into account the realistic possibility of labour integration, the Commission rules whether a person can be employed in the mainstream labour market or in a sheltered environment, such as in a sheltered workshop ('*Centre d'aide par le travail*') or an adapted company. Sometimes, the disability will be such that it is not possible for the individual to work in mainstream companies or public administration. It is not really the legal definition of "disabled worker" which is problematic, but the individual assessment, which must be made on a case-by-case basis. Official recognition of the status of disabled worker is important, because it allows people to benefit from measures on the compulsory employment of disabled workers as well as the right to "reasonable accommodation".

A 2008 DARES survey into the employment situation of people with official recognition[12] of their disability found that 6% of the French population aged between 15 and 64 fell into this category.[13] This group is characterised by a larger proportion of men (56%), older workers and a lower level of education than the total population. This is related to the fact that 80% of the disability status related to work accidents concern blue-collar workers. The activity rate for disabled workers is also much lower than that of the general working population (46% compared to 71%), and their unemployment rate, calculated on the basis of unprompted answers, is more than twice as high as that of the working age population (22% compared to 10%). The

[11] CE, 25 Oct. 1996, *RJS* 1996, No. 1334.

[12] Recognition of this status could be for the purposes of receiving an invalidity allowance from the military authorities, receiving an allowance following an accident at work, receiving invalidity benefit due to incapacity to work, receiving the disabled adults' allowance, acquiring an invalidity card, acquiring recognised worker status, and working in a protected or adapted work establishment.

[13] DARES analysis (*Direction de l'animation de la recherche, des études et des statistiques* [French Directorate for Research, Studies and Statistics]) 'La situation sur le marché du travail en 2008 des personnes ayant une reconnaissance administrative de leur handicap', June 2011, No. 040. See S. Mongourdin-Denoix, 'Employment situation of disabled workers', European Observatory of Working Life – EurWORK, 17 May 2012, http://eurofound.europa.eu/observatories/eurwork/articles/labour-market/employment-situation-of-disabled-workers , last accessed 9 November 2014.

unemployment rate of female disabled workers is also higher (24% compared to 21%). For young disabled people (aged between 15 and 29), their unemployment rate is twice as high when a disability has been recognised (40%). Moreover, higher educational qualifications do not seem to guarantee a better outlook, as unemployment rates do not decrease with higher levels of education.

The activity rate is significantly lower for disabled workers. In 2008, more than half of the persons whose disability had been legally recognised and which enjoyed the right to benefit from the obligation to employ disabled workers were not working. Only 46% of this group stated that they were working or looking for work.[14] A quarter of this population works part-time, often on the basis of restricted hours. In four out of ten cases, this part-time work is due to their condition. The current economic and social crisis which has severely plagued France since 2008 has also had consequences on the employment situation of disabled people. According to the Agefiph,[15] the number of disabled jobseekers increased by 13.9% in 2011, while it increased by only 5.3% for all jobseekers.[16]

Although the 2005 Act has certainly contributed to improving the labour market situation for disabled workers, disability continues to expose people to the risk of being excluded from the labour market.[17]

[14] N. Aamrou, M. Barhoumi, 'Emploi et Chômage des personnes handicapées', DARES, Synthèse-Stat, No.1, Nov. 2012 (http://travail-emploi.gouv.fr/IMG/pdf/TH-Stat_6-11-2012.pdf).

[15] The Agefiph (Association de gestion des fonds pour l'insertion professionnelle des personnes handicapées [the Fund Management Organisation for the Professional Integration of People with Disabilities]) has been active in promoting the employment of people with disabilities since its creation in 1987.

[16] Agefiph, 'Les personnes handicapées et l'emploi, chiffres clés', May 2012, (see the Agefiph website: http://www.agefiph.fr/).

[17] F. Heas, 'Etat de santé, handicap et discrimination en droit du travail', *JCP Ed. S*, 2011, 1279.

3. THE OBLIGATION TO EMPLOY DISABLED WORKERS: THE QUOTA POLICY

The obligation for both private and public companies to employ disabled workers is certainly the flagship measure of disability employment policies in France. In 1987, legislation was introduced which obliged all companies with more than 20 employees to ensure that at least 6% their workforce were people with disabilities (Article L.5212-2 of the Labour Code). In particular, the law stipulated that private sector businesses failing to respect the quota would be obliged to pay a levy. It was as a result of this legislation that Agefiph was created, as the organisation responsible for collecting and managing these levies to promote the professional integration of disabled workers. This obligation was redefined by the Law of 11 February 2005 to make it more effective. The 2005 Act reinforced this obligation and the role of the Agefiph with regard to those enterprises who do not fulfil their obligations.

There are five ways in which companies can fulfil their obligation to employ disabled workers. They can hire people recognised as disabled by the State (in line with legal provisions). This can be done directly or indirectly. In the latter case, the employer can enter into contracts with adapted companies or sheltered workshops. They may sub-contract to these companies but this can only be used to meet 50% of the legal obligation. Companies can also employ disabled vocational trainees (for a maximum of 2%), but this option is rarely used. They may also conclude a collective agreement approved by the competent authority (see below) providing for the implementation of a programme dedicated to disabled workers. Finally, employers who do not meet their obligations under the quota system may do so by contributing to a specific fund. Under the 2005 Act, the annual contribution was increased to 600 times the minimum hourly wage per job not filled, depending on the size of the organisation, and has tripled to 1,500 times the minimum hourly wage for companies which have failed to meet the quota for three years. Thus, if during the last four years, an employer has not taken any action, that is to say, has not hired any disabled worker or has not subcontracted with adapted companies or sheltered workshops, and has simply contributed to the fund, the coefficient of 1,500 will be applied. If during this period, the situation has improved even although the quota has still not been reached, the coefficient applied is 400 for companies employing between 20 and 199 workers, 500 for companies employing between 200 and 749, and 600 for the rest. The coefficient may also vary depending on the degree of disability, if the disabled worker faces particular difficulties in accessing employment.

Agefiph resources come from these levies paid by companies with more than 20 employees and which fail to achieve the employment quota of 6%. The Agefiph uses

these funds to promote employment for disabled people and it can finance assistance for companies, including assistance with putting together a career plan, training, compensation measures, and accessing or retaining employment.

According to the DARES, the number of establishments employing at least one disabled worker has increased steadily since 2006. The increase was particularly marked in 2009, which could be a consequence of the 2005 Act. In 2010, 69% of establishments covered by the obligation to employ disabled workers directly employed at least one disabled worker (establishments applying a collective agreement are not included). The proportion of establishments that met their obligation simply by paying a contribution to the Agefiph has decreased significantly since 2009, from 23% in 2008 to 8% in 2010. This decrease could be due partly to the application, from 2009, of hefty penalties for establishments which had taken no positive action regarding disabled workers in the past four years. A certain effectiveness of the existing system can therefore be observed, although in 2010 the proportion of disabled workers remained at 2.8%, far from the 6% provided by the Law.[18]

In the current French economic context, which has seen a significant increase in unemployment, it should also be noted that unemployment among disabled workers, which remains much higher (around 19% compared to 9.5% for non-disabled workers) has increased faster than that of non-disabled workers, and precarious forms of employment have also increased.

French legislation also aims to encourage the social partners to engage in disability issues through collective bargaining to promote the employment of disabled workers. As far back as 1987 the Law which obliged companies with more than 20 employees to employ at least 6% of disabled workers, also allowed these employers to be released from this obligation if they implemented a collective agreement (at sectoral, group, enterprise or establishment level) approved by the competent authority, to establish an annual or multi-annual programme for disabled workers. The 2005 Act aimed to strengthen the social partners' involvement and established an obligation to negotiate measures relating to the employability and job retention of workers with disabilities (Article L.2242-3 of the Labour Code) on a three-year basis at branch level and every year at company level. This negotiation takes place on the basis

[18] DARES Analyses, 'L'emploi des travailleurs handicapés dans les établissements de 20 salariés ou plus du secteur privé: bilan de l'année 2010', Novembre 2012, No. 079. However, it is not always easy for companies to find workers whose skills and qualification suit their needs (see N. MAGGI-GERMAIN, (dir.), *Construire l'insertion des travailleurs handicapés: le rôle de la négociation collective*, Maison des sciences de l'homme Ange Guépin, Nantes, January 2009.

of a report prepared by the employer, presenting the situation of the company regarding the position of disabled workers. The obligation to negotiate does not imply any obligation to reach an agreement. Negotiations must focus primarily on conditions of access to employment, training and career advancement and the working conditions, job retention and employment of disabled workers. At company level, if a collective agreement is concluded and contains such measures, the obligation to negotiate is no longer annual but is extended to three years.

According to the annual report on collective bargaining published in 2012,[19] the obligation to conduct annual negotiations on the employment of disabled workers has resulted in consistent growth in the number of collective agreements dealing with the employment of disabled workers. This trend can also be seen in 2011 (1,251 agreements in 2011 compared to 985 in 2010). Nine times out of ten, the agreements deal with issues other than disability such as, for example, gender equality. The number of establishments covered by an agreement on employment of disabled workers has remained stable and represents about 9% of all establishment which are bound by the obligation to employ disabled workers.[20]

However, although the obligation to negotiate has certainly led to the conclusion of collective agreements on these issues, and although these agreements would perhaps not have been concluded in the absence of such a legal obligation, it is more difficult to obtain information on the qualitative content of these agreements. Furthermore, concluding an agreement on disability does not automatically mean it will be approved by the competent authority. Only when it is approved is the employer discharged from her or his obligation to employ disabled people. Under Articles R 5212-14 of the Labour Code, agreements approved by the administrative authority must provide for the implementation of an annual or multi-annual programme for disabled workers, and must include a plan for recruitment in an ordinary business setting also providing at least two of the following measures: an induction and training programme, a programme to adapt to technological changes, and a retention plan in the event of dismissals. Such an agreement also allows the employer to progressively increase the number of employees with disabilities over a period of two or three years. If these agreements are approved and effectively applied, the employer is released from his or her obligation to ensure that at least 6% of their workers have disabilities.

---

[19] Ministère du Travail, de l'Emploi et de la santé, *La négociation collective en 2011*, Bilans et Rapports, 2012, http://travail-emploi.gouv.fr/IMG/pdf/Bilans_et_rapports_-_la_negociation_collective_en_2011.pdf, last accessed 30 July 2014.

[20] Dares Analyse, 'L'emploi des travailleurs handicapés dans les établissements de 20 salariés ou plus du secteur privé : bilan de l'année 2010', November 2012, No. 079.

However, according to a report published in 2009, only few sectors are covered by such an agreement, even although more groups of companies and enterprises exist.[21] According to the findings of this study, several factors combine to explain the signing of such agreements. The Law has certainly played a key role in strengthening obligations on the employer and thus has had an incentive effect. It also appears that the choice to negotiate is motivated by the flexibility it provides, in terms of both defining and implementing the measures. But these choices remain conditioned by the existence of resources, particularly in terms of how these resources are organised, making implementation of the agreement possible.[22]

4. DISCRIMINATION ON GROUNDS OF DISABILITY AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT

All discrimination, direct and indirect, on grounds of disability is prohibited during the employment relationship.[23] Discrimination on the grounds of disability is treated in the same way as other types of discrimination: the HALDE and now the Defender of Rights are competent to deal with these forms of discrimination, the rules on the burden of proof have been adjusted, etc. However, some specific provisions apply to discrimination on the grounds of disability, as specified in Directive 2000-78 of 27 November 2000.

Article L.1133-3 of the Labour Code states that differential treatment based on medically-verified inability, state of health, or disability does not constitute discrimination when this difference is objective, necessary and appropriate.

---

[21] Thus in 2008, according to this report, only four collective agreements at sectoral level were signed (out of 274 sectors). It is possible that the number of agreements has increased since then as, at the time of the study, the obligation to negotiate on disability had only recently been established.

[22] N. Maggi-Germain (ed.), *Construire l'insertion des travailleurs handicapés: le rôle de la négociation collective*, Maison des sciences de l'homme Ange Guépin, Nantes, January 2009. Voir *Revue de l'IRES*, 2010, No. 67 p. 109 and N. Maggi-Germain and M. Blatge, 'Le handicap: objet de négociation collective ou de communication', *Revue de l'IRES*, 2010, No. 67, p. 95.

[23] See Art. L.1132-1 of the Labour Code which prohibits various forms of discrimination.

Therefore, the decision not to hire a worker can only be justified if the worker is found to be unable to work during the recruitment medical examination. It is also possible for a worker to conceal his or her disability.[24] Still on the subject of recruitment, the Defender of Rights states that, on the basis of the principle of non-discrimination, all job offers shall be open to all, except in the case of medically-verified inability, and that it is also prohibited to restrict certain job offers to disabled persons.[25]

The dismissal of a worker cannot be based on her or his state of health or disability. Here again, only when the inability to work is medically verified and after a certain procedure, is it possible for the employer to dismiss the worker. Furthermore, when an occupational health doctor certifies that a worker no longer has the ability to continue in his or her job, the employer has the obligation to offer the worker another job appropriate for his or her state of health or disability.[26] This obligation to attempt to relocate the employee means that employers must review all possible job openings in all companies and offices in their group. This obligation is strictly monitored by judges. When possible, the employer must offer the worker another job, as comparable as possible to the job previously held. If necessary, the employer must consider a job transfer, changes to the position, or changes to the organisation of working time. Only when there is absolutely no possibility of relocating the employee, can the employer dismiss the worker.

Moreover, Article L.5213-6 of the Labour Code incorporates Article 5 of the 2000-78 Directive on the reasonable accommodation for disabled persons. According to this article, in order to guarantee the principle of equal treatment, employers shall take all appropriate measures, depending on needs in a specific situation, to enable disabled workers to find employment or retain a job matching their qualifications, practice and progress in it, or provide them with training suited to their needs, provided that the responsibilities arising from implementation of the measures are disproportionate, particularly taking account of the grants which can offset all or part of the expenses borne by employers in this respect and which are defined at Article L.5213-10. For an employer, refusal to take appropriate measures is deemed to be a form of discrimination. Still in accordance with the European Directive, Article L.1133-4 of the Labour Code provides that measures taken to promote equal treatment for persons with disabilities, as provided in Article L 5213-6, does not constitute discrimination.

---

[24] Cass. soc. 7 November 2006, No. 05-41380.

[25] Deliberation No. 2010-126, 14 June 2010.

[26] Art. L. 1226-10 of the Labour Code when the inability to work is the consequence of an injury or occupational disease, Art. L.1226-2 in the other cases.

Financial assistance has therefore been developed in order to help companies fulfil their obligations. Article L.5213-10 of the Labour Code provides that the State may grant financial assistance from the Fund to promote the employment of disabled people to any employer bound by the obligation to employ disabled workers, including assistance with putting together a career plan, training, compensation measures, business start-ups and takeovers, access to employment and job retention. In the private sector, the Agefiph is responsible for funding these measures, while the competent body in the public sector is the Fiphfp.[27]

HALDE's annual reports (and now those of the Defender of Rights) give an idea on how these provisions are applied. Before the HALDE was established, health and disability (the two were not differentiated) were the second biggest grounds for complaint, the first being origin. These complaints account for over 20% of cases. In one of the most recent annual reports by the Defender of Rights, disability is now differentiated from health. Together, they constitute the biggest grounds for complaint, with disability representing 14.9% of all complaints (health represents about 15.8%).[28]

According to the HALDE in one of its reports,[29] observations made to the Courts[30] have helped to transpose the concept of reasonable accommodation into reality, which aims at compensating for disability by adopting appropriate measures to restore equality of opportunity as far as possible in practice, thus allowing people to be evaluated solely on their skills.

The HALDE has also developed guidance for private sector employers on how to implement the notion of "reasonable accommodation".[31] According to the HALDE, appropriate measures should be considered at all stages of an individual's career. They can be taken at the recruitment stage, they may involve adapting the work station

---

[27] Fund for the employment of disabled people in the civil service (Fonds pour l'insertion des personnes handicapées dans la fonction publique).

[28] Annual Report 2013 by the Defender of Rights. http://www.defenseurdesdroits.fr/sites/default/files/upload/rapport_annuel_2013.pdf, last accessed 30 July 2014.

[29] HALDE Annual Report, 2010.

[30] The HALDE and the Defender of Rights can present observations to the courts on cases of discrimination submitted to them.

[31] Deliberation No. 2010-126 of 14 June 2010, Avis de la haute autorité relatif à l'accès à l'emploi des personnes handicapés dans le secteur privé au regard des principes d'égalité de traitement et de non-discrimination. Also see Deliberation No. 2010-274 on public employment.

(supplying for example personalised equipment), or making adjustments to workplace or working time arrangements. Personal assistance, including during the probationary period, may also be provided. Assessing what kind of adjustments are required involves an individual analysis (rather than an abstract one) taking into account the personal situation of the individual, his or her autonomy, and the position or training in question.

The search for appropriate measures therefore requires a case-by-case analysis in order to find practical and appropriate solutions to the disabled person's situation. HALDE adds that the adjustments required by the handicap should, nevertheless, be reasonable, that is to say they should not impose disproportionate costs upon the employer. Each situation must therefore be assessed *in concreto*, taking into account the particular situation of the employer and the availability of public funding, in particular financial assistance which could be granted by Agefiph under Article L.5213-6 of the Labour Code.

The HALDE has implemented these principles and has recognised the existence of discrimination on the grounds of disability where it has been shown that the employer refused to take appropriate measures to enable a disabled person to access employment, training or promotion. A few examples of cases brought before the HALDE and the courts can be cited. The HALDE has thus provided useful interpretations of the "reasonable accommodation" provision.

A first case was about a high-performance athlete with a hearing problem, who had applied for a job as physical education teacher. The Ministry of Education refused his application. Because of his hearing problem he could not dive and therefore could not meet the prerequisites for water rescue. The HALDE had suggested reasonable adjustments, so that the teacher would be replaced by a colleague for activities taking place in the pool, while he replaced the colleague for other activities. The Ministry of Education refused this solution outright, which only required changes to the working times of the physical education teachers in the same establishment who, moreover, had expressed their agreement.[32] The case was referred to the administrative court in Rouen, which awarded 5,000 euros for moral damage to the physical education teacher which the Rouen education office had refused to hire. The court stated that there was no evidence that the disability was incompatible with the job in question or that the administration had sought to take appropriate measures to accommodate the disability. It also held that the appropriate measures did not constitute a disproportionate burden for a service that is only very partially devoted to water

[32] Deliberations 2005-34 of 26 September 2005, 2006-183 of 18 September 2006 and 2008-8 of 7 January 2008.

education activities, and that the complainant was well founded in claiming that this refusal constituted an error which engaged the administration's liability for the ensuing damage.[33]

In a second case, a disabled worker complained to the HALDE because a company refused to hire him as a sales advisor. The worker believed that he was not hired because of his disability. After a series of tests and recruitment interviews, he was called for a pre-recruitment medical examination and was declared fit to work on the condition that reasonable adjustments were provided. However, the worker's application was rejected by the employer on the grounds that he did not fit the job profile. After an investigation, the HALDE stated that the refusal to hire was actually based on the employer's refusal to take appropriate measures to enable the disabled worker to access employment. Thus, the employer's decision constituted discrimination on the grounds of disability under the provisions of Articles L.5213-6, L.1132-1 and L.1133-3 of the Labour Code, which define discrimination. The existence of discrimination in employment was also recognised in the employer's failure to provide any adjustments, and the HALDE recommended compensation for the damage.[34]

The third example involved an insulin-dependent diabetic women who had applied for a job in the National Police. The reason given for refusing to hire her was that her disease could lead to a long-term sick leave. The HALDE held that her state of health could only be assessed in relation to the time of hiring and not on the fact that her disease could potentially lead to sick leave in the future. The administrative court of Lyon awarded 12,000 euros in compensation.[35]

These few examples show that discrimination on the grounds of disability has been recognised in cases where the employer refused to make reasonable accommodation. However, until now they have been very few cases on this issue, particularly concerning the private sector. Moreover, some cases also demonstrate that administrative tribunals may be reluctant to recognise discrimination on the grounds of disability. In a decision of 2008, the Council of State recognised the legality of a decree which did not provided for any specific compensatory measures for disabled

[33] Tribunal Administratif de Rouen, 9 July 2009, No. 0700940-3.
[34] Deliberation No.2009-128 of 27 April 2009.
[35] Deliberation No. 2008-216, 29 September 2008.

persons.[36] It is not yet possible, therefore, to really analyse how judges will rule on this concept and, particularly, what may constitute a disproportionate burden for employers.

5. UNIVERSITIES

Generally speaking, one of the major aims of Act No. 2005-112 of 11 February 2005 on equal rights and opportunities, citizenship and participation of persons with disabilities is accessibility. This also applies to universities. The first University Disability Charter was signed in 2007 between the Ministry of Higher Education and Research, the Ministry of Labour, Labour Relations and Solidarity and the Committee of University Chancellors (*Conférence des Présidents d'Université*), followed by a second one in 2012.[37] The Act and the Charters set down universities' obligations towards their disabled students and increased universities' responsibilities. In addition to accessibility, students with disabilities should benefit from human and material assistance. Universities are responsible for defining their financial needs in terms of collective adjustments and services and submitting an application to the Ministry of Higher Education and Research for funding. A specific reception and support service should be created in each university to assist and support disabled students. This should be done in partnership with the various other university services (Registrar's office, medical service, academic team, etc.) and external services such as the disability centres which have been created in each Department (*Maisons départementales des personnes handicapées*).

At the University of Saint Etienne,[38] a disability support service was created to meet these legal obligations and several measures have been defined. Since then, there has been a significant increase in the number of students with disabilities at the University and some are now studying at Master level which, in the past, was rare. The number of students with disabilities remains low, but this may also reflect, of course, the extent to which young disabled people are integrated into secondary schools. 59

[36] CE, 14 November 2008, Féd. des syndicats généraux de l'Education nationale, req. No. 311312, see. X. SOUVIGNET, 'Le juge administratif et les discriminations indirectes', *Revue Française de Droit Administratif*, 2013, p. 315).

[37] http://media.education.gouv.fr/file/66/8/20668.pdf

[38] This information was collected through an interview with Emmanuelle Volle, who is responsible for the Disability Support Service at the University of Saint Etienne. Similar services now exist in many universities and provide more or less the same services.

disabled students were studying at Saint Etienne in the 2005-2006 academic year, in comparison with 101 in 2010-2011 (of a total of 17,000 students). 41 of these students have language impairment such as dyslexia and the only adjustment needed is to provide additional time for exams (many have up to one-third of additional time in the exam). Other significant disabilities include mobility impairment, vision and hearing impairments, psychological disorders, cognitive disorders, etc.

A personalised analysis of students' needs is carried out by the service and various measures can be taken. These may involve specific visits to the University to address accessibility, support in lessons and tutorials, note taking during classes and exams, and the loan of equipment (specific software, dictaphones, computers, etc.). Specific contracts can be concluded with students who are responsible for taking notes for students who cannot take their own, and for assisting them. Assistance could also be provided by social workers on issues such as housing, which are not directly related to academic life.

This policy seems to produce results, as there has been an increase in the number of students with disabilities and these students are progressing with their studies.

In terms of the transition of these students to the labour market, there is still very little feedback on this issue. A first step is submitting a request to acquire the status of disabled worker, which allows workers to benefit from the compulsory employment measures or to benefit from adjustments for public service entrance examinations. The disability service can also work jointly with the university traineeship service and with non-profit-making organisations to help these students find internships and jobs. For example, meetings between companies and disabled students coul be organised.

6. CONCLUSION

Ten years after adoption of the 2005 Act, some progress has been made. However, this progress has been very slow and was certainly not helped by the economic crisis. The obligation to ensure that 6% of the workforce consists of disabled workers has certainly contributed to the employment of disabled workers but it also has its limitations and some employers prefer to pay the levy rather than employing disabled persons, although the increased penalties have prompted some companies to take measures to improve the situation of disabled workers. The concept of "reasonable accommodation" exists in the French legal system but it has not yet

reached its full potential. Finally, the employment policy towards disabled workers also highlights the particularity of the prohibition of discrimination on the ground of disability. Combating discrimination usually involves not taking into account the prohibited criteria, while in this case, in contrast, disability status has to be taken into account, and denying the disability could be discriminatory. Hence the ambiguity: integration by mitigating difference is one of the goals of the policy while, at the same time, these differences may justify differential treatment in order to achieve equality.

Sylvaine Laulom
Professor of Private Law, Institut d'Etudes du Travail de Lyon,
Université Lumière Lyon 2, CERCRID (UMR 5137)
sylvaine.laulom@univ-lyon2.fr

INFORME ALEMÁN

(GERMAN REPORT)

INTEGRATION AND PARTICIPATION OF DISABLED PERSONS IN THE LABOUR MARKET – THE LEGAL INSTRUMENTS IN GERMAN LAW

JUDITH BROCKMANN
Assistant Professor of Labour Law
Research Staff. University of Hamburg

MINOU BANAFSCHE
Junior Professor for Social Law
University of Kassel

Fecha de recepción: 21–09–2014
Fecha de aceptación: 02–10–2014

UNIVERSITY: CAREER COUNSELLING AND JOB PLACEMENT FOR STUDENTS WITH DISABILITIES. 7.1. The legal situation concerning Higher Education in Germany. 7.2. Access to higher education. 7.3. Assistance during studies. *7.3.1. Information and practical support. 7.3.2. Financial support, especially provided by the BafögG*. 7.4. Job Placement. 8. CONCLUSIONS.

RESUMEN: Esta contribución presenta una visión general sobre los instrumentos jurídicos alemanes –tanto en el derecho laboral como en el derecho social– designados para asegurar la integración y participación de las personas con discapacidad en el mercado laboral. Las autoras tratan la influencia e implementación de normas legales internacionales, como las Directivas Europeas o la Convención sobre los Derechos de las Personas con Discapacidad (CRPD, por sus siglas en inglés). Además, se describe la situación real del mercado laboral en relación al empleo de personas con discapacidad. Finalmente, las autoras dan algunos ejemplos concretos de programas de empleo para titulados jóvenes con discapacidad, dirigidos por la Agencia Estatal de Empleo de Alemania, universidades y organizaciones de servicios para estudiantes.

ABSTRACT: This paper gives an overview on German legal instruments in both labour law and social law designated to insure the integration and participation of persons with disabilities in the labour market. The authors discuss the influence and implementation of international legal rules such as European Directives or the Convention on the Rights of Persons with Disabilities (CRDP). The paper also describes the actual labour market situation with regard to the employment of disabled persons. Finally, the authors give examples of job placement programs for young academics with disabilities, led by the German National Employment Agency, universities, and student services organisations.

PALABRAS CLAVE: participación en el mercado laboral, despido improcedente, Convención sobre los Derechos de las Personas con Discapacidad, ajustes razonables, acceso a la enseñanza superior.

KEYWORDS: participation in the labour market, unlawful dismissal, Convention on the Rights of Persons with Disabilities (CRPD), reasonable accommodation, access to Higher Education.

1. PREFACE

To fully appreciate the following report, we would like to point out some characteristics of the German legal system.

German constitutional law and any other written law has to be interpreted following the rule of "Völkerrechtsfreundlichkeit" (favourable attitude towards international law), which means that respecting the international law has to be enforced if at all possible in the limits set by the wording and the recognizable spirit of the law.[1]

The integration of persons with disabilities in the educational and vocational training system as well as in the labour market are relevant to the fields of labour law and social security law as well as to social assistance and welfare law. This distinction is important because the former is considered part of civil law and primarily follows the regime of contract law, whereas social security law and social assistance and welfare law are specialized fields of public, and here more specifically administrative law. These different premises may cause issues in the application of different acts.

Lastly, the above-mentioned areas of law are at the junction of the division of power within the federal system. Both the competency of legislation as well as the execution thereof can fall under the purview of either the federation or the federal states. This is further complicated in that within one area of law, competency of legislation can lie with the federation while the execution lies with the federal states.

[1] BVerfG, 26/03/1987, file ref. 2 BvR 589/79 ; 14/10/2004, file ref. 2 BvR 1481/04; 23/03/2011, file ref. 2 BvR 882/09; R. GEIGER, *Grundgesetz und Völkerrecht*, 6th ed., Munich, 2013, pp. 163, 170 et seqq.; K.-P. SOMMERMANN, in: Hermann von Mangoldt/Friedrich Klein/Christian Starck (eds.), GG, Vol. 2, 6th ed., Munich, 2010, Art. 20 rec. 254; K.-P. SOMMERMANN, "Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung – Die Menschenrechtsfreundlichkeit des Grundgesetzes", *AöR 114* (1989), p. 391 (418); J. v. BERNSTORFF, "Anmerkungen zur innerstaatlichen Anwendbarkeit ratifizierter Menschenrechtsverträge: Welche Rechtswirkungen erzeugt das Menschenrecht auf inklusive Schulbildung aus der UN-Behindertenrechtskonvention im deutschen Sozial- und Bildungsrecht?", *RdJB 2011*, p. 203 (208).

2. THE DEFINITION OF DISABILITY IN GERMAN LAW

2.1. The general definition of disability

Within German law, a definition of the term "disability" is to be found in § 2 (1) 1 SGB IX (Sozialgesetzbuch IX, Code of Social Law, Book IX). This definition has been adopted verbatim in § 3 Behindertengleichstellungsgesetz (BGG, Equality for the Disabled Act) as well. Furthermore, being considered the most appropriate legal definition, it is adopted into the entirety of the social law as well as other legal contexts.[2] The same definition underlies § 1 Allgemeines Gleichbehandlungsgesetz (AGG, General Equal Treatment Act).[3] The AGG was enacted as a realization of European directives, and with regard to labour law specifically the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[4], which itself, while mentioning the term "disability", does not include an explicit definition. However, even in the context of the European guidelines, the adoption of the term into the AGG is compatible with both European guidelines and German law.[5]

According to § 2 (1) 1 SGB IX a person is disabled, "if his or her physical function, mental ability or psychological health differs from the typical age-appropriate state of being for a period presumed to be more than six months and if this leads to a lack of integration and participation in society."

Following the explanatory statement of the draft for the SGB IX, § 2 (1) 2 SGB IX takes into consideration the international discussion which has lead to the previous adoption of the ICF[6], of which one crucial aim is the turn against a deficit orientated view of disability.[7]

---

[2] Cf. F. WELTI, in: Klaus Lachwitz/Walter Schellhorn/Felix Welti (eds.), *HK-SGB IX*, 3rd ed., Cologne, 2010, § 2 rec. 7 et seqq.; F. WELTI, "Das neue SGB IX – Recht der Rehabilitation und Teilhabe behinderter Menschen", *NJW 2001*, p. 2210 (2211).

[3] Cf. explanatory statement of the draft for the AGG, BT-Drucks. 16/1780, p. 31.

[4] OJ no. L 303 of 02/12/2000, p. 16.

[5] P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 81 rec. 34 et seqq., inter alia.

[6] International Classification of Functioning, Disability and Health.

[7] BT-Drucks. 14/5074, p. 98.

The definition of disability is trinomial.[8] It presupposes a functional disorder, which is more than temporary; which sets apart the person from the norm (atypical); and which leads to a lack of integration and participation in society.

2.1.1. Functional disorder

Firstly, a functional disorder of a physical, mental or psychological type has to be proven and thus be objectively assessable.[9] For indicators of what is considered a physical, mental or psychological disorder, § 14 (2) SGB XI and §§ 1 to 3 of the Eingliederungshilfe-Verordnung (EinglH-VO, Integration Assistance Ordinance) can be consulted.[10] On the international level the ICD-10[11], compiled by the World Health Organisation (WHO), can serve as a reference point. The functional disorder must be strongly presumed to exist more than six months. This is meant to differentiate the terms disability and disease in legal terms.[12] The latter has not been defined in written law. However, the federal social court has stated that disease is an untypical physical or mental state, which needs medical treatment and/or leads to (temporary) inability to work.[13]

---

[8] V. NEUMANN, in: Olaf Deinert/Volker Neumann (eds.), *Rehabilitation und Teilhabe behinderter Menschen – Handbuch SGB IX*, 2nd ed., Baden-Baden, 2009, § 5 rec. 1 et seqq., § 2 rec.s 6 et seqq.

[9] Cf. BSG, 18/06/1968, file ref. 3 RK 63/66 concerning the irregular physical or mental state in the context of the definition of disease.

[10] This is a federal ordinance based on § 60 SGB XII.

[11] International Statistical Classification of Diseases and Related Health Problems.

[12] V. NEUMANN, in: Deinert/Neumann (fn. 8), § 2 rec. 10.

[13] BSG 28/10/1960, file ref. 3 RK 29/59; 28/04/1967, file ref. 3 RK 12 /65; 30/05/1967, file ref. 3 RK 15/65; 18/06/1968, file ref. 3 RK 63/66; 27/05/1971, file ref. 3 RK 28/68; 20/10/1972, file ref. 3 RK 93/71; 13/02/1975, file ref. 3 RK 68/73; 12/11/1985, file ref. 3 RK 48/83; 08/03/1990, file ref. 3 RK 24/89; 28/02/2008, file ref. B 1 KR 19/07 R; see in the literature I. EBSEN, Krankenversicherung, in: Bernd Baron von Maydell/Franz Ruland/Ulrich Becker (eds.), *Sozialrechtshandbuch*, 5th ed., Baden-Baden, 2012, § 15 rec. 88; G. IGL/F. WELTI, *Sozialrecht*, 8th ed., Neuwied, 2007, § 17 rec. 31 et seqq.; R.WALTERMANN, *Sozialrecht*, 10th ed., Heidelberg, 2012, rec. 171 et seqq.

2.1.2. Difference from age-appropriate condition

The functional disorder must be atypical. This is defined as differing from the assumed age-appropriate state of being. The original intent was to exclude functional disorders that "develop physiologically in old age and are age-appropriate in kind and extent for the respective age and therefore cannot be considered as an abnormal state and consequently cannot be viewed as a disability."[14]

Today, jurisdiction and legal publications refer to the need of medical treatment as the arbitrative criterion in considering an atypical condition. The explanatory statement in the draft version of the SGB IX states accordingly that the atypical state of being for the respective age group is the "loss or disorder of normally existing physical functions, mental abilities or psychological health".[15]

2.1.3. Lack of participation in society

Lastly, in order to be classified as a disability, the atypical functional disorder must lead to a lack of participation in society.

As the SGB IX is conceived to enable persons with disabilities to live their life in an independent way and to enable them to participate in society, the terms "society" and "social" must be understood in a broad sense.[16] In this context, it is understood to include health care benefits aiming at habilitation and rehabilitation, as well as benefits aiming at integration in the labour market and participation in social events. The ICF refers to nine fields of participation: learning and applying knowledge; general tasks and demands; communication; mobility; self-care; domestic life; interpersonal interactions and relationships; significant areas of life; and community, social and civic life.[17] Following the explanatory statement of the SGB IX, "social benefits can only be seen as an offer and as an opportunity that need to be actively utilized by disabled persons to reach the aim of these benefits: integration and participation in society." [18]

---

[14] BT-Drucks. 10/5701, p. 9; also Federal Ministry of Labour and Social Affairs (ed.), *Anhaltspunkte für die ärztliche Gutachtertätigkeit im sozialen Entschädigungsrecht und nach dem Schwerbehindertenrecht* (Teil 2 SGB IX) [AHP], Bonn, legal status of 2008, p. 21.

[15] BT-Drucks. 14/5074, p. 98.

[16] BT-Drucks. 14/5074, p. 98.

[17] German Institute of Medical Documentation and Information (DIMDI)/WHO Center for Cooperation for the System of International Classifications (eds.), *International Classification of Functioning, Disability and Health – German-language version*, Cologne, 2005, p. 20.

[18] BT-Drucks. 14/5074, p. 98.

Therefore, the intention is to empower persons with disabilities and to strengthen their ability of independence and self-care.[19]

2.1.4. Further development of § 2 (1) 1 SGB IX influenced by the CRPD[20] and the European legal situation

Comparing the relatively narrow definition of disability in § 2 (1) 1 SGB IX and the CRPD evokes some concerns. The CRPD has been adopted as simple federal law.[21] Even if the CRPD does not include an explicit definition of disability itself (*argumentum e contrario* from Art. 2 CRPD),[22] its spirit and purpose as well as its scope (cf. Art. 1)[23] suggest a broad understanding of the term. Whether or not it is possible a broadening of the term in the context of German law, by favourably considering the international rule[24] in the context of § 2 (1) 1 SGB IX, is in doubt.[25] Alternatively, a modification of the German legal text according to the CRPD would

---

[19] BT-Drucks. 14/5074, p. 98.

[20] Detailed M. BANAFSCHE, "Die UN-Behindertenrechtskonvention und das deutsche Sozialrecht – eine Vereinbarkeitsanalyse anhand ausgewählter Beispiele (part I)", *SGb 2012*, p. 373 (374 et seqq.).

[21] BVerfG 26/03/1987, file ref. 2 BvR 589/79; 14/10/2004, file ref. 2 BvR 1481/04; exemplary B. KEMPEN, in: von Mangoldt/Klein/Starck (fn. 1), Art. 59 rec. 92.

[22] T. DEGENER, "Welche legislativen Herausforderungen bestehen in Bezug auf die nationale Implementierung der UN-Behindertenrechtskonvention in Bund und Ländern?", *br 2009*, p. 34 (34).

[23] For a discussion of reasons for not giving a definition of disability see T. DEGENER, „Die UN-Behindertenrechtskonvention als Inklusionsmotor", *RdJB 2009*, p. 200 (204); T. DEGENER, "Die UN-Behindertenrechtskonvention – Grundlage für eine neue inklusive Menschenrechtstheorie", *VN 2010*, p. 57 (57 et seqq.); for a discussion on controversy during the development stages of the CRPD, see T. DEGENER, "Menschenrechtsschutz für behinderte Menschen – Vom Entstehen einer neuen Menschenrechtskonvention der Vereinten Nationen", *VN 2006*, p. 104 (106); J.v. BERNSTORFF, "Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen", *ZaöRV 67* (2007), p. 1041 (1047).

[24] Vide supra Preface.

[25] For a discussion on the resolution of conflicts between international law and federal law in applying the 'lex posterior rule', see also: D. RAUSCHING, in: Rudolf Dolzer/Wolfgang Kahl/Christian Waldhoff/Karin Graßhof (eds.), *Bonner Kommentar zum Grundgesetz*, Vol. 8, status: February 2012, Heidelberg, 2012, Art. 59 rec. 141.

be necessary. In this regard, the interpretation of the term "disability" in the context of the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[26] by the CJEU seems very important.[27]

2.2. The term "severe disability" and its equivalence

The majority of labour laws protecting persons with disabilities in the workplace also require a so-called severe disability according to § 2 (2) SGB IX. By law a severe disability is determined by the competent authority[28] by assessing the lack of participation in society on a scale (Grad der Behinderung). The assessment process is indeed governed by schematic examination. The relevant criteria concerning physical, mental or psychological disorders are listed in a legal ordinance (Versorgungsmedizin-Verordnung, VersMedV). A severe disability needs a degree of disability of 50% or higher.

A grade of disability of 30% or higher can be equated by law to a "severe disability" by the employment agency. The legal consequence of the equivalence is the application of most of the benefits for persons with severe disabilities, especially §§ 68 to 160 SGB IX (cf. § 68 (1) and (3) SGB IX). The equivalence takes effect "from the day the claim was made."

3. LABOUR MARKET STATISTICS CONCERNING PERSONS WITH DISABILITIES

There are very little statistical data in Germany pertaining to the situation and integration of persons with disabilities in the labour market in total. Following the Federal Statistic Office, the percentage of persons with disabilities participating in the labour market is relatively low. In 2009 70% of persons with disabilities between the ages of 25 and 44 years were working or looking for employment, whereas the rate was

[26] OJ no. L 303 of 2/12/2000, p.16; vide already supra A.I.1.

[27] Cf. infra Section I, II. and CJEU,11/04/2013, file ref. C-335/11 – Ring/Skouboe Werge.

[28] The competence follows federal state law, usually it is the pension office (§ 69 (1) 1 SGB IX).

88% in the age group of persons without disabilities. The rate of unemployment was 10% of persons with disabilities, but only 7% for those without disabilities.[29]

Most of the statistical data are limited to assessing the employment situation of the above-mentioned severely disabled persons. This is reflected in the latest report of the Federal Government on the situation of persons with disabilities (Disability Report, 2009), which mainly refers to severely disabled persons.[30] The relevant data is collected by a procedure as provided in § 80 (2) SGB IX. It obliges any employer to report those data to the employment agencies, and they are the basis for calculating the percentage of positions to be filled by persons with severe disabilities and for the compensatory levy in case employers do not act in keeping with this percentage. § 71 (1) SGB IX places public and private employers with more than 20 employees under obligation to hire at least 5% persons with severe disabilities.[31]

3.1. Development of the rate of employment of persons with severe disabilities from 2003 to 2010

The following table shows the development of employment rates as reported by public and private employers for the reference period between 2003 and 2012[32] Data for 2013 is not yet available.

[29] Federal Statistic Office (ed.), Pressemitteilung no. 187, 12/5/2011 (https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2011/05/PD11_187_227.html), last access: 29/7/2014); see also Federal Ministry of Labour and Social Affairs (ed.), *Participation Report of 2013*, Bonn, status: August 2013, pp. 128 et seqq., referring to all persons with impairments and not only those with barriers to participation in society.

[30] Federal Ministry of Labour and Social Affairs (ed.*), Disability Report of 2009*, Bonn, status: June 2009, pp. 56 to 58; partially taking into account all persons with disabilities, cf. *Participation Report of 2013* (fn. 29), p. 133.

[31] For further information on the employment quota and compensatory levy vide infra Section III, I.1.a).

[32] Federal Employment Agency (ed.), Statistics of the Federal Employment Agency (http://statistik.arbeitsagentur.de/nn_31958/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Suchergebnis_Form.html?view=processForm&resourceId=210358&input_=&pageLocale=de&topicId=17388&region=&year_month=201212&year_month.GROUP=1&search=Suchen), last access: 28/7/2014.

	Relevant jobs		Target (5 %)		Actual state (in %)	
	Private employers	**Public employers**	**Private employers**	**Public employers**	**Private employers**	**Public employers**
2003	14,978,767	4,812,000	722,207	242,025	3.6	5.4
2004	14,680,371	4,815,439	701,668	242,002	3.6	5.6
2005	14,478,097	4,745,478	629,698	238,342	3.7	5.7
2006	14,611,180	4,735,735	699,694	237,738	3.7	5.9
2007	15,175,978	4,712,031	724,700	236,521	3.7	6.0
2008	15,696,407	4,727,327	749,702	237,375	3.7	6.1
2009	15,536,478	4,805,608	741,161	241,115	3.9	6.3
2010	15,695,522	4,817,990	748,591	241,795	4.0	6.4
2011	19,399,555	5,593,779	778,252	242,790	4.0	6.5
2012	19,696,397	5,663,318	789,528	245,312	4.1	6.6

3.2. Consideration

Concerning the data two aspects shall be examined in more detail. Firstly, the development of the rate of employment itself deserves a closer look. Secondly, the development of the rate of employment of persons with severe disabilities regarding the development of unemployment in general will be discussed.[33]

The Disability Report of 2009 only states that the rate of employment has risen by 0.3%, from 4.0% in 2003 to 4.3% in 2006. The Report concludes that the system of employment quota and compensatory levy positively and significantly influences the employment rate of persons with severe disabilities.[34] However, this conclusion does not differentiate between private and public employers –a distinction that is most informative–. A closer look is revealing: focusing only on the reported period from 2003 to 2006, 92% of all employers are located in the private sector, compared to only 8% of employers in the public sector. The number of relevant jobs in the private

[33] Already M. BANAFSCHE, "Die Beschäftigungspflicht der Arbeitgeber nach § 71 et seqq. SGB IX zwischen Anspruch und Wirklichkeit", *NZS 2012*, p. 205 (208 et seqq.).
[34] Disability Report of 2009 (fn. 28), p. 57.

sector decreased by approximately 2.5%, whereas the quota increased from 3.6% to 3.7%. In absolute numbers, this translates into an increase of 11,528 jobs filled with severely disabled persons.[35] In the public sector, the number of relevant jobs decreased by approximately 1.6%, while the quota increased from 5.4% to 5.9%, translating into 18,544 jobs in absolute numbers. While the loss of jobs in both sectors was more or less comparable, the increase in jobs designated for persons with severe disabilities in the public sector outnumbered those in the private sector by almost a third. The postulated positive effect of a quota and compensatory levy therefore could not be seen in the vast majority of the private sector employers although, making up for 92% of employers altogether, they are the main target group of the rules stated in §§ 71 et seqq. SGB IX.

According to the Disability Report of 2009, a reduction of 25,000 in the number of unemployed persons with severe disabilities could be observed in the period between 2005 and 2008.[36] Given a decrease of the unemployment quota as a whole of 33.5% in the reported period, the effects of the employment quota and the compensatory levy must be called into question. Indeed the employment quota of persons with severe disabilities during that period increased from 4.2% to 4.3%. However, taking a closer look at the distribution between private and public sector, in the private sector the quota remained at 3.7% and so it might be assumed that the increase is based solely on changes within the public sector.

4. SECTION I: JOB PLACEMENT POLICIES – LEGAL FRAMEWORK AND CASE LAW

4.1. The influence of international law

The CRPD and its Optional Protocol have been adopted as federal law by a federal act ("Gesetz zu dem Übereinkommen der Vereinten Nationen vom 13.12.2006 über die Rechte von Menschen mit Behinderungen sowie zu dem Fakultativprotokoll vom 13.12.2006 zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen"[37]) on 21 December 2008,

[35] See also the Statistics of the Federal Employment Agency (fn. 30).
[36] Disability Report of 2009 (fn. 28), p. 56.
[37] BGBl. II 2008, p. 1419.

according to Art. 59 (2) 1 GG (Grundgesetz, German Constitution). It came into effect on 26 March 2009.[38]

Since then, CRPD has to be taken into account in both word and intention whenever applying German constitutional law or other legal acts. As mentioned above, the latter have to be interpreted favourably in keeping with international law, e.g. the CRPD.[39]

There might be constitutions where rights from the CRPD might be individually enforced. This depends on whether or not the article in question assigns an individual right to the claimant and is self-executing.[40]

Particularly significant are Art. 27[41] and Art. 24 of the CRPD[42], both of which have to be considered and enforced by the legislation and in the application of any law. This obligation is imperative for public bodies at all levels, likewise for the

---

[38] Concerning the development and relevance of the CRPD T. DEGENER (fn. 23), *VN 2006*, pp. 104 et seqq.; J. v. BERNSTORFF (fn. 23), *ZaöRV 67* (2007), pp. 1041 et seqq.; V. AICHELE, "Die UN-Behindertenrechtskonvention und ihr Fakultativprotokoll – Ein Beitrag zur Ratifikationsdebatte", *Policy Paper No. 9*, Berlin, 2008; T. DEGENER (fn. 23), *RdJB 2009*, pp. 200 et seqq.; *Degener* (fn. 22), *br 2009*, pp. 34 et seqq.; T. DEGENER (fn. 23), *VN 2010*, pp. 57 et seqq.; V. AICHELE, "Behinderung und Menschenrechte: Die UN-Konvention über die Rechte von Menschen mit Behinderungen", *APuZ 23/2010*, pp. 13 et seqq.; J. v. BERNSTORFF, "Anmerkungen zur innerstaatlichen Anwendbarkeit ratifizierter Menschenrechtsverträge: Welche Rechtswirkungen erzeugt das Menschenrecht auf inklusive Schulbildung aus der UN-Behindertenrechtskonvention im deutschen Sozial- und Bildungsrecht?", *RdJB 2011*, pp. 203 et seqq.; P. MASUCH, „Die UN-Behindertenrechtskonvention anwenden!", in: Christine Hohmann-Dennhardt/Peter Masuch/Mark Villiger (eds.), *Festschrift für Renate Jäger – Grundrechte und Solidarität – Durchsetzung und Verfahren*, Kehl on the Rhein, 2011, pp. 245 et seqq.

[39] Vide supra Preface.

[40] So in the context of Art. 24 CRPD: E. RIEDEL, Zur Wirkung der internationalen Konvention über die Rechte von Menschen mit Behinderung und ihres Fakultativprotokolls auf das deutsche Schulsystem, Mannheim/Geneva, 2010, p. 8; cf. to the attribute of "self-executing" BVerwG, 04/06/1991, file ref. 1 C 42/88 - rec. 14; R. STREINZ, in: Michael Sachs (ed.), Grundgesetz, 6th ed., Munich, 2011, Art. 59 rec. 68.

[41] Detailed on Art. 27 CRPD: P. TRENK-HINTERBERGER, Artikel 27 – Arbeit und Beschäftigung, in: Antje Welke (ed.), *UN-Behindertenrechtskonvention mit rechtlichen Erläuterungen*, Berlin, 2012, pp. 190 et seqq.

[42] On Art. 24 CRPD: M. KRAJEWSKI/T. BERNHARD, Artikel 24 – Bildung, in: Antje Welke (ed.), *UN-Behindertenrechtskonvention mit rechtlichen Erläuterungen*, Berlin, 2012, pp. 164 et seqq.

national state (Bund), the federal states (Bundesländer) and the municipalities (Gemeinden) (cf. Art. 4 (5) CRPD).[43] The legal instruments in German labour and social law regarding disabled persons that are treated below[44] are considered to be measures of reasonable accommodation according to Art. 2 (4) CRPD when applied in individual cases.[45]

4.2. The influence of European law

In the context of European law and the protection against discrimination for persons with disabilities the AGG deserves special mention. The AGG was issued based on the following directives[46]: the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[47]; the "Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"[48]; and the 'Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'[49]. Revisions were made based on the "Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002" [50] and the law was amended based on the "Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)"[51]. The law aims at preventing or removing discrimination based on, among other factors, disability (§ 1). The presuppositions of the AGG as a realisation of European directives have to be

[43] Cf. AICHELE (fn. 38), *Policy Paper No. 9*, p. 8; AICHELE (fn. 38), *APuZ 23/2010*, p. 13 (17).
[44] Vide infra Section IV.
[45] Cf. P. TRENK-HINTERBERGER in: Marcus Kreutz/Klaus Lachwitz/Peter Trenk-Hinterberger, *Die UN-Behindertenrechtskonvention in der Praxis – Erläuterungen der Regelung und Anwendungsgebiete*, Cologne 2013, Art. 27 Rn. 24.
[46] See the overview at G. MEINEL/J. HEYN/S. HERMS, *Allgemeines Gleichbehandlungsgesetz*, 2nd ed., Munich, 2010, Introduction Rec. 1.
[47] OJ no. L 303 of 2/12/2000, p.16; vides already supra A.I.1.
[48] OJ no. L 180 of 19/7/2000, p. 22.
[49] OJ no. L 39 of 14/2/1976, p. 40.
[50] OJ no. L 269 of 5/10/2002, p.15.
[51] OJ no. L 204 of 26/7/2006, p.23.

interpreted in conformance with European law [cf. Art. 288 (3) Treaty on the Functioning of the European Union (TFEU) in conjunction with Art. 4 (3) of the Treaty on European Union (TEU)].[52] According to jurisdiction of the European Court of Law, these norms fall within the scope of European law.[53] They have to be applied by courts in conformance with European law.[54] Therefore, the benchmark is not just the directives upon which the AGG is based, but also primary law.[55] When applied in individual cases, the legal instruments provided in labour and social law regarding disabled persons that are treated below[56] are considered to be measures of reasonable accommodation according to Art. 5 of the Council Directive 2000/78/EC.[57]

In this context, Art. 21 of the European Union Charter of Fundamental Rights (Charter) stands out. Among other things, it prohibits any discrimination based on disability and other features. Additionally, Art. 26 Charter has to be considered which states that "the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community" has to be recognised and respected.[58]

4.3. German constitutional law in the Grundgesetz (GG)

In 1994, Art. 3 (3) 2 GG was added to the GG (the German constitution), prohibiting any disadvantageous treatment based on disability. This is a special rule of equality.[59] The main intention was to prevent social and legal exclusion of disabled persons.[60] Discrimination can only be justified constitutionally by compelling and

---

[52] See M. SCHWEITZER, *Staatsrecht III – Staatsrecht, Völkerrecht, Europarecht*, 10th ed., Heidelberg, 2010, rec. 352d, inter alia.

[53] CJEU, 19/01/2010,file ref. C-555/07 – Kücükdeveci.

[54] CJEU, 19/01/2010, file ref. C-555/07 – Kücükdeveci.

[55] CJEU, 22/11/2005, file ref. C-144/04 – Mangold.

[56] Vide infra Section I – IV.

[57] BAG, 19/12/2013, file ref. 6 AZR 190/12, referring to CJEU 11/04/2013, file ref. C-335/11 – Ring/Skouboe Werge.

[58] The definition of disability corresponds to the definition of § 2 (1) 1 SGB IX. Cf. H. JARASS, *Charta der Grundrechte der Europäischen Union*, 2nd ed., Munich, 2013, Art. 26 rec. 7.

[59] BGBl. 1994 I, p. 3146.

[60] BT-Drucks. 12/8165, p. 28.

urgent reasons.[61] The discrimination must be unavoidable to meet the concerns of special interests caused by disability. The principle of proportionality has to be considered to the utmost degree.[62] Consequently, the legislative powers are very restricted in this field.[63]

Concerning a constitutional legal understanding of the term of disability, the Federal Constitutional Court (Bundesverfassungericht, BVerfG) still refers to the now abandoned rule of § 3 (1) 1 Schwerbehindertengesetz (SchwbG; Severely Disabled Persons Act), that defined disability as "a consequence of a more than transitory functional disorder that is caused by an atypical physical, mental or psychological condition." [64]

In contrast to Art. 3 (1) 1 GG, which prohibits favouritism and discrimination, Art. 3 (3) 2 GG does not prohibit any and all discrimination, but it focuses only on disadvantages based on disability. This means that positive measures to the benefit of disabled persons are permitted, but they are not compulsory under constitutional law.[65] This is to imply that there is no direct constitutional claim to compensatory positive measures.[66]

4.4. Federal law

As there is no appropriate codification, many different acts of law are relevant in the field of integration of disabled persons into the labour market. This means not only the above-mentioned AGG[67], but also different acts of social law, such as different books of the Code of Social Law, i.e. Sozialgesetzbuch II (SGB II: Grundsicherung für Arbeitssuchende; Basic Social Security for Unemployed),

---

[61] BVerfG,19/01/1999, file ref. 1 BvR 2161/94; H. JARASS, in: Hans Jarass/Bodo Pieroth, *Grundgesetz*, 13th ed., Munich, 2014, Art. 3 rec. 149.

[62] L. OSTERLOH, in: Michael Sachs (ed.), *Grundgesetz*, 6th ed., Munich, 2011, Art. 3 rec. 314.

[63] B. PIEROTH/B. SCHLINK, *Grundrechte – Staatsrecht II*, 28th ed., Heidelberg, 2012, § 11 rec. 481, 488.

[64] BVerfG,08/10/1997, file ref. 1 BvR 9/97; V. NEUMANN, in: Deinert/Neumann (fn. 8), § 2 rec. 6 et seqq..

[65] BVerfG,08/10/1997, file ref. BvR 9/97.

[66] C. STARCK, in: Hermann von Mangoldt/Friedrich Klein/Christian Starck (eds.), *Grundgesetz*, Vol. 1, 6th ed., Munich, 2010, Art. 3 rec. 419.

[67] Vide supra Preface, I.1.

Sozialgesetzbuch III (SGB III: Arbeitsförderung, Employment Promotion); the above mentioned SGB IX, the Bundesausbildungsförderungsgesetz (BAföG; Federal Education and Training Assistance Act); and finally the Kündigungsschutzgesetz (KSchG; Protection Against Dismissal Act). Many of the instruments provided, e.g. in §§ 81 and 84 SGB IX, are understood as measures of reasonable accommodation according to Art. 2 (4) and 27 CRPD[68] and Art. 5 of the Council Directive 2000/78/EC[69]. The Federal Labour Court (Bundesarbeitsgericht, BAG) recently clarified that these European and International rules have to be taken into account when applying and interpreting the German legal rules.[70] To date, the federal government considered that no legislative activity was necessary to fulfil the demands of the CRPD in the field of employment politics.[71]

4.4.1. SGB IX – Rehabilitation and participation of persons with disabilities

The SGB IX was conceived to adopt the constitutional prohibition of disadvantages based on disability in the field of social politics.[72] It aims to promote a life based on independence and participation and inclusion in society, as well as to prevent disadvantages (cf. § 10 SGB I and § 1 (1) SGB IX).

The SGB IX itself is not primarily a source of inalienable rights, but is meant to classify the inalienable and individual rights and benefits provided in other acts of social law.[73] In its first part, it also defines the important legal terms and provides some special administrative procedures in favour of persons with disabilities. It provides a basis to standardise the content, the scope of benefits and their execution. In its second part, the SGB IX contains important rules (of labour law and social law) to promote the employment of severely disabled persons.[74]

---

[68] Vide supra Section I – I.

[69] Vide supra Section I – II.

[70] BAG, 19/12/2013, file ref. 6 AZR 190/12.

[71] Bundesministerium für Arbeit und Soziales, Nationaler Aktionsplan der Bundesregierung zur Umsetzung der UN-Behindertenrechtskonvention – Unser Weg in eine inklusive Gesellschaft, Berlin 2011, pp. 39 et seqq.

[72] BT-Drucks. 14/5074, p. 92.

[73] F. WELTI, in: Lachwitz/Schellhorn/Welti (fn. 2), § 7 rec. 5.

[74] Cf. F. WELTI, in: Lachwitz/Schellhorn/Welti (fn. 2), § 7 rec. 1, 4a; BT-Drucks. 14/5074, p. 100.

Important institutions providing social assistance for the participation and integration into the labour market, such as enumerated in §§ 33 to 54 SGB IX, are the Federal Employment Agency and –subsidiarily– the Integration Offices.

4.4.2. SGB III – Occupational integration

The law of occupational integration is contained in the SGB III[75], which aims to counteract unemployment, to shorten the period of unemployment, and to adjust supply and demand in the labour market. It also especially aims to prevent long-term unemployment by improving the individual employability. The latter is of special interest for disabled persons, because they are particularly affected by long-term unemployment, defined as a period of unemployment lasting one year or longer (cf. § 18 (1) SGB III).

The unemployment insurance ordinarily covers a 12-month period at most, according to § 137 (1) SGB III. Subsequently, in case that legal conditions for benefits of the unemployment insurance are not fulfilled, persons are entitled to benefits according to the SGB II. This form of social aid is aimed particularly at job seekers, only covering the minimum means of subsistence.

Benefits aiming at the integration of disabled persons into the labour market are included in §§ 112 to 129 of the SGB III, and are understood to be part of the active work support.

§ 19 (1) SGB III establishes a domain-specific rule concerning benefits for the disabled. In the context of the law, it defines as disabled those persons "whose expectations to participate in working life or to continue participating in working life are considerably diminished due to the type and the gravity of their disability and who consequently need special assistance in order to be part of the work force."

4.4.3. SGB II – Basic support for job seekers

Following the SGB III, work support falls under the purview of unemployment insurance, which is financed by employers and those employees contributing to the insurance (cf. §§ 340, 346 SGB III). In contrast, basic benefits for job seekers is a tax-based system, funded by the national state and municipalities § 46 SGB II.[76] For this

[75] Gesetz zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz – AFRG) of 24/03/1997, BGBl. I 1997, p. 594.

[76] Vgl.: G. IGL/F. WELTI (fn. 13), § 53 rec. 3; R.WALTERMANN (fn. 13), rec. 453c.

reason, public interest in terminating the period of unemployment is considered particularly important.[77]

According to § 16 (2) 3 SGB II, the rules of §§ 112 et seqq. SGB III are applicable for disabled persons entitled to the benefits for job seekers.[78] Contrary to the decreasing number of persons entitled to the benefits for job seekers (18.5 %), the number of disabled persons entitled to benefits under the SGB II has increased by 3%.[79]

4.4.4. BAföG – Federal Education and Training Assistance Act

The BAföG is considered a special part of the social code according to § 68 No.1 SGB I. The BAföG aims to promote vocational training and higher education and to realise equal chances in these fields.[80] The BAföG contains only a few norms concerning disabled persons.[81]

4.4.5. Protection against unlawful dismissal

Next to the rules of social benefits, the rules for the protection against unlawful dismissal are particularly relevant for disabled persons in terms of labour politics. The AGG does not contain provisions pertaining to this subject but refers to the common rules of unlawful dismissal (cf. § 2 (4) AGG). These rules are posed by the civil code, as far as the form and the delays are concerned. Rules about reasons and legal protection can be found in the KSchG.

These rules are supplemented by the special protection against unlawful dismissal for severely disabled persons[82] in §§ 85 et seqq. SGB IX.[83] The number of different acts and the interference of the numerous rules prove to be a major challenge when it comes to their application in industrial relations.

---

[77] Cf. the explanatory statement to "Entwurf eines Vierten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt", BT-Drucks. 15/1516, p. 53; ferner: S. RIXEN, in: Wolfgang Eicher/Wolfgang Spellbrink (eds.), *SGB II*, 2nd ed., Munich, 2008, § 10 rec. 11.

[78] Cf. S. THIE, in: Eicher/Spellbrink (fn. 68), § 16 rec. 13.

[79] Disability Report 2009 (fn. 28), p. 56.

[80] U. RAMSAUER/M. STALLBAUM/S. STERNAL, *BAföG,* 4th ed., Munich, 2005, § 1 rec. 4.

[81] Vide infra Section IV, III.2.

[82] P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 85 rec. 1, 45.

[83] Vide infra Section III, I.1.c).

4.5. Collective agreements

According to the basic rule of Art. 9 (3) GG, the regulation of industrial relations is conferred to the social partners. They do have to respect mandatory legal rules that provide minimum protective guarantees. In regard to disabled and severely disabled persons, these legal guarantees are particularly numerous, as this group is considered vulnerable in the labour market. This may be the reason for not including rules on employment and protection of disabled employees in collective labour agreements. However, the mandatory legal rules can be extended in collective agreements.

If operating agreements are reached between the employer and the works council, the special interests of severely disabled persons always have to be considered according to § 93 SGB IX.[84] Furthermore, § 83 SGB IX provides the so-called integration agreement as a special instrument to benefit severely disabled persons. The integration agreement is decided upon at a company level between the employer and the representative body of disabled employees[85] or the works council respectively.

5. SECTION II: CASE LAW

In a comparative perspective we should also examine case law. Thus, within the German legal system, case law in a strict sense has little significance, as it is based on written law. This also applies to the fields discussed here. Of course there is jurisprudence concerning the application of legal rules, which is discussed in context.[86] However, one issue has not been ruled on precisely by the law and, as of yet, is unresolved by jurisprudence. It concerns the employer's right to question an applicant or an employee about the existence of a severe disability.

Employers have a legally recognized interest to employ only those persons who are generally able to fulfil the tasks stipulated in the employment agreement.[87] Nevertheless, this may not lead to discrimination of persons with disabilities. For their

[84] In the public sector, this is addressed in the BPersVG (Federal Personnel Representation Act) and the Personal Representation Acts of the federal states.

[85] Vide infra Section III, I.1.a).

[86] Vide infra and vide supra.

[87] K. LEUBE, in: Norbert Kollmer/Thomas Klindt, *Arbeitsschutzgesetz*, 2nd ed., Munich, 2011, § 11 rec. 14 considers this as an « objectively legitimate interest »; cf. BAG, 7/06/1984, file ref. 2 AZR 270/83BAG, 13/02/1964, file ref. 2 AZR 286/63.

protection, the acceptable request of information by employers is narrowly defined through anti-discrimination rules. This is stipulated in the AGG and extends both to employees and applicants, following § 6 (1) 1 and 2 AGG.[88] It can be argued that since the AGG took effect, the employer's request for information concerning the (severe) disability of an applicant is prohibited.[89] The employer has a legally recognized interest in knowing about the severe disability of an (potential) employee, because employing a severely disabled person might count toward the quota or lower or remove the compensatory levy (§ 77 SGB IX).[90] However, following § 81 (2) SGB IX in combination with the AGG, it can be purported that the personality rights and protection against discrimination of the severely disabled person takes precedence over the interests of the employer.

The employer's legally protected interest, and consequently the right to question the applicant, is limited to the fact whether or not the applicant –in addition to being qualified– is physically, mentally and psychological able to fulfil the contracted duties.[91] Only this question may be asked by the employer and only this question may also be clarified by a pre-employment examination.

While having an employee under contract, the employer has a right to information with regard to severe disability, if all the rules of protection against unlawful dismissal apply, namely after a period of six months. In any case, there must be a legitimate interest of the employer, such as during the preparation of a dismissal.[92]

Physical aptitude is a *sine qua non* requirement for the appointment as civil servant. It is considered especially with regard to the risk of early retirement due to illness. In case of severely disabled applicants, the requirements are eased.[93]

---

[88] It is illegal to inquire whether or not an applicant is pregnant following § 7 (1) i.V.m. § 1 AGG, because this is considered to be a discrimination based on gender. If the question is posed nonetheless, the female applicant is permitted to lie.

[89] Not decided by BAG 07/07/ 2011, file ref. 2 AZR 396/10, *NZA 2012*, 34et seqq.

[90] Cf. BAG 16/02/2012, file ref. 6 AZR 553/10, NZA 2012, 555 et seqq.

[91] U. KELLER, „Die ärztliche Untersuchung des Arbeitnehmers im Rahmen des Arbeitsverhältnisses", *NZA 1988*, p. 561 (562), inter alia.

[92] Cf. BAG 16/02/2012, file ref. 6 AZR 553/10, NJW 2012, 2058 et seqq.

[93] OVG Lüneburg, 31/07/2012, file ref. 5 LC 226/11 (juris).

6. SECTION III: EMPLOYMENT POLICIES AND JOB PLACEMENT FOR PERSONS WITH DISABILITIES

6.1. Instruments of job placement

6.1.1. Labour law

a) Employers obligation to hire severely disabled persons according to §§ 71 et seqq. and § 81 (1) SGB IX.

According to § 71 (1) 1 SGB IX, private and public employers are obliged to fill at least 5% of their positions with severely disabled persons. This obligation applies to employers with a yearly average of at least 20 jobs.[94] The law provides additional alleviations for small enterprises, cf. §§ 71 (1) 3 and 77 (1) 1 SGB IX. In case of non-fulfilment of the quota, employers have to pay a compensatory levy as set in § 77 (1) 1 SGB IX for every unfilled job.

The term "position" in this context is defined by § 73 (1) SGB IX as any position where employees, public agents, judges and apprentices or other trainees are employed. Therefore, the number of positions generally corresponds to the number of employees.[95] § 74 SGB IX provides details on how to calculate the quota of jobs having to be filled by severely disabled persons. This system can only be described as complex. We refer to the legal text for further information.

A compensatory levy provided in § 73 (1) 1 SGB IX has to be paid by the employer as long as the above-mentioned quota is not fulfilled.[96] The payment of the compensatory levy does not suspend the employer's obligation to fill the quota, as the employer cannot choose to pay the quota rather than hiring a severely disabled employee (§ 77 (1) 2 SGB IX).[97] The compensatory levy is meant to be both an incentive for the employer as well as help finance assistance and benefits to employers

[94] In this context BT-Drucks. 15/124, p. 5.

[95] Bayerischer VGH, 26/11/2008, file ref. 12 BV 07.2529; P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 73 rec. 7.

[96] Concerning the constitutional aspects BVerfG26/05/1981, file ref. 1 BvL 56/78; BVerfG,01/10/2004, file ref. 1 BvR 2221/03; BVerfG, 10/11/2004, file ref. 1 BvR 1785/01.

[97] M. KOSSENS, in: Michael Kossens/Dirk von der Heide/Michael Maaß (eds.), *SGB IX*, 3rd ed., Munich, 2009, § 77 rec. 5.

that fulfil the quota.[98] The levy's amount is ruled in § 77 SGB IX and graded depending on the percentage of jobs filled with severely disabled persons. It varies from 115 to 290 € per every unfilled job position. The rule also provides exceptions for small businesses according to § 77 (2) 2 SGB IX.

Irrespective of the obligation to hire a certain number of severely disabled persons or the actual number already employed, § 81 (1) SGB IX puts the employer under the obligation to attempt hiring severely disabled persons whenever possible. In addition, public employers are obliged to invite any severely disabled person applying for a job to an interview.

b) Additional obligations for employers

Numerous legal rules are meant to protect existing employment of severely disabled persons and thus guarantee the sustained inclusion of disabled persons in the labour market. The employer's obligation to especially support severely disabled persons in career advancement provided in § 81 (4) SGB IX is to be understood in this sense. Inter alia, severely disabled persons have to be considered first for in-house or externally provided advanced training offers. This is also true for providing adequate and disability-friendly workplaces.

Furthermore, the employer has different legal duties to prevent the occurrence of severe disability and job loss due to a loss of physical capacity. Important instruments are the obligation of prevention provided in § 81 (1) SGB IX and the internal re-integration management (Betriebliches Eingliederungsmanagement, BEM), provided in § 84 (2) SGB IX.

Since 2004, employers are obliged to provide an "internal re-integration management" (BEM) for all employees who are unable to work due to illness for more than six weeks (consecutively or intermittently) within a given year. The program aims to overcome or prevent an inability to work in the future and to help maintain the employment.[99] This concerns not only severely disabled persons but any employee.[100] Others can be included in the BEM, namely (medical) experts, providers of social benefits and state integration agencies.[101] As part of a "cooperative search process"[102],

---

[98] Vgl.: BVerfG, 26/05/1981, file ref. 1 BvL 56/78; M. KOSSENS, in: Kossens/von der Heide/Maaß (fn. 86), § 77 rec. 2.

[99] For further information on the legal conditions see M. SCHILS, *Das betriebliche Eingliederungsmanagement im Sinne des § 84 Abs. 2 SGB IX*, Frankfurt a.M., 2009, pp. 61 et seqq.

[100] BAG, 12/07/2007, file ref. 2 AZR 716/06.

[101] BAG, 10/12/2009, file ref. 2 AZR 198/09.

all existing and legally provided options, as well as social benefits should be considered, in order to design a work place as health-friendly as possible and to maintain employment. In practice, the BEM is most promising when it is part of a larger strategy within a business to promote health and a culture of integration[103], [104].

c) Protection against unlawful dismissal

Concerning the protection against unlawful dismissal of employees with disabilities, the AGG refers to the 'general' rules, i.e., the KSchG and §§ 85 et seqq. SGB IX.

The KSchG is applicable to any labour contract after a period of 6 month according to § 1 (1) KSchG. Material to this is the legal existence of the contract. Small and very small businesses are excluded from the rule. The KSchG differentiates three types of reasons that may legally justify dismissal: personal reasons, behavioural reasons and economic reasons. In the context of (severe) disabilities the latter is particularly important. Also, as a special case of personal reasons, dismissal due to illness is particularly relevant.

§ 1 (3) 1 KSchG stipulates four conclusive social criteria for an employer in selecting a person who has to be dismissed for economic reasons ("social selection"). Next to length of employment, age, and spousal or child support obligation, severe disability is explicitly mentioned. Severely disabled persons can only be considered for termination in social selection if the proper integration offices are in agreement (cf. § 85 SGB IX).

Employees have special protection against being terminated (§§ 85 seqq. SGB IX) if at the time of receiving a dismissal they were objectively severely disabled according to § 2 (2) SGB IX. Generally, this has to be proven by a formal authentication by the pension office. If this is not authenticated at the time of dismissal, complications can arise that are exacerbated rather than solved by the

---

[102] BAG, 10/12/2009, file ref. 2 AZR 198/09.

[103] M. NIEHAUS/B., MARFELS/G. E. VATER/J. MARGIN/E. WERKSTETTER, Betriebliches Eingliederungsmanagement. Studie zur Umsetzung des Betrieblichen Eingliederungsmanagements nach § 84 Abs. 2 SGB IX, Cologne, 2008, p. 62.

[104] For a discussion of problems and challenges in application, see J. BROCKMANN, "Schwerbehindertenrecht, Arbeitsmarkt und Rehabilitation", in: Klaus-Dieter Thomann/Eberhard Losch/Petra Nieder, *Begutachtung im Schwerbehindertenrecht*, Frankfurt a.M., 2012, p. 1999 and G. NASSIBI, "Die Durchsetzung der Ansprüche auf Schaffung behinderungsgerechter Arbeitsbedingungen – Betriebliches Eingliederungsmanagement und Beteiligung der Interessenvertretung", *NZA 2012*, p. 720.

ambiguous rule in § 90 (2a) SGB IX. A dismissal cannot be based on the disability itself. Therefore, the approval of the respective government office has to be obtained. A dismissal based on illness is not considered discriminatory, if its specific requirements are met, even if the severe disability is the cause of the illness-related inability to work.

Recently, the Federal Labour Court (Bundesarbeitsgericht) stated that there is a legal protection against discriminatory dismissal under the AGG for disabled persons if the "general rules" do not apply.[105]

d) Representative body of severely disabled employees

All representatives of employees, such as the works council, are obligated to promote the rights and interests of severely disabled persons and control the employer in this regard according to § 93 SGB IX.

Additionally, a representative body of severely disabled employees shall be elected according to § 94 (1) 1 SGB IX. Members of the committee are the representative of severely disabled employees and his or her substitute. This pertains only to businesses (in the private and public sector)[106] that continuously employ at least five severely disabled persons. The representatives have a status and protection comparable to the members of the work council, § 96 SGB IX. The main tasks and competences of the representatives for severely disabled persons enumerated in § 95 SGB IX are the following: individual guidance and assistance to severely disabled persons; representation of collective interests towards and in cooperation with the employer and the work council. In addition, the representative body is a party of the integration agreement provided in § 83 SGB IX.

If no representative body of severely disabled persons exists, its tasks and rights are conferred to the work council or personnel board.

6.1.2. Social law

a) Participation and integration in working life of persons with disabilities, §§ 112 et seqq. SGB III.

As part of employment promotion, §§ 112 to 129 SGB III regulate the participation of persons with disability in working life. The goals of these benefits are regulated in § 4 (1) No. 3 und § 33 (1) SGB IX and include the maintenance,

[105] BAG, 19/12/2013, file ref. 6 AZR 190/12.

[106] Subsequently, the discussion of the legal situation is limited to the private sector.

improvement, instatement or re-instatement of gainful employment of disabled persons or those threatened by disability according to their abilities.

The approval of benefits for the participation in working life generally falls under the discretion of the funding agency. For benefits of active employment promotion, under which the benefits for participation of persons with disability fall, this follows § 3 (2) SGB III. However, according to § 3 (3) No. 8 SGB III, special benefits for participation in the workforce (§§ 117 to 129 SGB III) are excluded, since they are distinct from general benefits for the participation in working life.

The general benefits for participation in working life are regulated in §§ 115 und 116 SGB III. § 115 SGB III names the individual benefits of active promotion of employment, that can be granted to all persons entitled to benefits according to SGB III, irrespective of an existing disability.[107] The special benefits for participation in working life for persons with disabilities are regulated in §§ 117 to 129 SGB III and are designed in the sense of standard benefits. Insofar as general benefits suffice to ensure a participation in working life, there is no claim to special benefit.[108] 'Insofar' implies that general and special benefits should not preclude each other, but can also be combined.[109]

According to § 112 (2) SGB III, in choosing benefits, "aptitude, interest, previous employment, as well as current state and developments in the job market have to be considered. If necessary, the professional qualification is to be clarified or a trial work period as to be agreed upon."

---

[107] Vgl.: K. LAUTERBACH, in: Alexander Gagel (Begr.), *SGB II/SGB III*, Band 1, 45th complement, status 1/04/2012, Munich, 2012 § 98 SGB III rec. 3; W. KELLER, in: Bernd Mutschler/Ralf Bartz/Reimund Schmidt-De Caluwe (eds.), *SGB III*, 3th ed., Baden-Baden, 2008, § 98 rec. 5; S. LUIK, in: Wolfgang Eicher/Rainer Schlegel (eds.), *SGB III*, Vol. 1, 109th complement, status: May 2012, Cologne, 2012, § 98 rec. 17; R. GROSSMANN, in: Karl Hauck/Wolfgang Noftz (eds.), *SGB III*, Vol. 1, 2nd ed., Berlin, 2012, § 113 rec. 31; C. KARMANSKI, in: Klaus Niesel/Jürgen Brand (eds.), *SGB III*, 6th ed., Munich, 2012, § 98 rec. 4; B. GÖTZE, in: *Friedrich Ambs et al.*, *GK-SGB III*, 176th Complement, status: July 2012, Cologne, 2012, § 98 rec. 3.

[108] The explanatory statement to the "Entwurf eines Gesetzes zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz – AFRG)", BT-Drucks. 13/4941, p. 173; cf. BSG, 25/03/2003, file ref. B 7 AL 8/02 R, rec. 17 (juris) considers general and special benefits are graded.

[109] cf.: U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 98 rec. 9; *Luik*, in: Eicher/Schlegel (fn. 95), § 98 rec. 18; R. GROSSMANN, in: Hauck/Noftz (fn. 98) , § 113 rec. 52; ferner: K. LAUTERBACH, in: Gagel (fn. 98), § 98 SGB III rec. 4.

b) Trial work and work support for persons with disabilities, § 46 SGB III.

Trial work and work support for persons with disability are considered benefits for the employers according to § 34 (1) 1 No. 3 and 4 SGB IX. Following § 46 (1) SGB III "the costs for a limited trial work period of disabled, severely disabled persons or persons legally equated to them according to § 2 SGB IX for up to three months can be reimbursed, if thereby the possibility of participating in working life is improved or a complete and continuous participation in working life can be achieved." The benefits are at the discretion of the employment agencies. The rule is meant to be an incentive for employers to –possibly permanently– hire disabled persons after a positive trial work period.[110]

According to instructions by the Federal Employment Agency for the promotion of participation in working life, "benefits for trial work periods of severely disabled persons and those legally equated to them (§ 2 (2) and (3) SGB IX) […] can be granted even if they are not entitled to benefits for participation in working life according to SGB IX."[111] If this is interpreted to mean that employers are entitled to corresponding benefits for the trial work of severely disabled persons and those legally equated to them regardless of actual limitations of participation caused by disability, § 19 (1) SGB III with its reference to § 2 (1) SGB IX would mean the specific conditions are stated only for persons with mild disabilities. This, in turn, would be a misconstruction of the term "disability" which, according to § 2 (1) 1 SGB IX includes both severely disabled and persons legally equated to them.

The legal conditions for the approval of trial work are fulfilled when a prognosis predicts an improved possibility of participation in working life.[112]

§ 46 (2) SGB III[113] allows the responsible employment agency at their discretion to grant subsidies to employers for the adaptation of the work environment or working conditions of employees with disabilities to their special needs, if this is necessary to achieve or to assure a continuous participation and inclusion into working life.

---

[110] U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 238 rec. 3; R. BRANDTS, in: Niesel/Brand (fn. 95), § 238 rec. 1.

[111] Bundesagentur für Arbeit, Geschäftsanweisungen zur Durchführung der §§ 88 – 92 und 131 SGB III as of March 2013.

[112] U. KELLER in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 238 rec. 12; R. BRANDTS, in: Niesel/Brand (fn. 98), § 238 rec. 3.

[113] BT-Drucks. 17/6277, p. 94.

To ascertain the necessity of the grant, all relevant circumstances have to be considered individually, following the same procedure of a personal prognosis described above.[114]

6.2. Labour market situation and economic crisis; effects of labour market politics

The German labour market seems to have fared rather well during the last economic crisis. One of the explanations is the various measures taken during the so-called "Hartz legislation" beginning in 2003. The legislation permits an increased flexibility in hiring personnel; in terminating contracts; and exceptions for compulsory social security for certain types of contracts. At the same time, the period of benefits of unemployment insurance in one branch of social security provided in SGB III has been reduced. The Hartz legislation is completed by the basic provision for jobseekers now regulated in the SGB II, which reduces the amount of benefits in case of unemployment. Furthermore, the system of job placement by the employment agency has become a lot stricter. Some consider the German system has changed from welfare to workfare, and that it has become rather "unattractive" for unemployed persons.

6.3. Multidimensional or intersectional discrimination

Current research in social sciences suggests that multidimensional and intersectional discrimination respectively, are a relevant societal phenomenon in Germany.[115] This insight has not (yet) translated into the legal discussion and the application of the non-discrimination rules.[116] Indeed, § 4 AGG prohibits multiple discriminations. The problem of intersectional discrimination is discussed in this context; however, the wording of § 4 AGG seems to be limited to additive discrimination. Furthermore, disability as discriminatory factor has played a marginal role in the discussion about intersectional discrimination. In the jurisprudence to date,

[114] U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 237 rec. 10.

[115] M. PEUCKER, Diskriminierung aufgrund der islamischen Religionszugehörigkeit im Kontext Arbeitsleben – Erkenntnisse, Fragen und Handlungsempfehlungen, Berlin, 2010, p. 53 et seqq.

[116] Instructive J. ZINSMEISTER, *Mehrdimensionale Diskriminierung*, Baden-Baden, 2007.

only very little cases dealing with multiple or intersectional discrimination can be found, none of them concerning disabled persons.[117]

7. SECTION IV. UNIVERSITY: CAREER COUNSELLING AND JOB PLACEMENT FOR STUDENTS WITH DISABILITIES

The present study aims inter alia to compare the situation of students with disabilities when leaving university to enter the labour market. We focus on the legal framework provided by German legislation and its application by the competent bodies.

7.1. The legal situation concerning Higher Education in Germany

In general, the federal states are responsible for Higher Education matters. The field of Higher Education is subjected to their legislative and administrative competence. The federal rules are limited to the Framework Act on Higher Education (Hochschulrahmengesetz, HRG[118]). Following § 2 (4) 2, any institution of higher education is assigned to prevent disadvantageous treatment of students with disabilities and to facilitate their access to any program or offer of the university without further need of assistance. Since it falls under the federal states' purview, the legal situation of students with disabilities differs in every federal state. This is all the more true, as public universities and local student services organisations have the status of public entities with legislative competence concerning their own affairs.

In general, federal legislation provides that special interests of applicants and students with disabilities must be taken into account in particular. For example, § 3 (6) of the Hamburgian Higher Education Act (Hamburgisches Hochschulgesetz, HmbHG) determinates that institutions within the higher education system have to promote the inclusion of students with disabilities. They are also put under the

[117] Cf. S. BAER/M. BITTNER/A. L. GÖTTSCHE, *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Berlin, 2010; one of the rare cases is OLG Stuttgart, 12/12/2011, file ref. 10 U 106/11 on discrimination because of racial origin and sex (black male demanding access to a night club).

[118] Hochschulrahmengesetz in as issued on 19/01/1999, BGBl. I p. 18 and amended by the law of 12/04/2007, BGBl. I p. 506.

obligation to provide special compensation in the examination systems.[119] The German Rectors Conference adopted a negotiated agreement with an action plan in 2009 in favour of students with disabilities, aiming to reduce barriers. Recent evaluation shows an increasing number of offers for students with disabilities, but also that barriers persist, not least for financial reasons.[120]

Furthermore, students with disabilities may profit from the social law legislation concerning the participation and integration in working life, i.e., special integration benefits for disabled students following SGB IX and SGB XII and the above-mentioned BAföG.

Following the Social Survey, 7% of the students in higher education consider themselves disabled in the sense that they experience barriers in studying due to physical or psychological health problems.[121]

7.2. Access to higher education

The admission of students is subjected to Higher Education Acts of the federal states and internal rules of the universities. Both are bound by the GG and the HRG, and therefore must not discriminate applicants or students with disabilities. On the contrary, most rules provide advantages and preferentially enroll students with disabilities. This is explicitly demanded e.g. by § 10 of the Hamburgian Students Admission Act (Hamburgisches Hochschulzulassungsgesetz, HmbHZG).[122] These principles are implemented in the internal rules of the universities, such as by § 5 (6) and § 6 (2) of the Statutes on the Admission of Students for the University of

---

[119] This is followed by the obligation in § 60 (2) No.15 HmbHG to provide these compensations in the institution's statutes.

[120] Hochschulrektorenkonferenz (ed.), "*Eine Hochschule für Alle", Empfehlung der 6. Mitgliederversammlung der HRK am 21. April 2009 zum Studium mit Behinderung/chronischer Krankheit. Ergebnisse der Evaluation*, Bonn, 2013; Autorengruppe Bildungsberichterstattung, *Bildung in Deutschland 2014. Ein indikatorengestützter Bericht mit einer Analyse zur Bildung von Menschen mit Behinderungen,* Bielefeld, 2014, p. 173-174.

[121] E. MIDDENDORFF/B. APOLINARSKI/J. POSKOWSKY/M. KANDULLA/N. NETZ, *Die wirtschaftliche und soziale Lage der Studierenden in Deutschland 2012*, 2013, pp. 452 et seqq.

[122] Gesetz über die Zulassung zum Hochschulstudium in Hamburg dated of 28/12/2004, HmbGVBl. 2004, p. 515.

Hamburg (Satzung der Universität Hamburg über die Zulassung zum Studium, Universitäts-Zulassungssatzung – UniZS).[123]

7.3. Assistance during studies

7.3.1. Information and practical support

The above-mentioned student services organisations give particular support to students with disabilities. Their function is to support students in social affairs. They provide, among other things, barrier-free student housing and adapted housing for students with disabilities, and information on special grants by foundations favouring disabled students.

Following § 54 SGB XII, assistance and integration benefits can be granted to students with disabilities. The rules are implemented by internal administrative guidelines of the federal states. For example, the relevant guideline concerning benefits for persons with disabilities in institutions of higher education in Hamburg (Fachanweisung zu § 54 Abs. 1 Nr. 2 SGB XII in Verbindung mit § 13 Abs. 1 Nr. 5 der EinglHVO) provides numerous benefits for students with disabilities. There are both general benefits as well as special benefits that can be claimed, depending on special needs of different types of disabilities such as visual impairment, hearing impairment or restricted mobility.

Most federal states provide for the creation or election of a body for the special interests of students with disabilities (e.g. § 88 HmbHG). This body has to be involved on every institutional level if a decision is likely to particularly touch special interests of students with disabilities.

7.3.2. Financial support, especially provided by the BAföG

As mentioned before, the BAföG contains some rules in favour of disabled students, apprentices and other trainees. Disability is one reason to extend the funding and benefits according to the BAföG in excess of the age limit of 30 years in the beginning of the training or study phase in question (cf. § 10 (3) 1 BAföG). Funding is granted to cover all needs related to means of subsistence and costs related to educational matters. However, the needs covered are limited to those "typical" for subsistence and educational matters. An increased need due to disability can be

[123] Issued on 1/10/2008 and as amended on 29/09/2009.

covered by social aid according to § 30 (4) and (5) SGB XII. This additional provision, however, is limited to those with a 'relevant' disability according to § 30 (4) and § 53 (1) SGB XII in conjunction with the relevant ordinance. Insofar as this is not the case, disability-based additional needs related to the vocational training or higher education might lead to disadvantages.

However, a hardship regulation in § 25 (6) 2 BAföG provides that income of parents or partners are no reason to reduce grants, as it is the case in general.[124]

Disability also justifies an extension of the maximum period for the grant. This period usually corresponds to the prescribed common period of study (cf. § 15a (1) BAföG). Furthermore, in these cases, the funding is not granted as a bank loan but as a non-repayable grant.[125]

ERASMUS programs and the German Academic Exchange Service (Deutscher Akademischer Auslandsdienst, DAAD) offer special grants for students with disabilities to promote their international mobility.

7.4. Job Placement

Disabled students and graduates benefit from all available measures for job placement by the employment agencies to prepare their entering the labour market and working life. The employment agencies have specialised services for academics with disabilities to promote job placement, also on an international level.[126] It offers support not only to disabled persons but also to employers willing to hire a disabled person.

Additionally, a lot of specialized web pages can be found, offering information, special services or special job offers such as http://www.talentplus.de/ or http://www.projekt-probas.de/, to mention just two examples.

Usually, additional counsel and assistance is provided by student services organisations, occasionally in cooperation with the employment agency. Most universities also provide counselling at special career service centres, also targeting

---

[124] RAMSAUER/SALLBAUM/STERNAL (fn. 72), § 25 rec. 29 consider that there is no descretion – contrary to the wording of § 25 (6) BAföG.

[125] RAMSAUER/STALLBAUM/STERNAL (fn. 72), § 17 rec. 9.

[126] Cf. HEGA 07/09 - 01 - *Vermittlung besonders betroffener schwerbehinderter Akademiker durch die ZAV* and http://www.arbeitsagentur.de/web/content/DE/service/Ueberuns/WeitereDienststellen/ZentraleAuslandsund Fachvermittlung/Ueberuns/SchwerbehinderteAkademiker/index.htm.

students with disabilities. The action plan adopted by the German Rectors Conference[127] does not focus on job placement. However, evaluation shows that in most universities the body for special interests of students with disabilities provides individual counselling on labour market integration and cooperates with the Employment Agencies.[128] As mentioned above, there is no national standard, so the offers vary on the federal state level and from university to university. Nevertheless, the German Association of Student Services Organisations published an information booklet designed to support students with disabilities at all stages: on their way from school to university, during their studies and with regard to finding employment.[129] This is well worth to be taken as an example for other countries in providing information. As an example, the University of Hamburg also maintains a Career Centre that offers individual coaching and classes dealing with a wide range of questions concerning job search and application processes to all students, including those with disabilities.

8. CONCLUSIONS

To briefly conclude our appreciation of the German legal situation, we would like to draw the reader's attention to several critical points. We consider the differentiation in the terminology and the legal treatment between severely disabled and "simply" disabled persons introduced by different German legal rules problematic. This is especially true in regard to applicable European and International law. Furthermore, this leads to different protection levels in the appreciation of unlawful dismissals, and influences the chances and instruments in job placement as well. We expect reforms in this respect, knowing that it will be particularly difficult to guarantee an individually high level of protection to job seekers and employees with disabilities on the one hand, and to create rules that are sufficiently easy to apply by employers and courts on the other hand.

---

[127] Vide supra Section IV – I.

[128] Hochschulrektorenkonferenz (ed.), *"Eine Hochschule für Alle", Empfehlung der 6. Mitgliederversammlung der HRK am 21. April 2009 zum Studium mit Behinderung/chronischer Krankheit. Ergebnisse der Evaluation*, Bonn, 2013, pp. 19 and 21.

[129] Deutsches Studentenwerk (DSW)/Informations- und Beratungsstelle Studium und Behinderung (IBS) (ed.), *Studium und Behinderung – Informationen für Studierende und Studieninteressierte mit Behinderungen und chronischen Krankheiten*, 7. ed. Berlin 2013; available at: www.studentenwerke.de/behinderung.

Also, the multitude of competent public bodies and actors in the field of job placement and integration and participation in the labour market increases the risk of a diffusion of responsibility. Finally, the compensatory levy seems to reduce the effects of the employer's legal obligation to hire severely disabled personnel. However, the funds raised allow financing a broad range of measures in order to promote the inclusion of disabled persons.

Judith Brockmann
Assistant Professor of Labour Law
Research Staff. University of Hamburg
judith.brockmann@jura.uni-hamburg.de

Minou Banafsche
Junior Professor for Social Law
University of Kassel
banafsche@uni-kassel.de

INFORME POLACO

(POLISH REPORT)

EMPLOYMENT OF DISABLED PERSONS IN POLAND

MARZENA SZABŁOWSKA-JUCKIEWICZ
Ph. D. at Law. Assistant Professor in the Chair of Labour Law
Faculty of Law and Administration. Nicolaus Copernicus University

Fecha de recepción: 21-09-2014
Fecha de aceptación: 04-10-2014

RESUMEN: El presente estudio está dedicado al tema del empleo de personas con discapacidad en Polonia. La Constitución de la República de Polonia define un marco de obligaciones para las autoridades públicas (nacionales y locales) en el ámbito de la protección de los derechos de las personas con discapacidad en materia de empleo. Las regulaciones específicas en este ámbito están previstas en leyes y reglamentos. El tipo de soluciones introducidas por el legislador polaco está notablemente influenciado por los estándares internacionales y de la Unión Europea, particularmente en lo relativo a la igualdad de trato de las personas con discapacidad en el empleo, y en la adopción de mejoras razonables para estas personas en su lugar de trabajo. Los dos problemas fundamentales son la eficacia del sistema polaco de apoyo al empleo y la rehabilitación profesional de las personas con discapacidad a través de fondos públicos, y la transición sin problemas de los estudios al mercado laboral para las personas con discapacidad. Las áreas mencionadas requieren la adopción de medidas sistémicas.

ABSTRACT: The study concerns the issue of employing disabled persons in Poland. The Constitution of the Republic of Poland sets out framework obligations of public authorities (state and local) in the scope of protecting the rights of disabled persons in the field of employment. Detailed regulations in this scope are provided for in acts and regulations. The shape of solutions introduced by the Polish law maker is considerably influenced by the international and EU norms, in particular the solutions pertaining to equal treatment of disabled persons in employment and introduction of reasonable improvements for such persons in the workplace. The two major problems are the efficiency of the Polish system of support for the employment and vocational rehabilitation of disabled persons with public funds, and the smooth transition of disabled persons from studies to the labour market. The above mentioned areas require taking systemic measures.

PALABRAS CLAVE: discapacidad, persona con discapacidad, empleo, derecho laboral, empleado con discapacidad.

KEYWORDS: disability, disabled person, employment, Labour law; disabled employee.

1. NORMATIVE GROUNDS FOR THE PROTECTION OF DISABLED PERSONS

The provision of Article 68(1) of the Constitution of the Republic of Poland of 2 April 1997 reads that public authorities shall ensure special health care to disabled persons. Whereas under Article 69 of the Constitution, public authorities shall provide aid to disabled persons to ensure their subsistence, adaptation to work and social communication. "The aim of public authorities (state and local) is to provide, wherever possible, conditions enabling disabled persons to earn a livelihood and participate in social life."[1] Social and professional integration of disabled persons is a fundamental principle of social policy with respect to this group of persons.[2]

In Poland, the labour law was codified. The Act of 26 June 1974 – Labour Code is the most important source of labour law. As emphasised in the literature, "the Labour Code does not implement the stipulation of codification completeness to a full extent. [...] Numerous provisions remain outside the Labour Code, which have the *lex specialis* character with respect to this act, or are separate provisions systematically falling within the areas not covered by the codification. (...) Rights and obligations of employers and employees are provided for (...) not only in the Code, but also in other acts."[3]

The issue of vocational rehabilitation and employment of persons with disabilities is not regulated under the provisions of the Code. Detailed regulations in this area are included in the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities and numerous regulations issued under the authority stipulated in the Act.

The Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities specifies, *inter alia*, the rules of disability determination for the purposes of vocational rehabilitation and employment (Chapter II of the Act), additional rights of disabled employees (Chapter IV of the Act), as well

[1] P. WINCZOREK, "Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku", wydanie 2., Warszawa, 2008, s. 166.

[2] B. KOŁACZEK, "Polityka społeczna wobec osób niepełnosprawnych", Warszawa, 2010, s. 168.

[3] L. FLOREK, "Prawo pracy", wydanie 14, Warszawa 2012, s. 27-29.

as special rights and obligations of employers relating to the employment of disabled persons (Chapter V of the Act). The rules provided for in the Act are substantiated, *inter alia,* in the following regulations: Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on determining the disability and the degree of disability; Regulation of the Minister of Labour and Social Policy of 28 November 2007 on conditions, manner and procedure of collection and deletion of data in and from the Electronic National System of Monitoring the Disability Determination; Regulation of the Minister of Labour and Social Policy of 11 March 2011 on reimbursement for the additional costs related to employment of disabled employees; Regulation of the Minister of Economy, Labour and Social Policy of 22 May 2003 on detailed rules of granting absence leaves to persons with severe or moderate degree of disability for the purpose of participating in rehabilitation camp.

The shape of the normative regulation of the rights of disabled persons in the area of employment, as well as of the rights and obligations of the employer related to the employment of disabled persons in Polish law, is influenced to a considerable extent by international standards. Poland ratified the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities (6 September 2012), Convention No. 159 of the International Labour Organization of 20 June 1983 on vocational and social rehabilitation and employment of disabled persons (4 November 2004), and Convention No. 111 of the International Labour Organization of 25 June 1958 (8 May 1961) and the European Social Charter of 18 October 1961 (2 June 1997). The above-listed international agreements, upon their ratification and publication in the Journal of Laws of the Republic of Poland, have become a part of the national legal order. Pursuant to Article 87(1) of the Constitution of the Republic of Poland of 2 April 1997, they are the sources of universally binding law.

European Union norms affect as well the legal solutions introduced by the Polish law maker, in particular those aimed at ensuring equal treatment in employment (including counteracting discrimination in employment on grounds of disability). When undertaking actions aimed at implementing Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment inemployment and occupation, Section I of the Labour Code was extended by adding Chapter IIa entitled *Equal treatment in employment*. Moreover, the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment was adopted. The provisions of Chapter IIa in Section I of the Labour Code apply to employment relationships, whereas provisions of the Act of 3 December 2010 apply to employment relationships in the scope not regulated by the

Labour Code and to the forms of employment other than under contract of employment.

Sources of labour law include not only the sources of universally binding law listed in Article 87 of the Constitution of the Republic of Poland of 2 April 1997, but also sources specific to the labour law, referred to as "autonomous". Pursuant to Article 9(1) of the Labour Code, the latter includes collective labour agreements and other collective agreements based on the law, regulations (including work, remuneration and company social benefit fund regulations) and statutes (including statutes of higher education institutions and labour cooperatives). The provisions of collective labour agreements and other collective agreements based on the law, as well as of regulations and statutes, set out the rights and duties of the parties to the employment relationship, but may not disadvantage employees more than the provisions of the Labour Code and other laws and secondary legislation [Article 9(2) of the Labour Code]. Autonomous (non-statutory) sources of labour law may set out, in particular, additional rights of disabled employees, formulating more advantageous legal situation of those employees than the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities.

2. DEFINITIONS OF DISABILITY

In the Polish legal system, the definition of disability was first formulated in the Act of 9 May 1991 on employment and vocational rehabilitation of persons with disabilities. The Act was repealed under Article 69 of the currently applicable Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities. The term "disability" was used before in the resolution of the Sejm[4] (Parliament) of the People's Republic of Poland of 16 September 1982 on handicapped and disabled persons and in the Act of 29 November 1990 on social aid,[5] which is no longer in effect. However, the term was not defined therein.

Pursuant to Article 2(10) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, disability means the permanent or periodic inability to perform social roles due to permanent or long-term

[4] Editor's note: "Sejm" is the lower house of the Polish Parliament.

[5] J. JAWORSKI, "Praca dla osób niepełnosprawnych w zwalczaniu ich wykluczenia społecznego. Ocena polskiego systemu wspierania zatrudnienia osób niepełnosprawnych", Warszawa, 2009, s. 19.

physical impairment, in particular resulting in inability to work. When determining the meaning of the concept of "disability" for the purpose of vocational and social rehabilitation and employment, the Polish law maker considered the medical and social aspect of disability. "When analysing the definition of disability, it is hard not to get the impression that [...] the law maker treats the inability to work in a special way, giving it, in a way, the priority over other social roles. However, a question arises whether such approach does not compromise the purpose of the Act, being the vocational rehabilitation with the aim to facilitate disabled persons to obtain and maintain appropriate employment."[6]

The law maker provides for three degrees of disability: minor, moderate and severe. The physical impairment, resulting in a significant reduction of the ability to perform work as compared with the ability of a person with similar vocational qualifications with full mental and physical capacities, or a restricted ability to perform social roles which may, however, be compensated by means of orthopaedic equipment, auxiliary appliances or technical means and may be determined as an instance of minor disability. Whereas a person unable to work or able to work only in sheltered working conditions, or requiring temporary or partial assistance of other persons to perform his/her social roles is determined as a person with moderate disability. A severe degree of disability corresponds in turn to the case of a person unable to work or able to work in sheltered working conditions only, who thus requires the permanent or long-term care and assistance of other persons to perform his/her social roles, on account of his/her inability to lead an independent existence. Determination of a moderate or severe degree of disability does not exclude the possibility of such person being employed by an employer who does not provide sheltered working conditions, if the workstation is adapted to the needs of a person with disabilities or if a person is employed in the telework system (Articles 3-4 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities).

It is worth mentioning that the Convention No. 159 of the International Labour Organization ratified by Poland provides for a definition of a disabled person for the purpose of vocational and social rehabilitation and employment, whereas the United Nations Convention on the Rights of Persons with Disabilities, also ratified by Poland, sets out a "general" definition of a disabled person. Moreover, the concept of a

[6] A. TYŚKIEWICZ-MAZUR, "Definicje niepełnosprawności na potrzeby rehabilitacji zawodowej i zatrudnienia", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 45.

disabled person was also defined in the resolution of the Sejm of the Republic of Poland of 1 August 1997 entitled the Charter of Rights for Persons with Disabilities.

3. CERTIFICATES ATTESTING DISABILITY

In accordance with Article 1 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, a disabled person is a person whose disability is confirmed by a certificate certifying his/her degree of disability: minor, moderate or severe, or his/her total or partial inability to work under separate legislation, or his/her disability issued before attaining 16 years of age. "The definition of a disabled person under Article 1 of the Act is formal in this sense that regardless of the health condition, a given person is deemed disabled only if he/she obtained a relevant certificate of a competent authority".[7]

The process of determining the disability is conducted in two instances. Disability is determined by "poviat"[8] (county) teams of experts for determining the disability as first instance, and "voivodship"[9] (province) teams of experts for determining the disability as second instance. The Government Plenipotentiary for Disabled People supervises the process of disability determination [Article 6(1)-(1a) and Article 6c(1) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. In order to improve the effectiveness and quality of disability determination, the Electronic National System of Monitoring the Disability Determination was established (Article 6d of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities and Regulation of the Minister of Labour and Social Policy of 28 November 2007 on conditions, manner and procedure of collection and deletion of data in and from the Electronic National System of Monitoring the Disability Determination).

"Poviat" and "voivodship" teams of experts for determining the disability issue certificates of disability of persons under 16 years of age, certificates of the degree of

[7] K. ŻAK, "Prawne pojęcie niepełnosprawności", w: *Studia z zakresu prawa pracy i polityki społecznej*, redakcja A.M. Świątkowski, Kraków 2003/2004, s. 349.

[8] Editor's note: "Poviat" is a Polish administrative division corresponding to a county in other countries.

[9] Editor's note: "Voivodship" is a Polish administrative division corresponding to a province in other countries.

disability of persons who attained 16 years of age and certificates of recommendation to exemptions and entitlements of persons holding certificate of inability to work or of disability (Article 2 of the Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on determining the disability and the degree of disability). Disability of a child is determined for a specified period, however for a period not longer than until he/she attains 16 years of age, whereas the degree of disability of a person over 16 years of age is issued for a specified period or permanently. Whereas certificates of recommendation to exemptions and entitlements are issued until the expiry of a certificate of inability to work or disability (Article 3(5)-(7) of the Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on determining the disability and the degree of disability). Certificates issued by "poviat" and "voivodship" teams of experts for determining the disability are administrative decisions.[10]

Equivalent to the relevant certificates of the degree of disability are considered the certificates issued by authorized physician of the Social Insurance Institution and certificates on qualification of the disabled person to one of disability groups, the latter provided that they did not lose their binding force before 1 January 1998 (Article 5 and 62 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities).

4. PROMOTING THE EMPLOYMENT OF DISABLED PERSONS

"Disabled persons are a social group which from the very beginning since the unemployment in Poland emerged enjoys (…) the separation in the scope of support in finding the employment".[11] Pursuant to Article 2(1)(2) of the Act of 20 April 2004 on the promotion of employment and labour market institutions, a disabled person may have the status of unemployed if he/she is able and ready to undertake employment at least on a half-time basis for a given profession or service or other paid work. Persons without the certificate of disability are required to be able and ready to undertake full time employment. "Disabled unemployed may use the services and

[10] I. RADZIWON, "Orzekanie o niepełnosprawności oraz o jej stopniu", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 50.

[11] E. STASZEWSKA, "Środki prawne przeciwdziałania bezrobociu", LEX a Wolters Kluwr business, Warszawa, 2012, s. 236.

measures of labour market intended for all unemployed persons registered in a "poviat" labour office. Moreover, on account of such persons being considered persons in special labour market situation, additional actions are taken with respect to them."[12]

Expenditures for services or labour market instruments for disabled persons registered as unemployed are financed with the Labour Fund resources [Article 11(3)(1) of the Act of 20 April 2004 on the promotion of employment and labour market institutions]. This includes -but is not limited to- financing expenditures for:

> 1) medical or psychological examinations to determine ability to perform work, participate in a training or apprenticeship, work practice, performance of works of social benefit, as well as to determine the specific psychophysical predispositions required to perform a given occupation;
>
> 2) reimbursement for the costs of travelling to a medical or psychological examination;
>
> 3) trainings, work practice, apprenticeship for adults;
>
> 4) reimbursement for the costs of travelling to the employer submitting the job offer or to the place of work, work practice, apprenticeship for adults or classes in the scope of vocational counselling in connection with the referral of the "poviat" labour office;
>
> 5) reimbursement for the costs of accommodation at the place of work for the person who took up employment or other gainful work, work practice, apprenticeship for adults outside the place of permanent residence, in the case of the referral by the "poviat" labour office;
>
> 6) work of social benefit (up to 60% of the minimum benefit amount due to the persons performing work of social benefit, the remaining part is financed by gmina which organises the work of social benefit) and reimbursement for the costs of travelling to the place of performing the work of social benefit;
>
> 7) post-graduate studies.

Persons in a special situation in the labour market, including disabled unemployed persons, are a priority group in referral to a special programme. Moreover, a "starost" may enter into agreement with an employment agency to bring the unemployed in a special situation on the labour market for employment or other gainful work under civil law contracts for the period of at least 6 moths [Article 49(6)

[12] M. SZABŁOWSKA, " Wyrównywanie szans osób niepełnosprawnych w zakresie dostępu do zatrudnienia na otwartym rynku pracy", *Polityka Społeczna*, nr 10, 2013, s. 21.

and Article 61b of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities].

With respect to disabled persons holding the status of unemployed, not only actions financed with the Labour Fund resources are taken, but also actions financed with the State Fund for Rehabilitation of Disabled Persons resources.

Within the actions aimed at the labour market activation of disabled graduates, JUNIOR programme is implemented by the "poviat" labour office and the "voivodship" branches of the State Fund for Rehabilitation of Disabled Persons.

The addressees of the programme are persons with determined severe, moderate or minor degree of disability of up to 25 years of age –or in the case of persons who graduated from the higher education institution up to 27 years of age– referred to work practice as per the terms and conditions stipulated in the Act of 20 April 2004 on the promotion of employment and labour market institutions. The financial support from the State Fund for Rehabilitation of Disabled Persons is granted to: a disabled graduate (co-financing in the form of benefit for vocational rehabilitation), a vocational counsellor (bonus for taking care of a disabled trainee) and an employer participating in the programme (bonus for the placement of a disabled graduate), with the exclusion of employers operating a vocational rehabilitation facility.[13]

5. NO DISCRIMINATION IN EMPLOYMENT ON GROUNDS OF DISABILITY

Article 32(2) of the Constitution of the Republic of Poland of 2 April 1997 provides, in general, that no one shall be discriminated against in political, social or economic life "for any reason whatsoever", yet does not indicate any special criteria of discrimination.[14]

The principle of equal treatment in employment is a fundamental principle of Polish labour law (Article 11^2-11^3 of the Labour Code). Equal treatment in employment means that there must be no discrimination whatsoever, directly or indirectly, in particular on grounds of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as

[13] "Informator dla osób niepełnosprawnych", Warszawa 2013, s. 45-46.

[14] M. CHMAJ, "Równość wobec prawa i zakaz dyskryminacji", w: *Konstytucyjne wolności i prawa w Polsce*, tom 1. *Zasady ogólne*, redakcja M. Chmaj, Kraków 2002, s. 129.

well as on grounds of employment for a definite or indefinite period of time or full time or part time employment [Article 18^{3a} (2) of the Labour Code].

The Polish law maker formulates the prohibition against discrimination in employment, including employment relationships and employment other than under contract of employment. The signs of breach of the principle of equal treatment in employment include: direct discrimination on grounds of disability, indirect discrimination on grounds of disability, harassment on grounds of disability and practices related to encouraging another person to violate the principle of equal treatment in employment or when a person is ordered to violate that principle [Article 18^{3a}(2)–(5) of the Labour Code and Article 3(1)-(3) and (5) of the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment]. The employer's failure to ensure necessary and reasonable improvements for disabled persons in the work establishment [Article 23a(3) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities] is also deemed a breach of the principle of equal treatment in employment within the meaning of Article 18^{3a}(2)-(5) of the Labour Code.

Employees should be treated equally in terms of establishing and terminating an employment relationship, employment conditions, promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of disability [Article 18^{3a}(1) of the Labour Code]. "Provisions of the Labour code, based on the EU law, stipulate various circumstances which despite differentiation in the situation of the employee do not constitute breach of the principle of equal treatment in employment. Such differentiation must be objectively justified and proportionate to the aim the achievement of which is legitimate."[15] The law maker allows for applying measures resulting in different treatment of the legal situation of an employee in respect of the disability protection and introducing measures for a specified period of time aimed at the creation of equal opportunities for disabled employees [Article 18^{3b}(2)(3) and Article 18^{3b}(3) of the Labour Code].

The contents of Article 18^{3b}(2)(1) of the Labour Code are also worth mentioning. Pursuant to this provision, the principle of equal treatment in employment is not violated by conduct proportionate to legitimate aim, consisting in deciding not to employ an employee on one or more grounds referred to in Article 18^{3a}(1) of the Labour Code (including on grounds of disability), where the type of work or the conditions of its performance mean that the characteristic or the characteristics referred to in that provision constitute a genuine and determining

[15] L. FLOREK, "Prawo pracy", wydanie 14., C.H. Beck, Warszawa, 2012, s. 19.

occupational requirement for the employee. Taking this into account, in its judgment of 12 April 2012 (II PK 218/11) the Supreme Court found that "health condition allowing for performing all prosecutor's duties, unconditionally in irregular working hours, is essential and determining occupational requirement for regional public prosecutor (public prosecutor assistant). This requirement is of particular relevance owing to the fact that it ensures proper performance of duties imposed on the public prosecutor's office, therefore the aim of the requirement is legitimate. Such health requirement does not also fall beyond the scope of what is inevitable to achieve this aim. Health requirements are adjusted to the scope of duties of the public prosecutor, thus they must be deemed proportionate." Therefore, the dismissal of the claimant "due to her disability, as a result of which she lost the ability to perform the occupation of a regional public prosecutor (public prosecutor assistant), […] cannot be deemed a prohibited act of discrimination." The Supreme Court emphasizes, however, that "the assessment whether a disabled public prosecutor is able to perform his/her obligations depends on the circumstances of a given case, where the degree of disability (physical impairment) and the scope of the public prosecutor's duties play a significant role."

6. DAMAGES DUE TO PERSONS DISCRIMINATED AGAINST IN EMPLOYMENT ON GROUNDS OF DISABILITY

From the effective date of the Act of 14 November 2003 to amend the Labour Code and certain other acts (i.e. 1 January 2004), an employee discriminated against on grounds of disability is entitled to damages under Article 18^{3d} of the Labour Code. At the present moment, Article 18^{3d} of the Labour Code provides only for the bottom limit of damages (at least the amount of the minimum remuneration for work) due to an employee from the employer, which corresponds to the European norms.[16]

When determining the rules of liability for damages for breach of the principle of equal treatment in employment, the Polish law maker stipulated only damages and did not decide to introduce cash compensation for suffered harm. In the opinion of the Supreme Court, such shape of normative regulation does not prevent an employee from claiming remedy of not only property damage, but also non-property damage under Article 18^{3d} of the Labour Code (judgment of the Supreme Court of 7 January

[16] Z. GÓRAL, w: *Zarys system prawa pracy*, tom 1. *Część ogólna prawa pracy*, redakcja K.W. Baran, Warszawa, 2010, s. 631.

2009, III PK43/08; judgment of the Supreme Court of 3 April 2008, II PK/07). Similar view on damages under Article 18^{3d} of the Labour Code is shared by the representatives of legal writings.[17]

The dispute regarding damages under Article 18^{3d} of the Labour Code is a matter falling within the scope of the labour law within the meaning of Article 476(1) of the Code of Civil Proceedings and jurisdiction of labour courts (labour and social insurance courts).[18] In judicial proceedings, a person requiring payment of damages from the employer for the breach of the principle of equal treatment in employment enjoys evidentiary facilitations. Under Article 18^{3b}(1) of the Labour Code, a "special allocation of the burden of proof, other than provided for in Article 6 of the Civil code" was introduced.[19] This means that "an employee should indicate facts proving the alleged unequal treatment, and then the burden of proof that its reasons were objective shifts to the employer" (judgment of the Supreme Court of 9 June 2006, III PK 30/06).

Persons in employment other than under contracts of employment (in particular under civil law contracts) who were the victims of discrimination on grounds of disability have the right to claim damages under Article 13 of the Act of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment. They enjoy evidentiary facilitations mentioned in Article 14 of the said Act.

[17] P. CZARNECKI, "Charakter prawny odszkodowania za dyskryminację w zatrudnieniu", *Praca i Zabezpieczenie Społeczne*, nr 2, 2012, s. 18; T. LISZCZ, "Odpowiedzialność odszkodowawcza pracodawcy wobec pracownika", *Praca i Zabezpieczenie Społeczne*, nr 1, 2009, s. 2.

[18] W. SANETRA, w: J. Iwulski, W. Sanetra, "Kodeks pracy. Komentarz", wydanie 2., Warszawa, 2011, s. 181.

[19] B. WAGNER, "Zasada równego traktowania i niedyskryminacji", *Praca i Zabezpieczenie Społeczne*, nr 3, 2002, s. 11.

7. REASONABLE ACCOMMODATION FOR DISABLED PERSONS IN THE WORKPLACE

The employment relationship provides for a general obligation of the employer to protect health and life of an employee.[20] Pursuant to Article 207(2)(5) of the Labour Code, the employer is obliged to protect the health and life of employees by ensuring conditions of health and safety at work by the appropriate use of the achievements of science and technology. In particular, the employer is obliged to consider the protection of health and life of disabled employees within the preventive measures undertaken.

Special obligations of the employer related to the employment of disabled persons are set out in the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities. Article 23a was added in the said Act under the influence of the European Union law. The provision imposes obligations on the employer in the scope of introducing reasonable accommodation for disabled persons. The employer should ensure reasonable accommodation not only to a disabled person bound by the employment relationship therewith, but also to a disabled person participating in the recruitment process or training, work practice, vocational apprenticeship or work or postgraduate traineeships. "This means that obligations of the employer in the scope of introducing reasonable accommodation are universal. It should be noted, however, that the employer is released from introducing reasonable accommodation creating a disproportionate burden. This is the only reason for refusing the introduction of reasonable accommodation by the employer."[21] Pursuant to Article 23a(2) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, the burden related to introducing reasonable accommodation shall not, however, be deemed disproportionate when it is sufficiently compensated with public funds. This refers, in particular, to a situation where the employer introducing reasonable accommodation may obtain reimbursement from the State Fund for Rehabilitation of Disabled Persons for

[20] T. WYKA, "Ochrona zdrowia i życia pracownika jako element treści stosunku pracy", Warszawa, 2003, s. 249.

[21] E. CZECH, S. DUDEK, "Wprowadzanie racjonalnych usprawnień dla osób niepełnosprawnych w zakładzie pracy", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 242.

additional costs of employing disabled persons or for costs of equipping the workstation, under Article 26 and Article 26e of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, respectively.

The law maker has also regulated the issue of protecting persons whose disability was caused by an accident at work and/or occupational disease. Under Article 14 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, the employer is obliged to separate or organise an appropriate workstation with basic employee facilities for the employee who as a result of an accident at work or occupational disease, lost the ability to work on previous position and was recognised a disabled person, not later than three months from the date of declaring by such person the readiness to start work. The employer is released from such obligation if the accident was caused solely by breach of health and safety provisions by the employee due to its fault or intoxication –which is proved by the employer–.

As correctly noted in the literature, "it follows from the contents of Article 14 of the Act on vocational and social rehabilitation and employment of persons with disabilities that this provision may apply when the employment relationship between the disabled person and the employer still exists, which is indicated by using the phrase «employed person», that is a person still employed. Such conclusion may also be derived from the comparison of Article 14 with Article 23 of the Act on vocational and social rehabilitation and employment of persons with disabilities, under which obligation to pay financial sanction for failure to meet the obligations under Article 14 arises at the moment of terminating the employment relationship. This implies that the employer undertakes these actions with respect to an employee, and not with respect to a former employee."[22]

The employer who separates or organizes an appropriate workstation with basic employee facilities may be reimbursed for these costs with the funds from the State Fund for Rehabilitation of Disabled Persons (Article 26 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities). Whereas an employer who failed to separate or organize such workstation within three months from the date of declaring by the employed person the readiness to work shall

[22] M. LATOS-MIŁKOWSKA, "Ochrona trwałości stosunku pracy pracowników niepełnosprawnych i opiekunów osób niepełnosprawnych", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 260-261.

on the date of termination of the employment relationship with such person make payments to the State Fund for Rehabilitation of Disabled Persons in the amount of 15 times the average remuneration in the national economy in the previous quarter (Article 23 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities).

8. EMPLOYMENT OF DISABLED PERSONS IN OPEN AND SHELTERED LABOUR MARKET

8.1. Quota system

The Polish law maker introduced the quota system in 1991. According to the assumptions of the system, an employer either ensures the required level of employment of disabled persons, or makes monthly payments to the State Fund for Rehabilitation of Disabled Persons in the amount depending on the employment rate of disabled persons.[23]

The employment rate of disabled persons means the average monthly percentage share of disabled persons in total employment, expressed as full time equivalent [Article 2(6) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. From 1 January 2000, the required employment rate of disabled persons is, as a rule, 6%. For public and private higher education institutions, higher vocational schools, public and private schools, teacher training institutions, as well as care and rehabilitation centres, the rate is 2% (from 1 January 2005). With respect to those units, the employment rate of disabled persons is calculated as a sum of the rate of disabled persons and the doubled rate of pupils and students being disabled persons. The latter rate is determined based on the previous year's rate [Article 21(1) and Article 21(2b)–(2d) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. The obligation to achieve the required employment rate of disabled persons does not apply to diplomatic and consular posts, as well as foreign representations and missions [Article 21(6) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities].

Employers who employ at least 25 employees expressed as full time equivalent are obliged to ensure 6% or 2% employment rate of disabled persons. The employer who

[23] L. KLIMKIEWICZ, "Wpłaty na Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych", Warszawa, 2011, s. 23.

failed to achieve the required employment rate of disabled persons makes monthly payments to the State Fund for Rehabilitation of Disabled Persons in the amount being the product of 40.65% average monthly remuneration in the national economy in the previous quarter and the number of employees being the difference between the employment ensuring achievement of the required employment rate and actual employment of disabled persons. Whereas the employer with the employment rate of disabled persons being at least at the statutory level is exempted from the obligation to make payments to the State Fund for Rehabilitation of Disabled Persons [Article 21(1)–(2) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. The following non-profit facilities are also exempted from the obligation to make such payments, even if they do not achieve the required employment rate of disabled persons: social assistance institutions in the meaning of the provisions on social assistance, hospices in the meaning of the provisions on healthcare activities, and public and private organisational units whose objects comprise only social and healthcare rehabilitation of disabled persons, education of disabled persons or care for disabled persons. Employers conducting liquidation on the work establishment or who have been declared bankrupt are also exempted from the obligation to make payments to the State Fund for Rehabilitation of Disabled Persons [Article 21(1e) and Article 21(3) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities].

8.2. Employment of disabled persons in public administration

The Polish law maker introduced regulations aiming at achieving the equality of opportunities of disabled persons in the scope of access to employment in public administration. Pursuant to Article 21(2a) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities, state and local organisational units being budget enterprises or auxiliary enterprises are required to maintain a 6% employment rate of disabled persons.

Moreover, under the Act of 19 August 2011 the rules of preferential treatment of disabled persons applying for employment in an office where the employment rate of disabled persons is lower than 6%, were introduced. "The reasons for the new regulation stem from the low employment rates of disabled persons in the public sector (including administration-civil service, state offices and local governments)."[24]

[24] A. ZIĘTEK, "Zatrudnianie osób niepełnosprawnych w administracji publicznej ", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 146.

Currently, a disabled person has priority in employment at civil service posts and local government units, provided that such person is regarded as one of the best candidates meeting the basic requirements and additional requirements to the greatest extent. A disabled person who intends to exercise the right of priority in employment is obliged to file a copy of certificate of disability along with other application documents [Article 28(2b) and Article 29a of the Act of 21 November 2008 on civil service and Article 13(2b) and Article 13a of the Act of 21 November 2008 on local government employees].

8.3. Employment of disabled persons in sheltered and vocational rehabilitation workshops

The Polish law maker stipulated the possibility of employing disabled persons in sheltered working conditions, i.e., by entities with the status of sheltered workshop or vocational rehabilitation workshop [Article 2(7) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. "The main purpose of these workshops is the rehabilitation (vocational, medical and social) of disabled persons employed therein."[25]

The employer operating a sheltered workshop establishes a company fund for the rehabilitation of disabled persons, the funds from which are allocated to the financing of vocational, social and medical rehabilitation, including individual rehabilitation schemes for disabled persons, developed by the rehabilitation commission established by the employer [Article 33(1) and Article 33(4) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. Whereas in vocational rehabilitation workshops, company rehabilitation funds are established, used for financing of, *inter alia*, expenditures for assistance in preparing disabled persons with severe or moderate degree of disability to work outside the vocational rehabilitation workshop and ensuring equal opportunities thereof in the new workplace [Article 14(1) and Article 15(1)(5) of the Regulation of the Minister of Labour and Social Policy of 17 July 2012 on vocational rehabilitation workshops].

[25] L. KLIMKIEWICZ, w: K. Berenda-Łabędź, L. Klimkiewicz, A. Pałecka, "Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Akt wykonawcze. Komentarz", Warszawa, 2002, s. 191.

8.4. Social employment of disabled persons

Social employment means ensuring the possibility of participating in courses conducted by social integration centres, social integration and supported employment clubs. The latter means providing advisory and financial support in maintaining professional activity enabling the person to undertake employment, works of social benefit in the meaning of the provisions on the promotion of employment and labour market institutions, in establishing or joining social cooperative or undertaking non-agricultural economic activity. Social employment is ensured to persons who remain socially excluded and on account of their life situation are not able to satisfy their basic living needs on their own, and are in a situation leading to poverty and preventing their participation in professional, social and family life [Article 1(2)-(4) and Article 2(8) of the Act of 13 June 2003 on social employment].

Disabled persons constitute one of the groups of persons listed as an example by the law maker, entitled to benefit from the social employment. For disabled persons, participation in courses conducted by social integration centre or social integration and supported employment club is an opportunity for social and vocational reintegration, i.e., a chance for participating in the local community life and performing social roles in the workplace, a place of residence or stay, and being able to independently provide work on the labour market [Article 1(1)(8), Article 2(4)–(5), Article 3(1) and Article 18(1) of the Act of 13 June 2003 on social employment].

9. SYSTEM TO SUPPORT THE EMPLOYMENT OF DISABLED PERSONS FROM PUBLIC FUNDS

9.1. Supporting employers of disabled persons with public funds

Employers who employ disabled persons implement social objectives and therefore, it is justified to support their activity with public funds. The law maker grants certain entitlements to such employers as regards applying for funds from the State Fund for Rehabilitation of Disabled Persons, including the reimbursement for the additional costs of employing a disabled person, reimbursement for the costs of furnishing the workstation of a disabled employee, refund of the costs of training of a disabled employee, as well as monthly financial assistance towards payment of remuneration of a disabled employee. The perspective of minimizing the costs of work owing to public funds is to encourage the employers to employ disabled persons.

In the case of employers conducting non-agricultural economic activity, the financial assistance towards payment of remuneration of disabled employees and reimbursement for the additional costs of employment of disabled persons constitute public aid in the meaning of Article 41 and Article 42 of the general block exemption regulation, respectively, which may be provided along with other public aid, including the financial support from the European Union (Article 2 of the Regulation of the Minister of Labour and Social Policy of 9 January 2009 on a monthly subsidy to pay workers with disabilities and Article 2 of the Regulation of the Minister of Labour and Social Policy of 11 March 2011 on the additional costs related to employment of disabled employees).

9.2. Supporting sheltered and vocational rehabilitation workshops with public funds

The activity of employers operating sheltered workshops is supported with public funds. The employer operating a sheltered workshop may receive financing from the State Fund for Rehabilitation of Disabled Persons up to 50% of interest on bank loans, provided that such loans are utilised for the purposes of vocational and social rehabilitation of disabled persons. Such employer may also receive reimbursement from the State Fund for Rehabilitation of disabled persons for the costs of construction or extension of facilities, transport costs and administrative costs, if such costs constitute additional costs of the employer resulting from the employment of disabled persons. An employer operating a sheltered workshop may be reimbursed for the costs if the employment rate of disabled persons in its facility equals 50%, and the employer has lodged a relevant application [Article 32(1)-(2) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities]. An employer holding the status of a sheltered workshop who employs at least 30% of blind or mentally ill or intellectually disabled persons with severe or moderate degree of disability is also exempted from taxes (except for gambling tax, VAT, customs duty, income tax, and motor vehicle tax) and fees (except for stamp duty and sanctions) [Article 31(1)-(2) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities].

The activity of vocational rehabilitation workshops is also supported with public funds. The costs of establishing vocational rehabilitation workshops are co-financed with the funds from the State Fund for Rehabilitation of Disabled Persons, organising entity and other sources. Whereas activity of vocational rehabilitation workshops is co-financed with the funds from the State Fund for Rehabilitation of Disabled Persons

and "voivodship" local government in the amount of at least 10%, yet the percentage share of the "voivodship" local government may be reduced provided that other sources of financing are obtained (Article 29(3) of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities). An employer operating a vocational rehabilitation workshop, similarly to an employer operating a sheltered workshop, benefits from tax and fees exemptions under Article 31 of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities.

9.3. Supporting social cooperatives of disabled persons with public funds

Disabled persons, having full capacity to perform acts in law, may establish a social cooperative [Article 4(1)(3) of the Act of 27 April 2006 on social cooperatives]. Various forms of financing for such type of activity as well as privileges in the scope of tax obligations are to encourage the establishment of social cooperatives. Persons willing to establish or join a cooperative may receive funds from the Labour Fund. Moreover, there is a possibility of obtaining funds from the State Fund for Rehabilitation of Disabled Persons for making a contribution to the social cooperative.[26] Pursuant to Article 15(1) of the Act of 27 April 2006 on social cooperatives, a social cooperative activity may be supported from the state budget or the budget of the local government units, in particular through: subsidies, loans, sureties, financial, economic, legal and marketing services or consulting, refunding the costs of inspection. Subsidies and financial, economic, legal and marketing services or consulting may be co-financed from the European Social Fund resources [Article 15(7) of the said Act].

9.4. Supporting self-employment of disabled persons with public funds

The Polish law maker introduced regulations on supporting self-employment of disabled persons from public funds. Disabled persons registered in "poviat" labour office as unemployed or searching for work not being under employment contract may receive one-off support from the State Fund for Rehabilitation of Disabled Persons for undertaking non-agricultural economic activity, agricultural activity or making a contribution to the social cooperative. Whereas disabled persons conducting

[26] M. KEMPA, "Spółdzielnie socjalne osób niepełnosprawnych" w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014, s. 188-190.

non-agricultural economic activity, or owning or leasing a farm may apply for financing up to 50% of interest on bank loan taken out for continuing the activity. They may also apply to the refund of social insurance contributions (Articles 12–13 and Articles 25a–25d of the Act of 27 August 1997 on vocational and social rehabilitation and employment of persons with disabilities).

10. LABOUR MARKET PARTICIPATION OF DISABLED PERSONS – STATISTICAL DATA

Since 2007, Poland has witnessed an increase in labour market participation rate and employment rate of disabled persons, in particular of persons in working age. In 2013, the labour market participation of disabled persons in working age reached the level of 27.3% (women: 28.6%; men: 26.5%). Whereas the employment rate and unemployment rate reached the level of 22.4% (women: 23.2%; men: 22%) and 17.9% (women: 19.2%; men: 17.2%), respectively. In 2013, employers placed 59,300 job offers for disabled persons in Labour Offices. As regards the number of job offers, 14.8% (8,800) were subsidised job offers. Compared to 2012, the number of job offers for disabled persons increased by 8.5%.[27]

In December 2013, 1,392 sheltered workshops, employing 166,803 disabled persons and 19,523 employers from the open labour market employing 85,015 disabled persons were registered in the Supplementary Financing and Reimbursement Servicing System (SODIR) kept by the State Fund for Rehabilitation of Disabled Persons. In December 2013, 22,828 disabled persons conducting non-agricultural economic activity applied for the refund of social insurance contributions from the resources of the State Fund for Rehabilitation of Disabled Persons. Moreover, in the fourth quarter of 2013, 1,936 farmers were entitled to the refund of social insurance contributions.[28]

[27] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/rynek-pracy/ [dostęp: 07.06.2014 r.].

[28] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/sod-pfron/ [dostęp: 07.06.2014 r.].

11. DISABLED STUDENTS AND GRADUATES IN POLAND

11.1. The right to education of disabled persons

Pursuant to Article 70(1) of the Constitution of the Republic of Poland of 2 April 1997, "everyone shall have the right to education."

Public authorities shall ensure universal and equal access to education. To this end, they shall establish and support systems for individual financial and organisational assistance to pupils and students [Article 70(4) of the Constitution of the Republic of Poland of 2 April 1997]. Terms and conditions of the said assistance are provided for in acts including, but not limited to, the Act of 7 September 1991 on the Educational System and the Act of 27 July 2005 – Law on Higher Education.

In its resolution of 1 August 1997 entitled "the Charter of Rights for Persons with Disabilities", the Sejm of the Republic of Poland states that persons with disabilities shall have the right to be educated at schools together with peers without disabilities, as well as the right to special or individual teaching [Article 1(4)]. The Sejm of the Republic of Poland calls upon the Government of the Republic of Poland and local government authorities to undertake actions to implement this right (Article 2). The Government shall present, on an annual basis, information about actions undertaken to implement the rights of disabled persons, including the right to education (Article 3).

11.2. Organisational assistance for disabled students and doctoral students

Pursuant to Article 13(1)(9) of the Act of 27 July 2005 – Law on Higher Education, one of the principal objects of a higher education institution shall be creating conditions for the full participation of disabled persons in the process of learning and research. This provision "implements obligations imposed on the state under the Constitution of the Republic of Poland (Articles 32 and 70) and under the international law."[29]

Public and private higher education institutions receive State-budget grants for the performance of tasks related to the provision of appropriate conditions for the full participation in the process of learning by students and doctoral students with disabilities [Article 94(1)(11) and Article 94(4a) of the Act of 27 July 2005 – Law on

[29] H. IZDEBSKI, J.M. ZIELIŃSKI, "Prawo o szkolnictwie wyższym. Komentarz", LEX a Wolters Kluwer business, Warszawa, 2013, strona 70..

Higher Education]. Moreover, higher education institutions are entitled to receive grants for funding or co-funding of investments, including those which benefit students and doctoral students with disabilities [Article 94(1)(10) of the Act of 27 July 2005 – Law on Higher Education].

Requirements for the adequate execution of the teaching process, while taking into account specific needs of disabled students and doctoral students, shall be specified in study regulations and doctoral study regulations, accordingly [Article 162(6) and Article 195(3) of the Act of 27 July 2005 – Law on Higher Education]. The said regulations shall be adopted by the senate of a higher education institution [Article 161(1) and Article 196(6) of the Act of 27 July 2005 – Law on Higher Education].

Higher education institutions shall ensure organisational facilitations not only for disabled students and doctoral students, but also for candidates with disabilities. Pursuant to Article 169(5) of the Act of 27 July 2005 – Law on Higher Education, in the case of additional admission tests, the entrance requirements and procedures shall take into consideration any particular needs of candidates being persons with disabilities.

11.3. Financial assistance for disabled students and doctoral students

Students and doctoral students shall be entitled to apply for financial support of the following types: maintenance grant, special grant for disabled persons, scholarship as an outstanding student/doctoral student awarded by a rector, scholarship for academic achievement awarded by the minister, as well as assistance grants [Article 173(1) and Article 199(1) of the Act of 27 July 2005 – Law on Higher Education]. A student/doctoral student with a disability confirmed by a certificate from a competent authority may be awarded a special grant for disabled persons [Article 180 of the Act of 27 July 2005 – Law on Higher Education].

A public and private higher education institution shall receive State-budget grants for tasks regarding non-refundable financial support for students and doctoral students [Article 94(1)(7) and Article 94(4) of the Act of 27 July 2005 – Law on Higher Education].

Financial support for students and doctoral students, including students and doctoral students with disabilities, may also be granted by local government authorities [Article 173a(1) and Article 199a of the Act of 27 July 2005 – Law on Higher Education]. Moreover, scholarships for academic attainment may be awarded to students and doctoral students, including students and doctoral students with

disabilities, by natural persons or by bodies corporate who are neither State- nor local government-administered bodies corporate [Article 173b(1) and Article 199b of the Act of 27 July 2005 – Law on Higher Education].

11.4. The role of higher education institutions in the process of transition of disabled persons from studies to labour market

11.4.1. General comments

The law maker formulated obligations of a higher education institution in the scope of creating conditions for the full participation of disabled persons in the process of learning and research, as well as obligations in the scope of providing financial assistance to disabled students and doctoral students. However, it failed to clearly establish the role of a higher education institution in the process of transition of disabled persons from studies to the labour market. A significant role in ensuring fluent transition, especially of disabled persons, from studies to labour market is played, in turn, by the student career offices. Currently, 346 student career offices operate in 442 Polish higher education institutions.

11.4.2. The role of student career offices in occupational activation of disabled students and graduates

Student career offices shall mean entities acting for the benefit of occupational activation of students and higher education institution graduates, operated by higher education institutions or student organisations. Their tasks include, in particular:

1) providing students and higher education institution graduates with information about the labour market and opportunities for occupational qualifications improvement,

2) gathering, classifying and making available job offers, work practice and internships,

3) keeping a database of students and higher education institution graduates interested in finding a job,

4) assisting employers in finding proper candidates for job vacancies and work practices,

5) assisting in active job seeking [Article 2(1)(1) of the Act of 20 April 2004 on the promotion of employment and labour market institutions].

Rector's representatives for disabled students (e.g. at the University of Zielona Góra)[30] and dean's representatives for disabled students (e.g. at the Nicolaus Copernicus University, Faculty of Law and Administration, Toruń)[31] are also involved in the process of occupational activation of students and graduates with disabilities.

11.4.3. Monitoring the career of disabled higher education institution graduates

Pursuant to Article 13a of the Act of 27 July 2005 – Law on Higher Education, higher education institutions shall monitor the careers of their graduates with the aim of amending degree programme structure and curricula in order to meet the demands of the labour market, specifically at three and five year intervals following the date of graduation. "Also the institution of the Ombudsman for Graduate Affairs is included in the process of monitoring the careers of graduates, although on imprecise terms."[32]

The draft Act amending the Act – Law on Higher Education and Certain Other Acts (parliamentary document No. 2085) stipulates, in particular, that Article 13a be repealed and Article 13b be added in the Act of 27 July 2005 – Law on Higher Education. The drafted amendments aim at establishing the Polish national system for monitoring professional careers of graduates, maintained by the minister competent for higher education based on data included in the Polish list of students and data gathered by the Social Insurance Institution on the accounts of the insured and the accounts of premium payers. Higher education institutions would no longer be obliged to monitor the careers of graduates. They would, however, be entitled to monitor the careers of their graduates on their own with the aim of amending curricula to meet the demands of the labour market.

The Polish law maker did not introduce separate regulations in the scope of monitoring the career of disabled higher education institution graduates. Under the

[30] M. GARBAT, "Usługi społeczne i aktywizacja studentów z niepełnosprawnością na przykładzie działań podejmowanych na Uniwersytecie Zielonogórskim", w: *Osoby niepełnosprawne. Szanse i zagrożenia godnego funkcjonowania w nowoczesnym społeczeństwie*, redakcja J. Plak, Warszawa, 2011, strona 132.

[31] J. WASZAK, "Rola edukacji w przeciwdziałaniu wykluczeniu osób niepełnosprawnych z rynku pracy", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin, Warszawa, 2014, strona 107.

[32] H. IZDEBSKI, J.M. ZIELIŃSKI, "Prawo o szkolnictwie wyższym. Komentarz", LEX a Wolters Kluwer business, Warszawa 2013, strona 72.

currently applicable Article 13a of the Act of 27 July 2005 – Law on Higher Education, higher education institutions shall monitor, in particular, the careers of their disabled graduates. Upon repealing Article 13a and adding Article 13b in the Act of 27 July 2005 – Law on Higher Education, the minister competent for higher education shall monitor professional career of graduates, including graduates with disabilities.

11.5. Statistical data

11.5.1. Disabled students and higher education institution graduates

In 2012, higher education institutions had 31,613 disabled students, of which 17,579 were full-time students and 14,034 were part-time students. In 2012, among the disabled students there were deaf persons and persons with impaired hearing (2,047), blind and visually impaired persons (2,733), persons with reduced mobility (9,050) and persons with other impairments and diseases (17,783)[33]. "Most disabled persons are the students of specialisations such as: general and special pedagogy, law, history, philologies – Polish and West European culture philologies. The second largest group of disabled students is studying psychology and political sciences."[34]

In the academic year 2011/2012, 8,617 disabled persons graduated from higher education institutions, including 4,194 from full-time programmes and 4,423 from part-time programmes. Among the disabled students there were 597 deaf persons and persons with impaired hearing, 713 blind and visually impaired persons, 2,481 persons with reduced mobility and 4,826 persons with other impairments and diseases. The number of disabled graduates depended on the type of a higher education institution. As many as 2,998 disabled persons graduated from universities, 898 disabled persons graduated from higher technical schools, 239 from higher agricultural schools, 1,167 from higher economic schools, 707 from teacher training schools, 214 from medical universities, 32 from higher nautical schools, 52 from higher schools of art, 25 from higher schools of theology, 30 from higher schools of

[33] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/edukacja/ [dostęp: 05.07.2014 r.].

[34] J. WASZAK, "Rola edukacji w przeciwdziałaniu wykluczeniu osób niepełnosprawnych z rynku pracy", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin, Warszawa, 2014, strona 107.

the National Defence Department, and 2,204 disabled persons graduated from other types of schools.[35]

11.5.2. Level of education and labour market share of disabled persons

"Average level of education of disabled persons in Poland in total is lower than of population in total."[36] In 2013, the Central Statistical Office reported that 9.1% of disabled persons in working age had a university degree, 18.7% completed post-secondary and secondary vocational education, 6.6% completed general secondary education, 40.9% completed basic vocational education, and 24.7% had only lower secondary, primary or incomplete primary education (or no education at all).[37]

"The labour market share of disabled persons is closely related to education."[38] In the fourth quarter of 2013, the labour market participation of disabled persons and the employment rate of disabled persons in working age amounted to, respectively: 49.4% and 41.6% for higher education, 31.8% and 27% for post-secondary and secondary vocational education, 31.8% and 28% for general education, 26.4% and 21.1% for basic vocational education, and 13.3% and 10.6% for lower secondary, primary or incomplete primary education.[39] Insufficient education and qualifications are deemed to be one of the obstacles for the participation of disabled persons in the labour market.[40]

[35] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/edukacja/ [dostęp: 05.07.2014 r.].

[36] S. GOLIMOWSKA, "Integracja społeczne osób niepełnosprawnych. Ocena działań instytucji", IPiSS, Warszawa, 2004, strona 55.

[37] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/edukacja/ [dostęp: 05.07.2014 r.].

[38] S. GOLIMOWSKA, "Integracja społeczna osób niepełnosprawnych. Ocena działań instytucji", IPiSS, Warszawa, 2004, strona 55.

[39] www.niepelnosprawni.gov.pl/niepelnosprawnosc-w-liczbach-/edukacja/ [dostęp: 05.07.2014 r.].

[40] M. MAGNUSZEWSKA-OTULAK, "Bariery aktywności zawodowej osób niepełnosprawnych", w: *Osoby niepełnosprawne. Szanse i zagrożenia godnego funkcjonowania w nowoczesnym społeczeństwie*, redakcja J. Plak, Warszawa, 2011, strona 30.

12. CONCLUSIONS

The labour market share of disabled persons in Poland has been increasing, but is still considerably lower than in other Member States.[41] "The problem is not only the low labour market share of disabled persons but also the predominance of employing such persons in sheltered workshops."[42] The Polish law maker introduced a series of legal solutions aimed at promoting the employment of disabled persons on the open labour market, including the quota system, preferential treatment of disabled persons applying for employment in public administration, or special entitlements for employers of disabled persons. However, the open labour market is still not the target place of employment for most disabled persons active in the labour market. The literature is critical towards the Polish vocational rehabilitation system for disabled persons, indicating that it "plays only a marginal role in preparing disabled persons to enter the open labour market. In fact, the system and processes of vocational integration of disabled persons are considerably limited to maintaining sheltered workplaces."[43] The factors hampering the employment of disabled persons include as well frequent amendments to regulations on obtaining public funds by the employer of disabled persons and complex administrative procedures.[44]

Successful completion of higher education institution facilitates accessing the labour market by disabled persons. In Poland, during the last few years, the number of disabled students and doctoral students and the number of disabled higher education institution graduates has been growing, however the level of education of disabled persons is considerably lower than of the society in general. Therefore, insufficient education is deemed to be one of the obstacles for disabled persons to access the labour market. The issue of facilitating the transition of disabled persons from studies to the

---

[41] M. MAŃCZAK, "Między Polską a krajami Unii Europejskiej", *Niepełnosprawność i Rehabilitacja,* nr 1, 2000, s. 14.

[42] A. BARCZYŃSKI, "Skuteczność polskiego modelu aktywizacji zawodowej w warunkach gospodarki rynkowej", w: *Zatrudniając niepełnosprawnych. Wiedza, opinie i doświadczenie pracodawców*, redakcja B. Gąciarz, E. Giermanowska, Warszawa, 2009, s. 182.

[43] B. GĄCIARZ, E. GIERMANOWSKA, P. SOBIESIAK, "Wprowadzenie. Postawy pracodawców a polityka integracji osób niepełnosprawnych", w: *Zatrudniając niepełnosprawnych. Wiedza, opinie i doświadczenie pracodawców*, redakcja B. Gąciarz, E. Giermanowska, Warszawa, 2009, s. 12.

[44] J. BARTKOWSKI, B. GĄCIARZ, E. GIERMANOWSKA, A. KUDLIK, P. SOBIESIAK, "Pracodawcy o zatrudnianiu osób niepełnosprawnych", Warszawa, 2009, s. 17 i 20.

labour market should also be regarded as significant. Actions in this respect are insufficient.

13. BIBLIOGRAPHY

BARCZYŃSKI A., "Skuteczność polskiego modelu aktywizacji zawodowej w warunkach gospodarki rynkowej", w: *Zatrudniając niepełnosprawnych. Wiedza, opinie i doświadczenie pracodawców*, redakcja B. Gąciarz, E. Giermanowska, Warszawa, 2009

BARTKOWSKI J., GĄCIARZ B., GIERMANOWSKA E., KUDLIK A., SOBIESIAK P., "Pracodawcy o zatrudnianiu osób niepełnosprawnych", Warszawa, 2009

CHMAJ M., "Równość wobec prawa i zakaz dyskryminacji", w: *Konstytucyjne wolności i prawa w Polsce*, tom 1. *Zasady ogólne*, redakcja M. Chmaj, Kraków 2002

CZARNECKI P., "Charakter prawny odszkodowania za dyskryminację w zatrudnieniu", *Praca i Zabezpieczenie Społeczne*, nr 2, 2012

CZECH E., DUDEK S., "Wprowadzanie racjonalnych usprawnień dla osób niepełnosprawnych w zakładzie pracy", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

FLOREK L., "Prawo pracy", wydanie 14., Warszawa 2012

GARBAT M., "Usługi społeczne i aktywizacja studentów z niepełnosprawnością na przykładzie działań podejmowanych na Uniwersytecie Zielonogórskim", w: *Osoby niepełnosprawne. Szanse i zagrożenia godnego funkcjonowania w nowoczesnym społeczeństwie*, redakcja J. Plak, Warszawa, 2011

GĄCIARZ B., GIERMANOWSKA E., SOBIESIAK P., "Wprowadzenie. Postawy pracodawców a polityka integracji osób niepełnosprawnych", w: *Zatrudniając niepełnosprawnych. Wiedza, opinie i doświadczenie pracodawców*, redakcja B. Gąciarz, E. Giermanowska, Warszawa, 2009

GOLIMOWSKA S., "Integracja społeczne osób niepełnosprawnych. Ocena działań instytucji", IPiSS, Warszawa, 2004

GÓRAL Z., w: *Zarys system prawa pracy*, tom 1. *Część ogólna prawa pracy*, redakcja K.W. Baran, Warszawa, 2010

IZDEBSKI H., ZIELIŃSKI J.M., "Prawo o szkolnictwie wyższym. Komentarz", LEX a Wolters Kluwer business, Warszawa, 2013

JAWORSKI J., "Praca dla osób niepełnosprawnych w zwalczaniu ich wykluczenia społecznego. Ocena polskiego systemu wspierania zatrudnienia osób niepełnosprawnych", Warszawa, 2009

KEMPA M., "Spółdzielnie socjalne osób niepełnosprawnych" w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

KLIMKIEWICZ L., "Wpłaty na Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych", Warszawa, 2011

KLIMKIEWICZ, w: K. Berenda-Łabędź, L. Klimkiewicz, A. Pałecka, "Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Akt wykonawcze. Komentarz", Warszawa, 2002

KOŁACZEK B., "Polityka społeczna wobec osób niepełnosprawnych", Warszawa, 2010

LATOS-MIŁKOWSKA M., "Ochrona trwałości stosunku pracy pracowników niepełnosprawnych i opiekunów osób niepełnosprawnych", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

LISZCZ T., "Odpowiedzialność odszkodowawcza pracodawcy wobec pracownika", *Praca i Zabezpieczenie Społeczne*, nr 1, 2009

MAGNUSZEWSKA-OTULAK M., "Bariery aktywności zawodowej osób niepełnosprawnych", w: *Osoby niepełnosprawne. Szanse i zagrożenia godnego funkcjonowania w nowoczesnym społeczeństwie*, redakcja J. Plak, Warszawa, 2011

MAŃCZAK M., "Między Polską a krajami Unii Europejskiej", *Niepełnosprawność i Rehabilitacja,* nr 1, 2000

RADZIWON I., "Orzekanie o niepełnosprawności oraz o jej stopniu", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

SANETRA W., w: J. Iwulski, W. Sanetra, "Kodeks pracy. Komentarz", wydanie 2., Warszawa, 2011

STASZEWSKA E., "Środki prawne przeciwdziałania bezrobociu", LEX a Wolters Kluwr business, Warszawa, 2012

SZABŁOWSKA M., " Wyrównywanie szans osób niepełnosprawnych w zakresie dostępu do zatrudnienia na otwartym rynku pracy", *Polityka Społeczna*, nr 10, 2013

TYŚKIEWICZ-MAZUR A., "Definicje niepełnosprawności na potrzeby rehabilitacji zawodowej i zatrudnienia", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

WAGNER B., "Zasada równego traktowania i niedyskryminacji", *Praca i Zabezpieczenie Społeczne*, nr 3, 2002

WASZAK J., "Rola edukacji w przeciwdziałaniu wykluczeniu osób niepełnosprawnych z rynku pracy", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin, Warszawa, 2014

WINCZOREK P., "Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku", wydanie 2., Warszawa, 2008

WYKA T., "Ochrona zdrowia i życia pracownika jako element treści stosunku pracy", Warszawa, 2003

ŻAK K., "Prawne pojęcie niepełnosprawności", w: *Studia z zakresu prawa pracy i polityki społecznej*, redakcja A.M. Świątkowski, Kraków 2003/2004

ZIĘTEK A., "Zatrudnianie osób niepełnosprawnych w administracji publicznej", w: *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, redakcja A. Giedrewicz-Niewińska, M. Szabłowska-Juckiewicz, Difin SA, Warszawa, 2014

Marzena Szabłowska-Juckiewicz
Ph. D. at Law. Assistant Professor in the Chair of Labour Law
Faculty of Law and Administration. Nicolaus Copernicus University
m_sz@law.umk.pl

INFORME ITALIANO

(ITALIAN REPORT)

RIGHT TO WORK AND PLACEMENT OF THE DISABLED IN THE LABOUR MARKET: THE ITALIAN LEGAL FRAMEWORK

PIERLUIGI DIGENNARO
Ph.D. University of Bari Aldo Moro

Fecha de recepción: 15-1-2015
Fecha de aceptación: 02-02-2015

SUMARIO: 1. DEFINITION OF DISABILITY IN THE INTERNAL LEGAL SYSTEM IN THE LIGHT OF INTERNATIONAL DOCUMENTS. 2. ANALYSIS OF GENERAL STATISTICAL DATA. 3. THE INTERNAL REGULATION AND THE QUOTA SYSTEM MECHANISM. 3.1. Exonerations, exclusions, suspensions and compensation regarding the obligation of employment per quota. 4. THE AGREEMENT INSTRUMENTS AND THE INCENTIVE EMPLOYMENT POLICIES. 5. THE ROLE OF THE LOCAL AUTHORITIES. 6. THE ANTI-DISCRIMINATION REGULATION AND THE INFLUENCE OF EC DIRECTIVES. 7. ANALYSIS OF NATIONAL CASES. 8. THE ROLE OF UNIVERSITIES IN THE WORK GUIDANCE AND PLACEMENT OF DISABLED STUDENTS. 9. BRIEF CONCLUSION.

RESUMEN: El ensayo ofrece una visión general de los instrumentos legales que tienen como objetivo asegurar la integración y participación de las personas con discapacidad en el mercado laboral y, en última instancia, en la sociedad. El análisis se mueve de un examen de las normativas constitucionales hasta las normas más detalladas. El autor también analiza la influencia y la aplicación de las normas jurídicas internacionales en el derecho italiano y los posibles enfoques diferentes para la definición de discapacidad entre estos dos niveles. El documento también resume las decisiones judiciales más relevantes sobre el tema y describe, a través de datos estadísticos, la situación actual del mercado de trabajo en relación con el empleo de las personas con discapacidad, así como la eficacia de los instrumentos de derecho

analizados. Por último, el autor analiza el papel de las universidades en la colocación de los jóvenes titulados con discapacidad y da ejemplos de las mejores prácticas y programas específicos.

ABSTRACT: This paper gives an overview of Italian legal instruments that aim to ensure the integration and participation of disabled persons in the labour market and ultimately in society as a whole. The analysis moves from an examination of Constitutional standards to a consideration of the most detailed regulations. The author also discusses the influence and implementation of international legal regulations in Italian law and the possible different approaches to the definition of disability between these two levels. The paper also summarizes the most relevant court decisions on the subject and describes the present labour market situation with regard to the employment of disabled persons as well as the effectiveness of the law instruments, analysed by means of statistical data. Finally, the author analyses the role of Universities in the placement of young graduates with disabilities and gives examples of best practises and specific programs.

PALABRAS CLAVE: definición de discapacidad, empleo de los discapacitados, discriminación, eficacia, Italia.

KEYWORDS: Definition of disability, employment, discrimination, effectiveness, Italy.

1. DEFINITION OF DISABILITY IN THE INTERNAL LEGAL SYSTEM IN THE LIGHT OF INTERNATIONAL DOCUMENTS

In the Civil law legal systems legislators need to "translate" a social phenomenon into a binding legal definition: a definition that often comes from other sciences such as sociology or economics.

After this first step, it is possible to connect regulations to that definition.

In such cases there is a more pronounced need than usual to fill the gap between changing realities and provisions founded on static definitions that will remain unchanged in lexical terms.

This should be the task of exegetes and judges, but it becomes more and more complicated in proportion to the strictness of the definition.

The definition of disabilities in Italian law could be taken as a paradigmatic case. As will become clear in this work, Italian legislators have approached this problem by avoiding a direct definition of the concept of disability that would provide a basis for the application of legislative measures, but decided to enumerate every single personal condition that is required to access the law, and in doing so made the scope of the law too restrictive. This outdated strict medical approach to disability is a heritage which still remains to be overcome today.

An important step to better explain this issue will be to compare the changes in the international documents about disability as well as in Italian law.

Therefore, highlighting any differences and inconsistencies between the different regulatory levels, this first section will examine the extent to which the regulatory changes in the Italian legal system coincide with various approaches to definition adopted by international organizations over the course of time. In other words, the question that will be examined is whether those organizations have been able to influence Italian legislative reforms on this matter.

The definition contained in the «International Classification of Impairments, Disabilities and Handicaps» published in 1980 by the World Health Organization reflects a medical approach to the issue according to which a *handicap* is a sequential chain which determines, for the individual, an obstacle to the ability to perform an activity in the manner typical of a normally-endowed person. According to the WHO, the origin of this chain lies in a disease that causes an impairment considered as a loss

of a psychological, physiological or anatomical function which in turn results in the limitation of the ability to perform tasks common to people without disabilities. This is the condition causing the *handicap* and the resulting disadvantage.

Since formulating this initial definition, the WHO has given increasing importance to the relationship between personal condition and the general context in which the person lives, adopting in 2001 a new classification system of disability which has the merit of emphasizing that it is a health condition which, at a given time in the life of any individual, determines a relational, working or other difficulty that is the essential meaning of disability.

This definition of disability is in line with that found in the «Convention on the Rights of Persons with Disabilities» adopted by the UN General Assembly on 13th December 2006, and ratified in Italy by Law No. 18 adopted on 3rd March 2009, which states that «Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments [therefore, not necessarily permanent][1] which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others»[2].

In brief, disability is identified as an evolving concept resulting from the interaction between people with impairments (also attitudinal ones) and environmental barriers that prevent them from enjoying full and effective participation in society.[3]

The Convention therefore confirms the almost complete reversal of the traditional view of disability; it is not the natural or health condition itself which is seen both to cause the disadvantage and to hinder the enjoyment of rights, but the standards commonly accepted by society. These standards determine the exclusion of the disabled from the opportunity to participate in and contribute to society.

We can, therefore, say that the trend in the definition of disability is to focus on the environment instead of on the health condition alone.

Having clarified these points, attention can now be focused on the evolutionary framework set by the national provisions.

The «Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate» («Framework Law for the Assistance, Social Integration and Rights of People with Disabilities») No. 104 adopted on 5th February 1992 included a definition

[1] Author's italics.

[2] Article 1, paragraph 2 of the Convention.

[3] Concept expressed in recital e) of the Convention.

of disability which was in line with the WHO classification of 1980[4]. This law represented at least a first step toward replacing the view of disability as exclusively a problem of social welfare in favor of the integration of the disabled person.

The subsequent Law No. 68, adopted on 12th March 1999, undoubtedly contains elements that reflect a turning point in the general conception of disability. This is seen, first of all, in the efforts that the legislators made to provide mechanisms of placement which have their starting point not in the disability itself, but in the skills possessed by the disabled person, which are considered as being of value in the right social and working context, without a lowering of work standards in terms of quality and quantity. This should be emphasized, especially if one takes into account that the original framework of this law, subsequently adjusted in the course of time, preceded both the latest documents of the WHO and the previously mentioned Convention adopted by the United Nations. Also in terms of the language employed, it is noted that the Italian legislation uses the words disabled and disability and marginalizes the use of words such as *handicap* and *handicapped* which are, however, mentioned in the first paragraph of Article 1[5].

---

[4] Specifically, Article 3, paragraph 1 of the Law states that «the *handicapped person* is one who has a stable or progressive physical, mental or sensory impairment, which causes learning, relational or work integration difficulties and results in a process of social disadvantage or marginalization».

[5] This paragraph states that: «The purpose of this Law is the promotion of placement and work integration of disabled people on the labor market through support services and targeted employment. It applies to:

a) people of working age suffering from physical, mental or sensory impairments and handicapped with intellectual disabilities, resulting in a reduction of working capacity greater than 45 percent, determined by specific committees for the identification of civil disability in accordance with the table indicating the percentages of disability due to impairments and disabling diseases approved in accordance with Article 2 of Legislative Decree No. 509, 23rd November 1988 by the Ministry of Health on the basis of the International Classification of Impairments developed by the World Health Organization;

b) disabled working people with a degree of disability greater than 33 percent, assessed by the National Institute for Insurance against Accidents at Work and Occupational Diseases (INAIL) in accordance with the provisions in force;

c) people who are blind or deaf and dumb, as mentioned in Laws No. 382 adopted on 27th May 1970, as amended, and No. 381 adopted on May 26th, 1970, as amended;

This leads us to the main point, because the latter Article contains a list of beneficiaries which defines its scope of application; in doing this it indirectly provides a definition of disability that is not otherwise to be found in the law. It is no coincidence that it has been the subject of scrutiny by the European Court of Justice[6].

The definition of disability was not a matter of contention, but in the opinion of this writer the analysis of the legal case and the Commission's findings, the subsequent defense of the Italian Republic and the final decision of the Court are useful in illuminating the as yet incomplete transformation of the way in which disability is viewed by the internal legal system.

The European Court of Justice confirmed through its rulings[7] that the definition embraced by the European Union was to be found in the UN Convention. This provides a universal definition of disability that is essentially applicable to any able-bodied person depending on the changing circumstances and accidents of life. On this basis the European Commission criticized what it deemed the restricted scope of the Italian regulation.

In reality a number of points can considered to explain the approach adopted by Italian national law.

First of all the legislator could have been more prudent in enlarging the scope of the law because beneficiaries of these provisions are likely to become a financial burden on the State. It should also be emphasised that, quite apart from the previously mentioned fact that the definition of disability to be found in international documents is actually preceded by that used in Italian national regulation, precisely because of the highlighted characteristics it is more difficult to assimilate the former into an internal legal system if, in order to leave less room for interpretation, the approach to drafting the law is too traditional - something which could easily occur in a Civil-law legal system.

---

d) war disabled, civil disabled and disabled ascribed to service from the first to the eighth category of the tables annexed to the consolidated text of the rules regarding war pensions, approved by Decree of the President of the Republic No. 915 adopted on 23rd December 1978, as amended».

[6] Ruling of the Fourth Chamber of the Court of Justice adopted on July 4th, 2013 in Case C-312/11 which was actually focused on the correct transposition of Article 5 of Directive No. 78/2000, which will be analysed here in the continuation of the discussion.

[7] It refers to the case mentioned in the previous note and to the judgment of the Second Chamber 11th April 2013 (HK Denmark) in joined Cases C-C-335/11 and 337/11.

Article. 1, paragraph 1 of the above-cited Law is a typical example inasmuch as it defines disability indirectly through preset paradigms which can be applied to specific concrete cases according to schematic "in or out" criteria.

Conversely a definition of disability like that adopted by the UN, which we might consider teleological rather than analytical, also needs an active role by the exegete in integrating the standard, and so the exercise of greater discretion in its application to individual cases than is normally regarded favourably in countries with a system of Civil-law.

In this circumstance, a judge-made law system would probably be more effective in the transposal of the EU anti-discriminatory directives.

Analysis shows that, in the course of time, both international institutions and, by and large, also national legislators have paid greater attention to parameters that no longer conform to a model of commonly accepted normality, but to the capabilities that each person can express in relation to the specific situations and opportunities he or she experiences. Our next step will be to examine how this framework matches the provisions of the Constitution of the Italian Republic which came into force as far back as 1948[8].

It must be said that the Constitution does not deal directly with the disabled except for one Article in which disability is considered only as a welfare problem, according to an old concept which almost views disabled people as the object of charity.

In fact, under Article 38 «Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the event of accident, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The duties laid down in this article are provided for by entities and institutions established or supported by the State. Private-sector assistance may be freely provided».

If we focus on the language used and the general tenor of this Article, it is clear that they are affected by the elapsed time. From its characteristic social perspective, the Republic directly sought to ensure the livelihood of all those people who, because of old age or physical or social condition, would otherwise have been seen as unable to

[8] On these issues see C. COLAPIETRO, "*Diritto al lavoro dei disabili e Costituzione*", *Giornale di diritto del lavoro e di relazioni industriali,* Vol. 124, No. 4, 2009 pp. 606-632, who considers the national provisions consistent with the Constitution.

obtain adequate means for their living needs under the standard of normal productivity. It is no coincidence that the Article is included in Title III - Economic Relations and suggests a tendential underlying presumption that the contribution of the so-called *incapacitated and handicapped* to productive activities is of non-economic utility.

Nowadays this Article should be reinterpreted in the light of the observations previously made in this work.

In view of the emergence of a new understanding of disability which sees it as a social and relational status not necessarily involving an impairment of productive capacity and physical and mental faculties (when valued and expressed within the right context), also Article 38 of the Constitution has to be reread as a means to support the condition of particularly serious cases in which disability completely deprives the person of the opportunity to contribute to the economic and social life of the country or cases of involuntary unemployment due to the difficulty of placement of the disabled person.

There are, instead, other provisions of the Italian Constitution that should be highlighted and which, because of their particular flexibility and abstraction, are absolutely modern also in this context. The Constitution's distinguishing feature is its focus on the primacy of the human being, who is considered not as an abstract individual, but as a relational individual who truly fulfils himself or herself, realizing his or her personality only in the social dimension.

Thus, Article 2 states, «The Republic recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed» and at the same time requires every citizen to contribute to the well-being of the community by fulfilling «fundamental duties of political, economic and social solidarity».

For this reason, the principle of equality is conceived not only as a formal proclamation of the equal dignity of all people regardless of personal status (Article 3, first paragraph), but is also declared to be a substantive right which obliges the Republic to «remove obstacles of an economic and social nature, which constrain the freedom and equality of citizens, impede the full development of human personality and the effective participation of all workers in the political, economic and social development of the country» (Article 3, second paragraph).

Within this framework, work becomes the keystone on which the founding fathers built the structure of the society they envisaged since through work, on which the Republic is founded (Article 1), citizens are enabled to express their personalities

and at the same time, according to «their potential and their choice», they must contribute «to the material or spiritual progress of society» carrying out «an activity or function». Through work, in short, the citizen obtains for himself or herself the fulfillment of the promise of the Republic, but at the same time contributes to the Constituents' vision for the whole of society. It is within this legal framework that the Italian legislator should consider the situation of disabled people.

Like everyone else, the disabled are part of the osmotic exchange of rights and duties, but what differentiates their situation is the balance between assets and liabilities.

Clearly, the duty of the Republic to remove material and social obstacles is much more significant in the case of the disabled. In particular, this duty involves creating the conditions in which a worker's disability is, in a sense, "defused" by ensuring that a disability is neither directly nor indirectly a source of obstacles to the individual's possibility of expressing the working capabilities through which, like every other person, the disabled person develops his or her personality. At the same time, each disabled worker can, in this way, repay his social debt by contributing to the social and material progress of society without being required to give more than that which his or her condition and possibilities allow.

Obviously, this implies precisely the concept of disability which has emerged in recent years: a definition of disability as a social and relational fact and not just as a disablement or impairment which makes the person "unfit" according to the common parameter of *normal* abilities.

In other words, if disability is a health condition in an unfavorable environment, the task of the State is to seek to remove the conditions that determine such a disadvantage, so as to restore to each person equal dignity as a citizen in the full and complete sense (a status that also involves the duty of social participation).

2. ANALYSIS OF GENERAL STATISTICAL DATA[9]

The most recent data on this subject dates back to 2011. This data was collected and prepared by two different institutes namely ISTAT[10] and ISFOL[11]. These statistics are not completely comparable to each other as regards the objectives of the research itself and as regards the aggregate results and sample used. In the case of the former aspect, the ISTAT research aims at assessing the social inclusion of people with every kind of limitation in personal autonomy, and therefore has a more general range than the ISFOL research, which has the specific aim of assessing the impact of regulatory instruments set up by the legislator with regard to the employment of people with disabilities.

For this reason, it is necessary to "cross-read" the available data and, in particular, the data that coincide at least in terms of the subject concerned and which have the aim of assessing the employment status of the disabled in Italy.

However, also in this case, the diversity of the statistical results can be explained primarily by the sample to which the questionnaires were administered.

In fact, the section of the ISFOL study specifically relating to the above-mentioned aspect concerned all those individuals who perceive themselves as disabled, with the result that it covered a wider number of cases than that of the similar ISTAT study. This specific part of the ISFOL survey also dates back to 2008 while the section of the ISTAT survey dedicated to the similar area of research is based on more recent data of 2011.

---

[9] In order to ensure a better treatment of the topic it is considered more useful to report in this section only the general statistical data concerning the phenomenon, whereas more specific data will be reported with the analysis of the regulatory data presented throughout the notes.

[10] *Istituto Nazionale di Statistica (National Institute of Statistics)*, the Italian public research institution that deals with social and economic censuses and surveys. The research in question, entitled «Inclusione sociale delle persone con limitazioni dell'autonomia personale» (Social inclusion of people with limited personal autonomy) referring to 2011 was published on 14th December, 2012. It can be downloaded from the website www.istat.it.

[11] *Istituto per lo sviluppo della formazione professionale dei lavoratori (Institute for the Development of Vocational Training of Workers)*. This is a public research institution supervised by the Ministry of Labour and Social Policies. The data used here is supplied by the «Sixth Report to Parliament on the State of Implementation of Law No. 68 March 12th, 1999, Related to 2010-2011» which may be viewed on the website http://bw5.cilea.it.

According to the ISFOL data, the percentage of disabled people in employment amounts to 58% (compared to 70% of the Italian population), while according to the ISTAT data, 28% of people with functional limitations are in employment while occupied residents in Italy amount to 56.8%.

In both cases the age group between 15 and 64 is taken as a reference.

The ISTAT survey also shows that compared to the total population and given an equal number of unemployed people, among people with limited personal autonomy, the inactive are proportionately fewer, while the datum that makes the difference is the number of those who "dropout" of the market and who represent 40% of the sample, whereas among the total population the figure is less than 10%.

The ISFOL data is, however, interesting for other reasons, since it is a way to understand the entry paths to the labour market for the disabled and how long they are able to remain within it.

It is observed how much more difficult it is for the disabled to achieve higher educational qualifications, since only 5% have a university degree compared to 12% of the working age population, and 40% of the disabled end their educational career at middle school compared to 34.8% of the total population.

The influence of the protection provided by the legislator in favor of the disabled emerges clearly from some significant statistical data. For example, they are predominantly "dependent" (in 81.7% of cases compared to 75.4% of employment in Italy as a whole) and a lot of them are employed in the service sector, within which the public sector is still a particularly significant employer. This is confirmed by the modalities through which employees with disabilities find employment. While it is true that among unemployed people with disabilities it is more common to turn mainly to family and friends as well as to recruitment centers[12] in order to find employment, it is equally true that, apart from personal acquaintances, the most effective channel through which employment is actually found is through open public recruitment competitions[13].

[12] In the latter case, in a manner which is more than proportional with respect to the population as a whole (25.9% vs. 15%).

[13] The main channels of access are, firstly, friends, relatives and acquaintances in 32.9% of cases (compared to 33.4% for the total population) and alternatively public exam competitions in 22.7% of cases (compared to 18.5% for the total population), despite the fact that only 4% of people with disabilities seek employment through the latter channel. The employment services

3. THE INTERNAL REGULATION AND THE QUOTA SYSTEM MECHANISM

Although it was far from being immune from criticism or inconsistencies, Law No. 68[14] adopted on 12th March, 1999 entitled *Standards for the Right to Work of Disabled People* led to a significant cultural and legal-regulatory shift in Italy, replacing the previous law on compulsory employment, namely Law No. 482 of 2nd April, 1968. While the earlier law was essentially based on numerical job placement, the 1999 Law introduced the concept of "targeted" employment.

The precise aim of the law is to build «technical support tools that permit the proper assessment of the capacity to work of people with disabilities and to place them in the appropriate post» (Article 2). The purpose of this is to restore to each disabled worker the opportunity to play an active and productive role in society through the opportunity to perform a job in which the specific residual capacities of each individual are best expressed.

The purely welfare-based logic which existed in the past, for which the regulations were seen as a way to enable the disabled to sustain themselves through any job "offered" by employers, who were in effect being asked for a sort of solidarity contribution through the employment of disabled workers, has been replaced by a form of promotion of employment through forms of "contracted" recruitment, tailored in relation to the subjective qualities of the worker and the real needs of the company which employs him or her.

From this different perspective, each disabled person can perform a job that is appropriate to their individual characteristics and allows them, to all intents and purposes, to have an active role in society as «integral and integrated parties of the social and production system of the country»[15].

---

are useful only in 10.1% of cases, which proves the limited effectiveness of this public body (considering that 26% of unemployed people with disabilities apply through them)

[14] Among the earliest analytical comments on the 1999 Reform see D. GAROFALO, *Disabili e lavoro, Profilo soggettivo*, *Inserto di diritto&pratica del lavoro*, No. 37, 1999, pp. 3-23 and *Id*, *Disabili e lavoro, Profilo oggettivo e sanzioni*, *Inserto di diritto&pratica del lavoro,* No. 38, 1999, pp 3-29. For a complete, although not fully up-to-date analysis, of the provisions related to the access of the disabled to labour see F. LIMENA, *L'accesso al lavoro dei disabili*, Cedam, Padova, 2004.

[15] F. LIMENA, *ibidem*, p. 19.

For people with disabilities, the provisions of Law No. 68/99 are a crucial element in the overall regulatory framework[16], because they specifically aim at facilitating their access to the labour market[17].

The starting point of this legislative construction is the obligation for public and private employers to hire disabled workers in a variable amount that depends on the total number of human resources of the company. Thus, if the company employs more than 50 employees, the quota is 7%; if it employs from 36 to 50 employees, the quota is 2 workers; finally, if it has between 15 and 36 employees, one disabled person is sufficient to meet the requirements[18]. While small businesses with under 15

---

[16] The judicial framework is first of all composed of the "Framework Law for the assistance, social integration and rights of the *handicapped* No. 104/1992" which, as regards the question of labour law, contains provisions which promote educational integration and vocational training for disabled people and delegate to the Regions and Local Authorities the rules relating to benefits for individual "handicapped" people to help them to reach their workplace or to start up and carry out activities of self-employment, as well as the regulation of incentives, concessions and subsidies for employers, also in order to adapt the workplace to meet the needs of recruited "handicapped people" (Article 18), and for service cooperatives (Article 38).

To complete the picture, mention should be made of the Law on Social Cooperatives, whose aim is facilitating the work placement of disabled persons (according to this law, at least 30% of their members should be disadvantaged people) and Laws No. 63 and No. 42 of Legislative Decree 81/2008 on Safety in the Workplace, respectively, related to the obligations of the employer in establishing structures which take into account the access needs of disabled people, and in adapting work tasks in the event of unexpected unsuitability to the tasks being performed.

[17] The legislator wanted to focus on two key features: flexibility in the hiring process (connected to recruitment procedures that could be programmed and agreed upon between the institutions responsible for management of the mandatory employment and employers obliged to employ) and training, incentivized also during the employment relationship, which should ensure qualification or re-qualification of the disabled without the necessary expertise.

[18] According to the statistics provided by ISFOL in the report mentioned above in the paper, the main area receiving disabled workers is composed of firms with over 50 employees, while the size class of firms which registered the highest rate of available positions, is the one including firms with from 15 to 35 employees with rates of about 25% in 2010 and 23% in 2011, while public administration authorities with more than 50 employees develop more than 96% of the reserve share and indicate a percentage of available positions of approximately 19% in both years (see pp. 47-48).

employees obviously have the option to employ disabled people, they are not obliged to do so.

The criteria to calculate the reserved quota was changed with Law No. 92 adopted on 28th June, 2012, which introduced significant exceptions and clarifications regarding the previous general rule according to which all "subordinate" workers under a contract of paid-employment are computed in order to determine the number of disabled people to hire. Specifically, it was decided to exclude from the computation disabled workers recruited compulsorily according to the Law, members of Production and Work Cooperatives, managers, temporary agency workers, workers engaged in activities abroad, home-based workers, and workers employed under fixed-terms for a period of 6 months or less.

Procedurally, the law states that employees ascertained as disabled who aspire to a job must enroll in the appropriate lists held by recruitment centers so that a specific form is compiled for each worker containing «Working skills, abilities, capacities and dispositions as well as the nature and degree of disability» (Art. 8).

As a preliminary act to the actual process that leads to the employment of the worker, employers must send an information prospectus in relation to the employment situation of their company by January 31st each year.

This prospectus should contain information about the total number of employees and specify the number and names of the employees who are already beneficiaries of the measures introduced by Law 68/99, the positions and tasks available and all the information necessary in order to proceed with the introduction to employment for beneficiaries of the regulation in question.

In fact, by comparing this information it is possible to facilitate a match between the effective demand for work and the supply of labour, and at the same time to introduce each disabled person not just to any job, but to an activity suitable for his or her skills and professional qualifications.

Consequently, the start-up of the employment relationship can occur in two ways: The first of these was conceived as the main institutional channel by the legislators, while the second is through the signing of specific agreements. The latter will be discussed below together with the provisions that incentivize its use, but a few words should be said here about the mechanism through which legal requirements are complied with and about the modalities used to choose the workers to place[19].

[19] It is only possible to mention briefly here the previous regulation ex Law No. 482/68 in order to highlight the different logic used in the past. The system then revolved on a numerical placement based on a ranking list of disabled people registered with the employment services.

Within 60 days of the time when the legal conditions are met, each employer obliged to meet the quota has to submit a request for the one or more workers needed. After that, the relevant authorities arrange the placement procedure.

The information prospectus already indicates which tasks or duties are available and, in addition, the employer may specify the category, position and job title of the disabled worker once introduced to work. The registration in the lists, as has been explained, indicates working skills, abilities, capabilities and dispositions as well as the nature and degree of disability of each worker.

Article 9, paragraph 2 also states that «In the case of impossibility of introducing employees with the specific qualification requested or otherwise arranged with the employer, the relevant authorities shall provide workers with similar qualifications, according to the ranking and prior training or apprenticeship [..]».

As is clear at this point of the analysis, *matching* this information between public bodies and employers will tend to remedy the possible negative effects of previous numerical placement system[20].

In addition, and in line with the modalities we have seen, Article 7 allows the employer to choose directly a specific person he wants to hire (this is known as "*assunzione nominativa*"), but this is possible only to meet the following portions of their quota: 50% for employers with between 36 and 50 employees; 60% for employers with more than 50 employees and, finally, employers can fulfill their obligation to employ one disabled person using this option if they have between 15 and 35 people[21].

The placement took place on the basis of possession of the generic vocational qualification requested by the employer regardless of the correspondence with the professional level of the worker to be employed. The whole process resulted in the mortification of both the worker's capabilities and the company needs. It was, thus, an inefficient and ineffective system with respect to its goal of work integration, which the legislators intended to change entirely.

[20] Although it must be said that the maintenance of a certain proportion of workers placed at work according to the numerical system on the basis of the ranking list and under the control of public bodies should not be seen as an entirely negative fact, because the probable aim of the legislator was a better distribution of job opportunities among workers with disabilities to whom employers would hardly ever turn voluntarily.

[21] Also political parties, trade unions, social organizations and bodies are obliged to employ in this way.

3.1. Exonerations, exclusions, suspensions and compensation regarding the obligation of employment per quota

The obligation under Article 3 of the law is partially mitigated by the cases of exclusions and exonerations granted by Article 5 of the same law. Although this Article was partially remodeled by subsequent reforms, most recently those of the Monti government, its general logic has not been changed and, for this reason, it is still considered in line with anti-discrimination regulations.

The obligations established by the law do not apply to either public or private employers that operate in certain sectors such as building as well as in air, rail, sea and land transportation (but in this case exoneration covers the on-board personnel only). These exclusions evidently reflect the false preconception that certain types of activities are in themselves not accessible for workers with disabilities where the rule works by a kind of "legal presumption" that excludes a more useful case-by-case analysis.

Law No. 92 adopted on 28th June, 2012 expanded the circumstances for exclusion in the building sector when it stated that «Also considered building site personnel are those directly active in industrial or plant installations and in related maintenance works carried out on site» (Article 4, paragraph 27).

In addition, it is important to mention a regulation (Art. 5, paragraph 3) according to which employers whose businesses are involved with unspecified «special conditions of activity» may choose to pay a contribution to the Regional Fund for Disabled Employment instead of entirely meeting their compulsory quota. Despite the vagueness in the wording of this provision, it seems clear, first of all, that it is not possible to be completely exonerated from the duty of employment simply by paying the contribution and secondly that the Article in question applies to exceptional cases only.

Finally, Article 5, paragraph 8 specifies that in the case of private employers taking on disabled workers in different production units and of private employers in companies that are part of a group, the legal obligations laid down in Articles 3 and 18 can be fulfilled by compensating for the smaller number of disabled workers employed in one unit or group with the assumption of a greater number of disabled workers in other factories or other group enterprises established in Italy[22].

[22] Article 9 of Decree Law No. 138, adopted on 13th August 2011, ratified by Law 14 of September 2011, introduced a new system of automatic compensation thereby eliminating the need for the ministerial or relevant provincial body authorization. Therefore, a private employer with personnel in several production units or in different companies of the same

A similar regulation allows public administrations, upon motivated request, to employ in compensation within the same Region provided a specific authorization is obtained (Article 5, paragraph 8-ter) [23].

The legislator has also provided the possibility to suspend the obligation of employment per quota for companies that are in such a critical situation as to have requested the intervention of the Extraordinary Treatment of Salary Integration or that have workers enrolled in the list that ensures a special unemployment benefit (Article 3, paragraph 5).

4. THE AGREEMENT INSTRUMENTS AND THE INCENTIVE EMPLOYMENT POLICIES

As mentioned in the previous section, the fulfillment of the obligation pursuant to Article 3 of Law 68/99 can be accomplished through the agreement instruments introduced by the 1999 reform, it being understood that the same instruments are also available to those employers completely excluded from the scope of Article 3 of Law No. 68/1999. As we shall see here, an important role is also played in this by the Regions and by Provincial services.

The "*schedule agreements"* ("Convenzioni di programma") pursuant to Article 11 of Law 68/1999 are particularly important both for the purposes underlying the regulation and the incentives associated with them which have a positive impact on their effective utilization. The legislators' idea in creating these agreements, which are signed between companies and Public employment services to meet the mandatory quota, was to facilitate the gradual integration of people with disabilities and stabilize their employment in the company required by law to employ them.

---

group who wants to rely on the automatic compensation has only to submit electronically the information form pursuant to Article 9, paragraph 6 of Law 68/99 to each of the relevant Provincial bodies in which the production units of the company itself or branches of the various group companies are located.

The form should, clearly, point out the fulfillment of the obligation at the national level on the basis of data relating to each production unit or undertaking belonging to the group.

[23] Amendments to paragraph 8 and addition of paragraph 8-*ter* were made through Article 9 of Legislative Decree No. 138, adopted on 13th August 2011, converted into Law No. 148/2011.

A personalized plan of interventions to address most effectively the obstacles encountered when introducing disabled people at work, can be defined through this type of program.

These tools establish times and modalities of employment that the employer agrees to respect. It is also possible to include the option for the employer to choose the workers directly ("chiamata nominativa" as referred to above), to ease the introduction of the disabled at work by means of internships for training or guidance purposes as well as to offer fixed-term contracts, and to conduct trial periods longer than those required by collective bargaining (Article 11, paragraphs 1,2,3).

Therefore, the advantage for the employer is a more favourable management of the circumstances leading to employment than would be the case applying the quota system *sic et simpliciter*, and moreover the chance to plan the entry of disabled workers in the productive system a few at a time without being worried about possible sanctions for non-compliance with the quota required by law.

Article 11, paragraph 4, also provides specific *agreements of labor integration* designed for individuals who have special difficulty in entering the ordinary working cycle. These persons have to be entered on a training path which is an integral part of the agreement and which must be observed periodically by the public bodies in charge of monitoring and control. The regulation requires that the agreement include a detailed explanation of the tasks assigned to the disabled worker and of the manner in which they are to be carried out. Moreover the agreement also includes forms of support, advice and mentoring provided by the appropriate Regional services or vocational guidance centres or bodies, institutions, social cooperatives and voluntary associations, enrolled in the Regional registers, which perform activities to facilitate the placement and labour integration of disabled people.

Article 11, paragraph 5 allows agreements to be stipulated with a number of legal entities involved in social activities such as social integration cooperatives, consortiums at least 70% of each of which formed by social cooperatives set up as cooperative companies, and voluntary organizations enrolled in the Regional registers, etc.

Article 13 of this law also grants the Regions and Autonomous Provinces the responsibility of regulating the procedures and modalities for granting contributions related to the employment process from the *Fund for the Right to Work of People with Disabilities* at the Ministry of Labour and Social Security in favor of employers who employ through the agreements pursuant to Article 11.

Although the economic contribution is also granted to those employers who have no obligations under Article 3, this is in any case only for the permanent employment

of workers who have severe reductions of their working capacity of at least 79% (and in this case the contribution is 60% of the wage cost) or between 67% and 79% (contribution of 25%). A similar contribution, consisting of the partial coverage of the annual wage cost, is also provided to incentivize workers with severe disabilities particularly in their learning abilities. Moreover concessions are provided in social security contributions[24].

To continue the analysis, Article 12 of Law 68/1999 concerns the so-called "temporary placement agreements" ("*convenzioni di inserimento temporaneo*") involving private employers, cooperatives or freelance professionals. This kind of agreement can be activated only in the presence of a verified difficulty with introducing the disabled worker directly into the company, when the person in question is considered to need training in order to be able to work effectively for his employer. This instrument foresees a complex triangular relationship between an employer subject to the obligations of the law, the relevant Provincial authorities, and a "host". The first two sign the convention agreement ("*convenzione di inserimento temporaneo*"). The "host" may be a social cooperative, a disabled freelance professional, a social enterprise, or a private employer not subject to the obligations, and its objective will be the introduction of the disabled person into work. In brief, the employer employs the disabled worker on a permanent basis, but employment remains "frozen" for the duration of the temporary placement agreement. At the same time, with the drafting of this agreement, the worker is introduced to a hosting employer's workplace, integrated in the hosting-company's human resources during a period of time of up to a maximum of 12 months + 12 months, during which the disabled worker carries out appropriate training to prepare for future placement in the production process of the employer.

In addition, the employer is obliged to entrust the "host" with orders or commissions for an amount not less than that which allows the latter to apply the clauses of the national collective bargaining contract (above all the clauses related to

[24] The framework of incentives is completed by letter d) of paragraph 1 of Article 13 of the Law in question, which allows for the partial lump-sum reimbursement of expenses necessary for the transformation of the workplace in order to adapt to the operational capabilities of disabled people with reduced working capacity greater than 50 per cent, or for the provision of telecommuting technologies or the removal of architectural barriers which restrict in any way the labor integration of disabled people. It should be added, for completeness, that the Regions, are entitled to grant service and training subsidies to disabled self-employed people.

wages), to pay social security and welfare contributions in favor of the workers, and to fulfill the functions aimed at introducing the placement of the disabled at work.

The use of this kind of agreement for one disabled worker is allowed when the employer employs fewer than 50 workers, up to a limit of 30% of the mandatory quota when he employs more than 50, but it must be said that in practice this instrument has almost never been used.

Article 12-*bis* Law 68/99 introduced by Law 247/2007 provides for a new type of agreement that is similar to the one described above. The Employment Services may enter into special agreements (only for the employment of the disabled who have particular characteristics and placement difficulties) with private employers subject to the quota system (named "*employer transferor*") and "*recipients*" (such as social cooperatives and their consortiums, social enterprises, and private employers not subject to the obligations of Law 68/99).

In this case, the main difference from the agreement under article 12 lies in the fact that the disabled worker will be hired directly by the "recipient", while in common with the provisions of article 12, the "*employer transferor*" entrusts the "recipient" with orders or commissions for a value amounting to not less than the wage and welfare contributions arising from the assumption including any training and coaching costs.

Such agreements must have a duration of 3 years, extendable only once for a further period of not less than two years. At the expiry of the agreement, the "*employer transferor*" can hire the disabled worker directly with a permanent contract. In this case, the employer will be able to access the National Fund for the Right to Work of Disabled People achieving the right of first refusal in the allocation of resources.

These agreements are permissible within the limits of 10% of the mandatory quota. The employment of the disabled worker is considered fulfillment of the employment obligation pursuant to Law 68/99 during the period of effectiveness of the agreement.

Some of the Regions have regulated the agreement under Article 12 bis of Law No. 68/1999[25] foreseeing validation of the agreement itself by the Region, generally

[25] The statistics related to all agreements types broadly show a majority for use of those under article 11. The agreements of labor pursuant to Article 11, first paragraph, in Italy, were 9,333 (of which 3,759 for women) in 2010 and 9,163 in 2011 (of which 3789 for women). Labour integration agreements pursuant to Article 11, paragraph 4, were 1,545 in 2010 (of which 593 for women) and 1,907 in 2011 (of which 764 for women). The agreement instrument is especially widely adopted in Northern Italy where in statistical terms its use is double that in

on the basis of the respect of four main criteria namely: method of calculation of the unit value of the commission or order, numerical limit in covering the mandatory quota by agreement, modality for adhesion to framework agreement, procedure for the identification of disabled workers with particular placement problems that need to be taken on by the cooperatives in order to take advantage of the framework agreements.

It is appropriate in concluding this point, to make some brief general comments on the legal instruments considered so far.

Especially through the agreement instrument, which is agreed on between the public administration and the private employer, the legislators undoubtedly attempted to overcome the idea that pursuing the objective of removing barriers to the social inclusion of people with disabilities should necessarily pass through measures taken by public bodies. In fact, compulsory measures are frequently deemed by entrepreneurs as intrusive on their prerogatives and entrepreneurial powers, and this can seriously undermine their effectiveness.

The possibility to fulfill the legal obligations related to the quota through agreements or through the direct recruitment of individuals and the greater focus on matching the actual needs of the company with the professional skills and knowledge of the resource to place are suitable measures to reconcile the right to work and the social dignity of the disabled, both analysed as constitutional rights at the beginning of this work, with the employer's private economic initiative that is safeguarded by Article 41 of the Constitution. The necessity of this reconciliation was underlined by the Italian Constitutional Court in a number of important rulings which will be analysed briefly in Section 7.

However, one of the critical points of the current system, particularly regarding the agreements, is its non-uniform application in all parts of the national territory.

The fact that these instruments have been left in the hands of the local authorities has meant that their application has been affected by the different experiences and capabilities of those bodies, as well as by the recruitment centers that are an integral part of the overall employment system. This has meant that effectiveness in achieving

---

Central and Southern Italy. The agreements pursuant to Article 12 are virtually unused (only 8 in 2011), while slightly more are those pursuant to Article12bis (15 in 2010 and 22 in 2011). In this case, these agreements were signed by the Regions of Central and North-Eastern Italy.

the final goal has varied according to geographical location, with greater efficiency in the northern regions and greater difficulty in those of the south and on the islands[26].

5. THE ROLE OF THE LOCAL AUTHORITIES.

Law No. 68/99 also assigns a role to the Regions and Provinces that has become very important over time, firstly due to the reform of Article 117 of the Constitution concerning the division of legislative powers between the State and the Regions and, secondly, to the reform of employment services, which are now permanently assigned to local authorities following the ratification of Legislative Decrees No. 181/2000 and 297/2002 and Presidential Decree No. 442/2000. This has resulted in the search by the Regions for ways to link the rules of Law 68/99 with the later regulatory instruments, with the inevitable result of solutions that are not always uniform.

In both the private and public sectors the hiring process introduced by Law 68/99 goes through the provincial recruitment centers which are appointed to receive requests from employers for disabled workers to introduce at work. These bodies establish a single ranking list of unemployed disabled people and, following the requests of employers, they take steps to place the workers (Article 8, paragraph 1). There are, however, two exceptions, namely the cases of so-called "internal disabled workers" - workers that become "unfit" for the tasks assigned to them as a result of injury or disease in the course of their work and are not included in the list at all (covered by Article 4, paragraph 4) and disabled people who have been dismissed because of the reduction of personnel or for justified objective reasons and who maintain their position in the original ranking (Article 8, paragraph 5).

The authority to verify infringements of the obligations related to the quota system (Article 9, paragraph 8) and to determine penalties (Article 2, paragraph 15), remains in the hands of a peripheral body of the State, namely the Provincial Directorate of Labour (Direzione Provinciale del lavoro).

The criteria and procedures for the formation of the aforesaid ranking list is also delegated directly to the Regions under Article 8, paragraph 4 of Law 68. Although

[26] Even though the following statistics must be analysed taking into account the general condition of advantage in terms of employment and economic development of Northern Italy compared to Southern Italy and to the islands, it is still useful to note that 67.4% of the successful placements are operated in the North while the Centre achieves 21.6% and the South 10.9% (these figures refer to 2011, but similar data was reported in 2010, (cf. ISOFOL report pp. 60-61).

the criteria used differ from Region to Region, priority is generally given to a) length of inclusion in the list of people with disabilities b) economic and financial circumstances c) family expenses d) the degree of disability and e) difficulties with locomotion.

It is clear that the consideration of additional elements other than disability can often lead to a kind of marginalization or limited recognition of both the degree of disability and of the individual's skills and ability. At the same time, as we have already seen, the percentage reduction of work capacity does have a role both in the employment incentives provided for by Article 13 of Law No. 68, and employment by agreements (Article 12 and 12 bis). On the other hand, socio-economic indicators that are irrelevant in those areas are, indeed, important in the targeted employment process.

As a result of the implementing measures of Legislative Decrees No. 181/2000 and No. 297/2002, a fundamental role is played by the Regions in the establishment, preservation and suspension of the "unemployed status", that is, with regard to the subject of this paper, the essential condition to benefit from a protected employment process.

For these reasons, Regions have the task of coordinating the general provisions with those provided for by Law 68/99. For example, in the case of loss of unemployment *status*, Article 10, paragraph 6 of Law 68/1999 foresees the loss of unemployment subsidy and cancellation from the unemployment list when there is a failure to answer the call or the unjustified refusal of a job matching the worker's professional skills. According to the law, the loss of rights is determined by the Provincial Directorate of Labour, a public body of the State without any authority in employment issues.

Similar and more detailed rules regarding the matching of labor supply and demand were provided by Article 4 of Legislative Decree No. 181 adopted on 21st April, 2000, which placed this matter under Regional and Provincial control.

The regions have, therefore, operated so as to adapt the general discipline to cases of unemployment of disabled workers, acting to resolve the critical situations that result from coordination between the different sources of law.

Consequently and in compliance with the principle of subsidiarity, from the regionally addressed acts comes the responsibility of the provinces for the most minutely bureaucratic aspects such as planning, implementation and monitoring of interventions in favour of the employment the disabled, the management and

preparation of the ranking list, the implementation of actions financed with the resources of Provincial Funds, and the granting of the benefits provided for by Article 13, Law 68/19.

6. THE ANTI-DISCRIMINATION REGULATION AND THE INFLUENCE OF EC DIRECTIVES

The analysis of the regulations would not be complete without taking into account the most recent legislation, namely Law No. 67 adopted on 1st March, 2006, regarding measures for the legal protection of people with disabilities who are victims of discrimination, and Legislative Decree No. 216 adopted on 9th July, 2003, which has implemented in the national legal system Directive 2000/78 /EC on equal treatment in employment and working conditions[27]. These two measures partly overlap in terms of regulation, but are complementary in terms of the scope of their application.

In effect, both regulatory instruments adopt the same concepts of direct and indirect discrimination as well as of harassment directly inspired by the European Directive. In addition, in both cases, a specific provision refers to Article 44 of Legislative Decree No. 286/98 (Consolidated Law on Immigration) concerning judicial protection[28].

---

[27] For a diachronic analysis of the legal remedies against discrimination, especially as applied in reference to the disabled, from its origins in the United States to the European Union Directives, see G. TUCCI, *La discriminazione contro il disabile: i rimedi giuridici*, *Giornale di diritto del lavoro e di relazioni industriali*, No. 129, 1, 2011, pp. 1-27.

[28] In particular, paragraphs 1 to 6, 8 and 11 of Article 44 of the Consolidated Law on Immigration are recalled.

Thus, for any case of discrimination in the workplace regardless of the discriminatory factor, it is possible to activate a summary emergency judgment trial in order to verify the discrimination and to remedy through a court order in the form of an injunction or *inaudita altera parte* decree in cases of particular urgency, which results in the termination of the behavior and the removal of the effects. It is, therefore, an instrument based on Article 28 of the Workers' Statute to which, as in the case of anti-union conduct, in the event of non-compliance the penalty is connected with the court order. The revision of the decision on appeal is clearly possible.

The reference to paragraph 11 imposes a social clause on companies also based on the one provided for by Article 36 of the Statute of Workers. The verified discriminatory behavior

The complementary nature of these acts lies, however, in the fact that the most recent of the two regulates equality and the prohibition of discrimination against any individual on grounds of religion, personal beliefs, disability, age or sexual orientation, exclusively in the employment context from the beginning until the termination of the working relationship and includes any event related to it.

The most recent Legislative Decree, however, exclusively protects people with disabilities, but has a wider scope in terms of application, being designed to provide them with the full enjoyment of their civil, political, economic and social rights through the prohibition of any discrimination in any field or sphere of social life and relations.

Closer analysis of Legislative Decree No. 216 adopted on 9th July, 2003, shows in the first place that Article 4 of the Decree modifies Article 15 of the Workers' Statute [29], so as to make it the pivotal provision against discrimination deriving from all possible forms of diversity. Article 3 of this Decree specifies its scope. The general principle of equal treatment must be observed with specific reference to the following area where it can be judged directly:

> a) access to employment and work, either self-employment or waged employment (including selection criteria and employment conditions);
> b) employment and working conditions during the relationship (including career advancement, wages and conditions of dismissal);
> c) access to all types and levels of vocational guidance and training, further training and retraining, including practical work experience;
> d) membership and activities in organizations of workers or employers, or in other professional organizations and services provided by these organizations.

Paragraphs 4 and those which follow in the same Article 3, contain a number of exceptions to the general principle, one clause regarding specific work activities or functions of public interest (the armed forces, public order, emergency and prison services) and two general clauses.

The first of these is provided directly by the Directive, but could probably have been detailed better by the legislators. This clause considers that the differences in

---

results in the withdrawal of benefits and/or any tax break or benefit as well as public tenders, and in the most serious cases, to the exclusion of the person responsible from the granting of any financial or credit incentives, or from any tender, for a period of two years.

[29] Law No. 300, adopted on 20th May 1970.

ex Article 2 when they derive from the necessary characteristics or abilities required of the employee as dictated by the nature of the work itself or the context in which it is carried out. In other words in cases where they are «essential and determining for the purposes of carrying out the activity itself».

However, the legislators went beyond the requirements of the Directive by providing for a quite generic additional exemption according to which differences of treatment that «are objectively justified by legitimate aims pursued through appropriate and necessary means» are not to be considered discrimination (Article 3, paragraph 6) .

Another issue raised by the not quite correct implementation of the Directive in the national legal system, already emphasized by observant authors[30], was the absence, following the transposition, of any reference to Article 5[31] of the Directive and to the related Article 2 b) ii).

In this way the Italian legal system was left without a major tool for change that implies the very definition of "interactional disability" found in the United Nations Convention approved by the European Community[32] and which is aimed at removing the obstacles which substantiate disability within the working environment.

In actual fact, Article 5 of the Directive is the one that requires the employer to provide *reasonable accommodation* for adapting the work environment to concrete situations in order to make it suitable for the best expression of the personal qualities and working capacities of the differently-able person. When the European Commission referred Italy to the Court of Justice for inadequate transposition[33] of the

---

[30] M. BARBERA, *Le discriminazioni basate sulla disabilità*, in VV.AA., *Il nuovo diritto antidiscriminatorio*, Giuffrè, Milano, 2007, pp. 77-123.

[31] Article 5, the summary of which is "Reasonable accommodation for disabled people", declares that «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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned».

[32] By Decision 2010/48.

[33] With the infringement procedure IP/ 09/1620. The defense of the Italian Republic was based on trying to prove the correct transposition of the Directive by means of the interpretation of the overall Regulatory Framework in which the Legislative Decree was

Directive, the trial resulted in a condemnation based on the following reasoning[34]. On the basis of a previous similar ruling related to Denmark[35], and contrary to the arguments presented by the Italian Republic, the Court stated that the national regulation had not properly transposed the Directive, on the grounds that it contained only public measures of support for the employability of people with disabilities and excluded any direct and specific charges at the expense of employers. Article 5 of the Directive, on the contrary, is specifically intended to oblige all employers to take tangible measures involving the various aspects of employment and working conditions that are effective with respect to the needs of specific situations[36] that arise and that need a proper action carried out by the employer.

This ruling was followed by the addition of Article 3 *bis* of Legislative Decree 216/03[37], which states that «In order to ensure respect for the principle of equal treatment of people with disabilities, public and private employers are required to find reasonable accommodations in the workplace, as defined by the UN Convention on the Rights of Persons with Disabilities, ratified under Law no. 18 adopted on 3rd March 2009, to ensure people with disabilities full equality with other workers. Public employers must ensure the implementation of this paragraph without new or increased charges for public finance and through human and financial resources available under the current law». The choice to refer directly to the UN Convention rather than to the Directive, and the financial limit imposed in relation to the public employer, must be highlighted.

---

inserted. On the contrary, in the view of the Court of Justice, the national regulations could not be considered fully accomplished precisely because of the absence of any provisions of specific obligations for employers.

[34] See note n. 6. For a comment on the judgment see: M. C. CIMAGLIA, *"Niente su di noi senza di noi": la Corte di Giustizia delinea il nuovo diritto al lavoro delle persone con disabilità*, *Rivista giuridica del lavoro*, 3, 2013, pp. 399-414, and M. AGLIATA, *La Corte di giustizia torna a pronunciarsi sulle nozioni di handicap e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, *Diritto delle relazioni industriali*, 1, 2014, pp. 263-268.

[35] Judgment mentioned above in note n. 7, the analysis of which is in the report related to Denmark within the same issue of this journal.

[36] The Court made even practical examples (paragraph 60 of the mentioned ruling) such as the ones related to the arrangement of the premises, the use of equipment, work rhythm, workplace or distribution of tasks in order to put the disabled in a condition to access and perform their jobs meaningfully.

[37] By means of Article 9, paragraph 4 Law Decree 76/13, converted into Law 99/13.

Being an implementation provision of a directive, the legislators should have produced a more comprehensive and detailed regulation and not simply reproduced the general principle and so judges will inevitably take action to meet this failing. Moreover, it can be expected this provision will result in litigation in the coming years. This is even more the case for the fact that, in accordance with Article 3 letter c) of the Directive, it must be applied both to conditions for employment access and to working conditions, including dismissals and wages.

It is therefore likely that the concrete application of this measure will turn into a massive innovation since it will potentially reverse well-established orientations that emerged from court decisions that are based on the supposed absolute immunity of organizational decisions made by entrepreneurs, who have been granted incontestable discretion in this sphere. The latter principles have, in fact, always been safeguarded by the Corte di Cassazione (the Italian Supreme Court; hereinafter the "CdC") also in the interpretation of the relevant provisions of Law 68/99 and those which preceded it.

Specifically, the CdC, stated in the past that also when disability affects the workers during the employment relationship the employer is not obliged to modify the workplace materially or to acquire new technologies to make the condition of the worker compatible with the company organization (*sic* Cass. No. 10339[38] Aug. 5th, 2000), and also that, in the event of the worsening of the health status of a disabled worker employed under Law 68/99, the employer has no obligation to modify or adapt the organization to the worker's new health conditions, even in order to avoid dismissal in the case of unsuitability for the preceding tasks (*sic* Cass. No. 24091/2009), despite Article 10, paragraph 3 of Law 68/99. In fact, according to the Court, in such cases the employer should only check if different tasks which would be suitable for the state of health of the disabled worker, are vacant in the company.

[38] In *Massimario della giurisprudenza del lavoro*, 2000, p. 1208 annotated by FIGURATI, *Questioni in tema di licenziamento intimato durante la malattia: la richiesta di ferie interrompe il rapporto?*, pp. 63-64.

7. ANALYSIS OF NATIONAL CASES

The constitutional validity of the system of compulsory employment based on Legislative Decree 3rd October 1947 (concerning the compulsory employment of mutilated and disabled veterans) and later Law No. 482/1968 (replaced in 1999) was challenged, because some believed it restricted the freedom of economic initiative, and of the organization and dimensioning of companies, all elements protected by Article 41, paragraph 1 of the Constitution.

The alleged violation stemmed from the fact that this obligation derived directly from exceeding a certain company size, commensurate with the number of employees, regardless of any other economic and/or organizational consideration. In addition, it was assumed that the costs of the obligatory employment of disabled persons would be borne by certain groups of private citizens, while by their very nature of social public expenditure, these costs should have been a burden on the whole community and therefore on treasury funds pursuant to Article 38 of the Constitution.

The rulings of the Constitutional Court, which had intervened on these issues in order to reject the previously mentioned constitutional findings, are still of current relevance since they affirm valid general principles, *mutatis mutandis*, also in accordance with the regulations in force today.

The first ruling, to which all successive rulings would refer, was No. 38, adopted in 1960, in which the Court stated that the purpose of the rules then in force was not to provide the beneficiaries with charitable maintenance, but to put in place conditions to conclude a real employment contract in which physical fitness for employability was a required basis for the start and continuation of the work relationship.

The Court added that those provisions of the Decree were necessary to remove «in harmony with the spirit and the wording of the second paragraph of Article 3 of the Constitution, the obstacles to the actual participation of all workers in the economic and social development of the country».

Moreover, the Court also considered that it was right, in accordance with Article 4 of the Constitution, that the regulation promoted and implemented the conditions which made it possible for the beneficiaries still in possession of the necessary aptitude and professional skills to return to the work environment, with employment contracts that required the performance of work, offering them the «way to still play a role according to their abilities; [*urging*] the fulfillment of that inescapable duty of

solidarity which is a solemn statement of the fundamental principles of the Constitution (Article 2) [..]»

Similar observations were made in the coeval ruling No. 55 adopted on 11th July, 1961 where the Constitutional Court stated that the regulation on war invalids then in force was not in conflict with Article 38 of the Constitution because it did not dictate assistance in favor of the disabled, but predisposed «a system designed to ensure employment and re-integration in the national economic productive life cycle, for people who, although handicapped, retained a capability to work and were still able to perform».

Also unfounded, for the Court, was the supposed unconstitutionality of the law in question on the basis of Article 41. In the opinion of the Court, the law did not limit or repress private economic initiative because it did not affect the economic organization of companies, since the quota of positions it imposed was modest compared to the total number of employees freely chosen by the entrepreneur[39].

Even after the introduction of laws subsequent to the Legislative Decree of 1947, which updated the instruments in the field of compulsory employment, the Constitutional Court continued to refer faithfully to the "stare decisis" of these first rulings. This was also the case in the most recent rulings No. 449 of 23rd December 1994 and No. 86 of 21st March 1996.

In the light of the *ratio legis* of the above-analysed regulations regarded by the Constitutional Court as fulfillment of the precepts of the Constitution, and bearing in mind the precepts contained in the anti-discrimination measures promoted by the European Union, some authors and a number of judgments by Courts have questioned whether the law imposes on the employer a concrete obligation to conclude an employment contract with the worker who would obviously have a matching right to conclude.

In the specific case of the compulsory employment of disabled people, the issue revolves around the applicability of Article 2932 of the Civil Code which allows a kind of injunction to be obtained (more precisely an order in the form of a judgment which produces the terms and effects of the contract) in the case of refusal by one of parties to conclude a contract despite a previous obligation (normally a preliminary agreement signed before the main one).

[39] The Court, moreover, based its opinions on the overall provision of Article 41 of the Constitution which legitimizes State intervention with «measures protective of social well-being and, at the same time, restrictive of private initiative» (ruling No. 103 of 1957), provided that the private initiative is not cancelled or terminated by such action.

An earlier opinion of the CdC had considered feasible the application of Article 2932 of the Civil Code, when Law No. 482 of 1968 was in force (Cass., October 7th, 1976, No. 3323[40]), on the assumption that the Article of the Civil Code «supposing lack of conclusion of a contract by the obligated party, does not distinguish between contractual or legal obligation, and since it is the same law of 1968 which considers the obligation of the employer enforceable by judicial decision» (Cass. Jan. 22nd, 1979, No. 497[41]).

Subsequently, however, in the rulings of the CdC the exact opposite principle was consolidated, which is still dominant (e.g. March 2nd, 1979, No. 1322[42], May 24th, 1980, No. 3425[43]), according to which, in the event of unjustified rejection of employment by the company, it is not possible to obtain a sentence establishing the working relationship, since to conclude such a contract required the predetermination of the essential elements of the relationship (such as wages, duties and qualifications) which depend on the will of the parties. Therefore, in the event of refusal to employ despite the legal obligation under the law, the disabled worker has only the right to claim for damages (Cass., May 16th, 1998, No. 4953 and lastly Cass. Apr. 20th, 2002 , No. 5766) [44]

The rulings of the CdC on the interpretation of the provisions of law 68/1999 regarding the inclusion of people with disabilities are clearly linked with what was reported above. On this matter, as will be shown in the following example, the Supreme Court recalls in general terms the wording of the Constitutional Court about the effectiveness of the employment relationship. The perspective of the Court seems to seek the application of the general spirit of the law to the balance between, on the one hand, the aspirations of the disabled to find jobs suitable for their skills and, on the other, the needs of profitable placement within the organization.

Therefore, the Court clarified that, once it is assumed that the whole mechanism of the targeted employment system is to guarantee, on one hand, that the employer has a worker in possession of specific qualifications as well as the right technical and

---

[40] In *Massimario della giurisprudenza del lavoro,* 1976, p. 714.

[41] In *Foro italiano*, 1979, I, p. 1463.

[42] In *Foro Italiano* 1979, I, 1462 .

[43] In *Massimario del foro italiano*, 1980 and entirely on online database IusExplorer, Giuffrè editore.

[44] In *Massimario del Foro Italiano,* 2002 and entirely on online database IusEXplorer, Giuffrè editore.

professional capabilities in order to be useful in the company organization and, on the other hand, that the worker's dignity is respected and he can express his professional expertise, «[…]the employer is entitled to refuse to employ not only a worker with different qualifications, but also a worker with qualifications "similar" to those he asked for, in the absence of prior training or internship to be carried out according to the procedures provided for by the same Article 12 Law No. 68 of 1999[45]**»** (Cass., Ruling No. 6017 of 12 March 2009).

The CdC reaffirmed this approach with the subsequent ruling No. 15058 adopted on 22nd June 2010 and No. 7007 adopted on 25th March 2011.

Moving on to an analysis of the case law concerning the condition of a disabled person at the time of a dismissal, firstly it must be said that, according to the general rule, a permanent disability of the worker acquired *ex novo* or engendered by the aggravating of disabilities provides grounds for a justified dismissal[46], when it is so significant as to make it impossible to carry out the tasks assigned[47].

However already at the time when the Law in force was No. 482 of 1968, the CdC had introduced the concept, which has become substantially generalized, of dismissal as *extrema ratio* by case law No. 7755 of 1998 Sez Unite[48].

The Court clarified that the breach of the employment contract in this particular case cannot be purely evaluated from the employer's point of view alone for which a severe lowering of the performance in the specified assigned tasks could obliterate his

---

[45] Cass., Ruling N.. 6017 of 12th March 2009, in *Massimario del foro italiano*, 2009, p. 604, but also on *Foro italiano* database 1987-2009.

[46] In fact, according to the general principles on the matter, the fairness of dismissal is guaranteed by a duty of justification on the part of the employer. In particular, a dismissal is possible when the employee commits offences (such as theft for example) so serious as to break any fiduciary relationship with the employer, making even temporary continuation of employment impossible (this case is defined as "giusta causa" under article 2119 c.c), or in the case of a considerable breach of contractual obligations or, finally, in the case of «reasons relating to production, work organization or standard functioning of it» (defined as "giustificato motivo" under art. 3 Law n. 604/1966). The impossibility to carry out the task assigned because of a disability is considered in theory to fall within the scope of the last provision.

[47] Among authors see, for a regulatory analysis regarding individual and collective dismissals, S. GIUBBONI, *Il licenziamento del lavoratore disabile tra disciplina speciale e tutela antidiscriminatoria*, *Rivista critica di diritto del lavoro*, Vol. 2, 2008 pp. 427-447.

[48] In *Giustizia Civile*, 1998, I, p. 2451 annotated by GIANCALONE and in, *Guida al diritto*, 1998, iss. 37, p. 58 annotated by D'ORIANO.

contractual interest in the execution of the contract because of a lack of usefulness of the performance itself.

This could not be considered compatible with the system outlined by Law No. 604 of 1966 (that was then in force) and with its purpose.

The Court stated, instead, that an objective assessment of the impossibility to assign the employee to equivalent tasks compatible with his or her residual working capacity was required even though it should not result in a change within the company structure.

The due work performance, argued the Court, was to be found in concrete terms as a result of the interpretation in good faith of the contract, the evolution of the relationship and the business environment in which it was inserted.

It follows that in determining the performance due in cases of permanent partial disability of the employee, it will be necessary to assess the possibility to move the worker to equivalent tasks within that company, this imposition being for the creditor an effect of the contractual good faith which also implies a duty of cooperation with the debtor.

A subsequent ruling No. 10347 of 17th July, 2002, specified some aspects with regard to the above mentioned landmark decision. In the case of assignment of the disabled worker to new tasks, in order to avoid dismissal elements such as other worker's health and safety and workplace safety have to be guaranteed.

In actual fact, the Court wanted to emphasize once again that, even if the employer was obliged to move a disabled worker to equivalent tasks compatible with the new state of infirmity, as just underlined, this should not imply radical changes to the company's organizational structure and staffing.

The rulings analysed above, in actual fact, made reference to a regulatory framework modified by the introduction of Law No. 68, which essentially codified the *acquis* case law under which the CdC had generalized the *repêchage* obligation and the principle of *extrema ratio* as a condition of legitimate dismissal for justified cause.

Article 4, paragraph 4, of Law 68/99 therefore imposes on the employer not only the obligation to move a worker who becomes disabled after their hiring to equivalent tasks, but also to less qualified positions[49]. However, as the law specifies, «in the case

[49] According to the prevailing case law approach, the employer who, in order to avoid dismissal of a disabled worker for objective justified cause, proposes, a downgrading of the employee, must obtain the worker's consent. In addition, the former «is required to objectively justify the

of allocation to lower tasks they [*workers*] have the right to retain the more favorable treatment corresponding to the duties of origin»[50].

A problematic point of this legislation is that it is, literally, in favor of workers who become unable to perform their duties due to injury and illness and not of employees who were already disabled at the time they were employed.

In the event of a worsening of the health condition of people with disabilities who are compulsorily employed that is incompatible with the continuation of their work, Article 10, paragraph 3, provides in the first instance, an unpaid suspension of the activity and, subsequently, the possibility of termination of employment only if «even by implementing possible adjustments, the medical commission[51] finds the definitive inability to reinsert the disabled person within the company».

Given the cases heard by the CdC which have generalized the *repêchage*[52] obligation, Article 10, paragraph 3 of Law 68/99 must be interpreted in the sense that

---

downgrading, also on the basis of inability to assign duties that are not equivalent, only when the employee has, […] expressed willingness to accept those duties: this so-called pact of deskilling is the only way to preserve the employment relationship and to exclude the application of Article 2103 of the Civil Code» (Cass. No. 10339 of 2000, but also Cass. September No. 21035 dated 28th September, 2006).

[50] So Article 4, paragraph 4 states in its complete form: «The workers who become unable to perform their duties as a result of injury or illness cannot be counted in the proportion of the reserve quota referred to in Article 3 if they have suffered from a less than 60 per percent reduction of work capacity or, in any case, if they have become disabled due to the employer who has not followed safety and hygiene regulations at work, a circumstance which must be assessed by courts. For the above-mentioned workers injury or illness do not constitute a justified reason for dismissal if they can be assigned equivalent duties or, if not, lower duties. In case of allocation to lower tasks they have the right to retain the more favorable treatment corresponding to the duties of origin. If any of such employees cannot be assigned to equivalent or lower tasks, they are placed by the relevant authorities referred to in Article 6, paragraph 1, in other companies, in activities compatible with residual capacity for work, without inclusion in the ranking list pursuant to Article 8».

[51]This is a public body instituted in the local health authority which has the task of verifying a condition of disability and inspecting the health condition of beneficiaries of the legislation in question in some circumstances directly established by law.

[52] By means of judgments n. 21579, Cass. 13 agosto 2008, in *Massimario di giurisprudenza del lavoro* 2009, p. 159, annotated by C. PISANI, *Il licenziamento impossibile: ora anche l'obbligo di modificare il contratto;* n. 11775, Cass. 12 luglio 2012 in, *Guida al lavoro*, 2012, p. 36; n. 14517, Cass. 1 luglio 2011, *ivi*, 2011, p. 35. Previously, there was only one case in which the burden of proof was on the employer to demonstrate that it would have been impossible to

if it is not possible or is too costly for the employer to adapt the productive organization to the new health situation of the disabled person so as to permit their reintegration, the employee can also be assigned to lower tasks. Only when this solution is impracticable, may he or she be dismissed. Thus any doubt concerning the constitutional legitimacy of Article 3 of the Constitution in terms of unequal treatment of similar situations is avoided.

It must be said that, in any case, disqualification remains a residual hypothesis following the CdC ruling No. 24091 of 2009[53]. While this ruling contrasts with the European Directive 2000/78 about *reasonable accommodation*, as mentioned in the previous section, it remains a decision of particular interest; and it still retains its validity today when it affirms that, if it is deemed necessary to avoid a disabled worker's dismissal, the employer is obliged to redistribute tasks and job positions among workers already in service despite any consideration about the workforce already being complete [54].

---

reassign the redundant employee even to lower tasks, avoiding a layoff, namely in case of permanent inability to perform the duties because of disability which occurred during the employment relationship.

Moreover even the burden of proof in relation to the negative result of the probation period is on the employer. In fact, this must be justified, «so that the judge can verify the correctness, or not, of the exercise of power by the employer and consider in particular whether the evidence agreement is not being used to evade the Law» (Cass. 27th November, 1982 No. 6437 in *Massimario del Foro Italiano*, 1982, 16th January 1984 No. 362 in *Massimario del Foro Italiano*, 1984, 4th June 1992 No. 6810, in *Massimario del Foro Italiano*, 1992, 18th February 1994 No. 1560, in *Il diritto del lavoro*, 1994, II, p. 46 ; see also Cass. 1st April 1994 No. 3177, in *Impresa*, 1994, p. 1411; 29th May 1999 No. 5290, in *Massimario della giurisprudenza del lavoro,* 1999, p. 894 annoted by MARETTI, *Sull'obbligo di motivazione del recesso dal patto di prova concluso con l'invalido*, pagg. 896-903; Cass. 30th October 2001 No. 13525, in *Massimario del Foro Italiano*, 2001 and Cass. 18th March 2002 No. 3920, in *Diritto e giustizia,* 2002, iss. 15, p. 25 annoted by BUONOMO).

[53] In *Massimario del foro italiano*, 2009, p. 1417 and entirely on online database Iusexplorer, Giuffrè editore.

[54] As regards the assessment of the conditions that prevent the reintegration of permanently disabled workers, it is worth mentioning the recent ruling of the CdC No. 8450 dated 10th April, 2014, which reiterated that the assessment of the conditions which prevent once and for all the reintegration of the disabled employee are reserved for Medical Commissions set up at the local health wards as third bodies (in the same terms as Cass. No.15269 dated 2012) Cass.

It will be interesting to observe the legal impact which the transposition of the European Directive will have on these issues.

8. THE ROLE OF UNIVERSITIES IN THE WORK GUIDANCE AND PLACEMENT OF DISABLED STUDENTS

Law No. 17 of 28th January 1999 made mandatory in each university the establishment of the post of Managing Director for disability, establishing specific guidelines on the activities to be carried out in favor of students with disabilities. The Law also provided for financing from a separate section of the Fund for the financing of universities.

Each university is required to provide services for the integration of students with disabilities, in favour of whom the law itself provides for the use of technical and teaching aids, the establishment of special tutoring services and the personalized treatment for passing exams.

Certain universities including those of Cagliari, Padua, Turin, Bologna and Bari have chosen to establish a disability office specially dedicated to the development of best practices to improve the services that the regulations require.

To this it must be added that under Article 6 of Legislative Decree 276/2003 the public and private universities are authorized to conduct skills matching and intermediation in the labor market.

Specifically, the Universities activate measures to promote the encounter between the supply of and demand for labour by sending out information material, and organizing events such as conferences, seminars, exhibitions and workshops.

The Universities, therefore, act with their *job placement*[55] services as integrated entities in the network of employment services.

In particular, along with traditional training functions, universities increasingly combine guidance activities and organization of internships and apprenticeships in companies both during university courses and within twelve months of graduation.

Further developments include support and promotion activities creating opportunities through a database of graduates' *curricula* and a bulletin board for job

No. 15269 of 2012, in *Massimario del Foro Italiano*, 2012, p. 714 or *Foro Italiano* database 1987-2012).

[55] See various authors on the subject AA.VV., *Le opportunità occupazionali dei giovani: il ruolo del placament universitario*, Adapt, 2011, available on line at www bollettinoadapt.it.

offers. The intermediation platform can be managed by a consortium (i.e., ALMALAUREA[56]) or it may be a University database.

Some universities have activated a newsletter through which the Placement Office sends updates on job vacancies to its subscribers.

From this point of view, therefore, the individual universities do not necessarily offer specific services for their graduates with disabilities, but normally organize *placement* offices which offer their assistance indifferently to all ex-alumni.

There are, however, some exceptions that stand out for innovation and for being aimed specifically at graduates with disabilities.

The University of Insubria offers the "Cald Job" service, which presents internship offers for protected groups through the disability portal of the Universities of Lombardy.

The Universities of Emilia Romagna have set up a committee including Rector's Delegates, representatives of the entrepreneurial community and disability groups, to ensure during the degree course the possibility that the disabled can enter the working world.

The Universities of Veneto have promoted and financed together with the Region the project called “lavorABILE” ("workABLE"), designed by disabili.com, a national reference portal, with the aim of disseminating the *best practices* to enter the working world, starting with the capabilities and individual attitudes of new graduates and comparing them with the needs of companies[57].

Of particular value is the initiative carried out at the University of Florence, which set up a centre of university studies and research regarding disability issues called *Centro di studio e ricerca di ateneo per le problematiche della disabilità (University Center of study and research for disability problems)* which in addition to promoting and coordinating study and research activities, provides disabled students with a range of care, collaboration and integration services necessary to facilitate full participation in the didactic, scientific and social life of the University. In particular, the centre has launched a project called "Altea" (Accompaniment to work between education and

[56] For details see Inter-University Consortium AlmaLaurea, *Condizione occupazionale dei laureati. XIV Indagine 2011*, 2012, (Employment Condition of Graduates XIV Survey 2011, 2012), available on www.almalaurea.it/

[57] Look up www.disabili.com/

autonomy) to promote training and guidance courses to facilitate the employment of disabled students.

In conclusion, the analysis carried out in this section shows a varied situation due to the autonomy granted to public and private universities and to the skills and dedication to this field applied by each university according to individual strategies.

9. BRIEF CONCLUSION

The Italian legislation with regard to the disabled has experienced a series of reforms and modifications over the years, and cannot be said to be immune to criticism. The legislation does, however, provide the disabled in search of work with strong protection based on a system which, despite what is foreseen about the opportunities to employ on the basis of agreements, as examined in Section 4 of the present work, is still essentially founded on the obligation of employers to accept a quota of disabled workers (quota system), and suitable anti-discriminatory measures. The effectiveness of the system designed by the legislators is undermined by the lack of a correct culture in society that overcomes discrimination or prejudice towards the effective value of the contribution disabled workers can make in the working context. This explains, for example, the limited utilization of the conventional agreements by employers who, in effect, utilize the possibility of "agreed" integration only when it is accompanied by economic incentives. The modification of the regulations by the legislator according to the concept of reasonable accommodations still appears inadequate, even though it is an extremely significant part of the question, not only because it is able to help the effective integration of the worker in the company, but also because it acts on cultural prejudice according to a virtuous circle. A disabled worker placed in the right situation is, in fact, able to demonstrate that his or her productivity is equal to that of a non-disabled worker. The more similar cases that there are, the more awareness of this will spread in society and amongst employers.

Pierluigi Digennaro
Ph.D. University of Bari Aldo Moro
digennaropierluigi@gmail.com

INFORME ESPAÑOL

(SPANISH REPORT)

DISCAPACITADOS: INSERCIÓN SOCIAL A TRAVÉS DEL EMPLEO Y PRINCIPIOS DE IGUALDAD Y NO DISCRIMINACIÓN

JUAN GORELLI HERNÁNDEZ
Catedrático de Derecho del Trabajo y de la Seguridad Social de la Universidad de Huelva (España)

Fecha de recepción: 26-08-2014
Fecha de aceptación: 02-10-2014

SUMARIO: 1. EL CONCEPTO DE DISCAPACITADO EN EL ORDENAMIENTO ESPAÑOL. 2. LA DISCAPACIDAD EN ESPAÑA EN TÉRMINOS CUANTITATIVOS. 3. BREVE REFERENCIA HISTÓRICA. 4. MARCO NORMATIVO. 5. PERSPECTIVAS JURISPRUDENCIALES SOBRE LA DISCRIMINACIÓN POR DISCAPACIDAD. 6. PROHIBICIÓN DE DISCRIMINACIÓN, AJUSTES RAZONABLES Y ACCIONES POSITIVAS. 6.1. Prohibición de discriminación e igualdad de oportunidades. 6.2 Prohibición de discriminación, necesidad de aptitud y ajustes razonables. 6.3 Acciones positivas. 7. INSERCIÓN LABORAL DE LOS DISCAPACITADOS. CRISIS DE EMPLEO Y POLÍTICAS ACTIVAS DE EMPLEO. 7.1 Incentivos económicos a la contratación de discapacitados. 7.2 Cuotas de reserva y medidas alternativas. 7.3 Empleo con apoyo. 7.4 El empleo protegido de los discapacitados: los Centros Especiales de Empleo. 7.5 Fomento del trabajo autónomo. 8. UNIVERSIDAD, ORIENTACIÓN AL TRABAJO E INSERCIÓN DE TRABAJADORES DISCAPACITADOS.

RESUMEN: El presente trabajo analiza el régimen jurídico actualmente vigente en materia de inserción social de los discapacitados en España. La aparición de una nueva Ley General de derechos de las personas con discapacidad justifica la necesidad de un estudio de estas características, que pone el acento fundamentalmente en la necesidad de impulsar un principio de igualdad efectiva, especialmente facilitando el acceso de los discapacitados al trabajo. En este sentido, el autor analiza los diferentes

mecanismos establecidos para alcanzar el objetivo de una plena integración laboral de los discapacitados.

ABSTRACT: This paper analyzes the current legal regime for social inclusion of disabled persons in Spain. A new General Law on the rights of persons with disabilities justifies the need for a study of this nature, which focuses mainly on the need to promote an effective equality principle, especially by facilitating access of disabled persons to work. In this sense, the author discusses the various mechanisms established to achieve the goal of full integration of disabled persons into the labour market.

PALABRAS CLAVE: Discapacitados, discriminación, igualdad, acceso al empleo, inserción laboral.

KEYWORDS: Disabled, discrimination, equality, access to employment, employment promotion.

1. EL CONCEPTO DE DISCAPACITADO EN EL ORDENAMIENTO ESPAÑOL

El Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social (LGDIS a partir de ahora), señala en su art. 4.1 que son personas con discapacidad «aquellas que presentan deficiencias físicas, mentales, intelectuales o sensoriales, previsiblemente permanentes que, al interactuar con diversas barreras, puedan impedir su participación plena y efectiva en la sociedad, en igualdad de condiciones con los demás». De este concepto destaca, de entrada, la vinculación de la discapacidad a la presencia de limitaciones físicas, mentales, intelectuales o sensoriales, intentando así agrupar las diferentes fuentes o vías que generan la discapacidad.

De otro lado, el carácter previsiblemente permanente de la discapacidad: la reducción anatómica o funcional debe prolongarse en el tiempo, de lo contrario será considerada simplemente como una enfermedad en proceso de curación; de ahí que se exija que previsiblemente sea permanente[1]. Recientemente la STJUE de 11 de abril de 2013[2] ha incidido en la necesidad de que las deficiencias o minusvalías que se sufran deben ser a largo plazo (siguiendo lo dispuesto por el art. 1 de la Convención sobre los derechos de las personas con discapacidad de 13 de diciembre de 2006). No obstante, se aclara por esta Sentencia que dentro del concepto de discapacitado se incluyen también aquellas situaciones en las que una enfermedad, curable o incurable, acarrea

[1] En este sentido la Sentencia del Tribunal de Justicia de la Comunidad Europea de 11 de julio de 2006, TJCE\2006\192: «La importancia que el legislador comunitario atribuye a las medidas destinadas a adaptar el puesto de trabajo en función de la discapacidad demuestra que tuvo en mente supuestos en los que la participación en la vida profesional se ve obstaculizado durante un largo período. Por lo tanto, para que la limitación de que se trate pueda incluirse en el concepto de "discapacidad", se requiere la probabilidad de que tal limitación sea de larga duración». Entre la jurisprudencia española se reitera por la Sentencia del Tribunal Superior de Justicia de Andalucía, de 9 de abril de 2008, AS\2008\2673: «el concepto de discapacidad se refiere a una limitación derivada de dolencias físicas, mentales o psíquicas y que suponga un obstáculo para que la persona de que se trate participe en la vida profesional (…) para que la limitación de que se trate pueda incluirse en el concepto de discapacidad, se requiere la probabilidad de que tal limitación sea de larga duración».

[2] TJCE\2013\122.

una limitación que impide la participación plena y efectiva de la persona en la vida profesional en igualdad de condiciones que el resto de los trabajadores, siempre que dicha limitación sea de larga duración. Es decir, incluye en el marco del concepto de discapacidad también a las situaciones de enfermedad que cumplan estas condiciones[3]. Además, esta Sentencia plantea que ha de entenderse comprendida dentro del concepto de discapacidad la situación en que la persona pueda desempeñar su trabajo, pero sólo de manera limitada, rechazando la idea de que la discapacidad sólo existe cuando implique la exclusión total del trabajo o de la vida profesional[4].

Por último, el legislador no pretende en modo alguno vincular la discapacidad con un concreto aspecto de la vida social como es el trabajo; ello es una perspectiva propia de la protección de Seguridad Social. Al contrario, el legislador pretende vincular la discapacidad con cualquier aspecto de la vida en sociedad; de ahí que se relacione con las limitaciones a participar en la sociedad en igualdad de condiciones con los demás.

En realidad, cuando se define quién está discapacitado se establece siempre en función de alcanzar un límite de falta de capacidad, una barrera a partir de la cual se considera discapacitado. La constatación de que se alcanza dicho límite implica la necesidad de un procedimiento de valoración del discapacitado. En este sentido, el art. 4.2 LGDIS señala que sólo tendrán la consideración de personas con discapacidad «aquellas a quienes se les haya reconocido un grado de discapacidad igual o superior al 33 por ciento. Se considerará que presentan una discapacidad en grado igual o superior al 33 por ciento los pensionistas de la Seguridad Social que tengan reconocida una pensión de incapacidad permanente en el grado de total, absoluta o gran invalidez, o a los pensionistas de clases pasivas que tengan reconocida una pensión de jubilación o retiro por incapacidad permanente para el servicio o inutilidad»[5].

---

[3] Vid. apartados nº 41, 42 y 47 de la citada STJUE de 11 de abril de 2013.

[4] Vid. apartados nº 43 y 44 de la citada STJUE de 11 de abril de 2013.

[5] A tenor de lo que acabamos de señalar, se establece una conexión importante entre la regulación sobre discapacidad y la propia sobre pensiones de incapacidad permanente de Seguridad Social, pues aquellos trabajadores que tengan reconocida una pensión de Seguridad Social por incapacidad permanente, automáticamente se consideran también discapacitados. En realidad, esta regulación procede de la ya derogada Ley 51/2003, habiendo establecido la jurisprudencia ciertas limitaciones en cuento al reconocimiento de efectos de la consideración como discapacitado, pues se limitaba a los beneficios derivados de esa Ley 51/2003. Así lo afirmaba una nutrida jurisprudencia; vid. SSTS de 13 de noviembre de 2008, RJ 2008\7664; 24 de septiembre de 2008, RJ 2008\7643; 22 de julio de 2008, RJ 2008\7638; 7 de julio de 2008, RJ 2008\4344; 29 de enero de 2008, RJ 2008\2063; 28 de enero de 2008, RJ 2008\3820; 21 de marzo de 2007, RJ 2007\3539. No obstante, bajo la regulación actual creo

En definitiva, llegados a este punto podríamos señalar que para el ordenamiento español y a efectos laborales, el discapacitado sería aquella persona que sufre reducciones anatómicas, funcionales o psíquicas, de carácter previsiblemente permanente o, al menos, de larga duración, a la que tras el procedimiento administrativo oportuno, se le declara que sufre unas reducciones en su capacidad equivalente al menos al 33%.

2. LA DISCAPACIDAD EN ESPAÑA EN TÉRMINOS CUANTITATIVOS

En España podemos contar con un conjunto de instrumentos que nos permiten acceder a la cuantificación de la discapacidad: de una lado hay importante conjunto de datos procedentes del Instituto Nacional de Estadísticas (INE), que ha elaborado a lo largo de la década anterior dos encuestas esenciales sobre la situación de los discapacitados, que incluyen datos de extraordinario interés: la Encuesta sobre Discapacidades, Deficiencias y Estado de Salud (EDDS) de 2002 y la Encuesta de Discapacidad, Autonomía personal y situaciones de Dependencia (EDAD) de 2008. Más recientemente ha publicado el INE el estudio sobre Empleo de las Personas con Discapacidad (EPD 2008-2010), y posteriormente el Informe Empleo de las Personas con Discapacidad 2012 (publicado en enero de 2014). También podemos contar con los datos que nos ofrece el Servicio Público Estatal de Empleo en materia de contratación de trabajadores. También existen diferentes estudios realizados por instituciones públicas que contemplan la situación de los discapacitados en relación al mercado de trabajo (el Consejo Económico y Social[6], el Instituto de Migraciones y Servicios Sociales[7], o el propio Servicio Público de Empleo Estatal[8]).

que debe ponerse en cuestión dicha conclusión, y estimar que el reconocimiento como discapacitados de los beneficiarios de pensiones de incapacidad permanente ha de entenderse realizado a todos los efectos.

[6] Así, el informe "La situación de las personas con discapacidad en España", CES, Madrid 2004.

[7] Vid. "La discapacidad en cifras", IMSERSO, Madrid 2002.

[8] Vid. el "Informe del mercado de trabajo de las personas con discapacidad 2008", Observatorio de las Ocupaciones del Servicio Público de Empleo Estatal, que puede consultarse en la dirección: http://www.sepe.es/contenido/observatorio/mercado_trabajo/975-1264.pdf.

En cuanto al número de personas discapacitadas, a tenor de los datos estadísticos[9], podemos señalar que en el año 2008 existía un total de 3.847.900 personas que declaraban estar afectadas por una situación de discapacidad en España, o lo que es lo mismo, el 8,5% de la población[10], si bien en el año 2012 sólo disponían de un certificado de discapacidad el 4,8% de la población[11]. Debemos destacar que España, Grecia e Italia son los países europeos donde estadísticamente se declara un menor porcentaje de discapacidad respecto del total de la población[12]. De este total, la distribución por edad evidenciaba que esta es una variable de enorme importancia, pues el número de discapacitados se dispara a partir de los 45 años de edad[13]. De otro lado, en cuanto a la distribución por sexo, la mayoría de las personas discapacitadas son mujeres, alcanzando los 2,30 millones; mientras que los hombres eran sólo 1,55 millones (el 60,5% frente al 39,5%). En cuanto a la distribución de las discapacidades, las físicas alcanzan el 45,03%, las psíquicas el 12,7% y las sensoriales el 31,5%, adscribiéndose el resto (10,75%) a otras deficiencias[14].

En cuanto a los datos relativos a la situación laboral, las cifras son, lógicamente más reducidas, pues sólo podemos tomar en cuenta a aquellos ciudadanos que han solicitado y obtenido la calificación como discapacitados por superar el 33% de discapacidad, siempre y cuando tengan una edad comprendida entre los 16 y 65 años, es decir, que están en edad laboral y pueden ser calificados como población activa. Pues bien, en 2010 había en España un total de 1.171.900 personas que habían

---

[9] Sobre este tema debemos tener en cuenta la EDAD-2008.

[10] Según el estudio realizado por G. RODRÍGUEZ CABRERO, C. GARCÍA SERRANO, C. y L. TOHARIA, *Evaluación de las políticas de empleo para personas con discapacidad y formulación y coste económico de nuevas propuestas de integración laboral*, Ediciones Cinca, Madrid 2009, p. 20, en 2008 la población con discapacidad severa era el 5,9% del total de la población (1.727.472 personas), mientras que los discapacitados en grado moderado suponían un 9,9% del total de la población (2.868.736 personas). A tenor del informe "La discapacidad en cifras", en 1999 en España la cifra era de 3.528.221, siendo mayoritariamente mujeres (58,3%); op. cit., pp. 17 y 18.

[11] Informe Empleo de las Personas con Discapacidad 2012.

[12] Vid. sobre la cuestión las cifras comparativas que se obtienen de EUROSTAT. "Disability and Social Participation in Europe", datos citados por el informe del Consejo Económico y Social del Reino de España "La situación de las personas con discapacidad en España", CES, Madrid 2003, p. 17.

[13] Vid. el informe "La discapacidad en cifras", op. cit., p. 18.

[14] Estos datos pueden obtenerse en el Informe del Mercado de Trabajo de las Personas con Discapacidad 2008, "Observatorio de las Ocupaciones del Servicio Público de Empleo Estatal", que puede consultarse en la dirección:
http://www.sepe.es/contenido/observatorio/mercado_trabajo/975-1264.pdf .

obtenido la certificación de discapacidad y que estaban en edad de trabajar, o lo que es igual, el 3,8% del total de la población en edad laboral en España. En 2012 eran 1.450.800; es decir, el 4,6% del total.

De esta población destaca su poca presencia en el mercado de trabajo. Debemos subrayar lo siguiente respecto de las cifras de 2010:

1º Hay una bajísima tasa de actividad de los discapacitados, pues sólo alcanza al 36,2%, frente al 75,9% de la tasa de los ciudadanos sin discapacidad[15]. La población activa de los discapacitados es tremendamente reducida: sólo son activos 423.700 discapacitados. En 2012 el porcentaje es del 36,6%, también casi 40 puntos por debajo de la tasa de ciudadanos sin discapacidad, siendo 531.600 discapacitados.

2º Existen importantes diferencias en función del tipo de deficiencia[16]. Así, mientras que las personas con deficiencias auditivas presentan unas tasas de actividad relativamente aceptables (un 58,2%, en 2012 57,4%), las personas con trastornos mentales tienen, por el contrario, una tasa de actividad muy inferior (24,9%, en 2012 27,1%). De otro lado, también es importante subrayar que la tasa de actividad también está íntimamente ligada al grado de discapacidad: mientras mayor es el grado de la misma, más baja es la tasa de actividad[17].

3º Sólo el 27,7% de la población discapacitada en edad laboral está ocupada, frente al 60,6% de las personas sin discapacidad[18]. Las mujeres discapacitadas tienen cifras mucho peores que los hombres: baste señalar que

---

[15] Vid. sobre la cuestión G. RODRÍGUEZ CABRERO, C. GARCÍA SERRANO y L. TOHARIA, *Evaluación de las políticas de empleo para personas con discapacidad y formulación y coste económico de nuevas propuestas de integración laboral*, Ediciones Cinca, Madrid 2009, op. cit. p. 19.

[16] Vid http://www.ine.es/inebmenu/mnu_mercalab.htm, concretamente en el estudio "El empleo de las personas con discapacidad", concretamente la tabla "Relación con la actividad y tipo de discapacidad (1.8)".

[17] La tasa de actividad en el grado inferior (entre el 33% y 45% de discapacidad) alcanza el 55% en 2010 y el 54,1% en 2012, sin embargo la discapacidad de grado superior (75% de discapacidad y superior), es de sólo el 14,2% en 2010, 13,3% en 2012. Vid http://www.ine.es/inebmenu/mnu_mercalab.htm, el estudio "El empleo de las personas con discapacidad", concretamente la tabla "Relación con la actividad y grado de discapacidad (1.9)".

[18] A tenor del "Informe del Mercado de Trabajo de las Personas con Discapacidad 2008", el total de demandantes de empleo discapacitados existentes en ese momento era de 107.502, de los cuales los parados eran 65.892 y los no parados 41.610.

del 27,7% de la población discapacitada con empleo, que supone un total de 324,800 discapacitados, sólo 124.000 eran mujeres (el 38,2%).

4º Estas cifras suponen que las tasas de desempleo en el ámbito de la población discapacitada son mucho más altas que las de la población general[19].

Hemos de tener en cuenta que a efectos laborales hay dos variables que tienen bastante incidencia sobre la integración de los discapacitados en el mercado de trabajo: la edad (a más edad se incrementa el número de discapacitados)[20] y los estudios[21]. En este último caso es relevante que, como una prueba más de su situación socialmente desfavorecida, los discapacitados se configuran como una fracción de la población con un importante déficit de estudios, lo que dificulta aún más su acceso al mercado de trabajo[22].

3. BREVE REFERENCIA HISTÓRICA

En términos históricos, la primera norma que establece una preferencia de empleo a favor de discapacitados es la Real Orden de 27 de noviembre de 1876 que establecía una preferencia por la contratación de servicios de un Ministerio del Gobierno respecto de una entidad cuidadora de discapacitados[23]. Pero la primera vez que nuestra normativa jurídica habla de reserva de puesto de trabajo para personas con discapacidad es en el artículo 1 del Decreto nº 246 de 12 de marzo de 1937, que reserva para los mutilados de la Guerra Civil con más de tres meses de permanencia en el frente, un 10% de puestos en las Administraciones Públicas.

---

[19] En este sentido G. RODRÍGUEZ CABRERO, C. GARCÍA SERRANO y L. TOHARIA, op. cit., pp. 19 y 23. Estos autores señalan que en 2008 la tasa general de desempleo en España era del 9,7%, pero que los discapacitados severos alcanzaban el 16,9%, mientas que los discapacitados en grado moderado mantenían una tasa de desempleo del 12,2%, op. cit., p. 23. En el año 2012, la tasa de desempleo de los discapacitados se situaba en el 33,1%, 8,1 puntos por encima de la tasa de paro de personas sin discapacidad.

[20] Sobre esta cuestión vid. los datos que ofrece el informe del Consejo Económico y Social del Reino de España "La situación de las personas con discapacidad en España", CES, Madrid 2003, p. 23. Para la situación en 2012 vid. el "Informe Empleo de las Personas con Discapacidad 2012", p. 18.

[21] Vid. lo señalado en el Informe Empleo de las Personas con Discapacidad 2012, pp. 20 y 21.

[22] Vid. G. RODRÍGUEZ CABRERO, C. GARCÍA SERRANO y L. TOHARIA, op. cit., pp. 24 y 25.

[23] Real Orden de 27 de noviembre de 1876: «Dispone que la imprenta del Colegio Nacional de Sordomudos sirva para todas las impresiones del ministerio de fomento».

Esta regulación es continuada por el Reglamento provisional de Beneméritos del Cuerpo de Mutilados de la Guerra por la Patria de 1938, que establecía (art. 15) que «los Mutilados útiles serán obligatoriamente colocados en sus cuerpos respectivos o en destinos técnicos o burocráticos o trabajos manuales para los que reúnan condiciones de aptitud». Además, se establecían reservas de empleo en diferentes puestos de las Administraciones y categorías profesionales (30% de las plazas de nueva creación en el cuerpo de Auxiliares de la Administración Civil del Estado, Cuerpo de Porteros de los Ministerios Civiles y Militares y centros relacionados con la Administración Central, Diputaciones y Ayuntamientos, Guardia forestal, de Conserjes y Guardas de monumentos; carteros urbanos, rurales, etc.). Uno de cada siete puestos vacantes en los empleos de carácter administrativo, y el 20% de las vacantes en los demás empleos subalternos, de las Compañías Mercantiles, Sociedades Civiles, Asociaciones y demás personas jurídicas o empresas en general que tuvieran alguna relación con el Estado en concepto de auxilio o subvención. Por último, las empresas tenían la obligación de contratar a 1 discapacitado por cada 20 trabajadores.

Con posterioridad, la Orden de 15 de enero de 1968 dota una partida presupuestaria destinada a empleo y minusválidos, cuyo concepto único es «ayuda para procurar el empleo de los minusválidos». Surge así en el ordenamiento español una preocupación por favorecer una política de empleo destinada especialmente a los discapacitados, más allá del intento de paliar los efectos de la conflagración civil. Inmediatamente después se aprueba la Orden de 7 de noviembre de 1968 por la que se conceden ayudas a Centros de Empleo Protegido para trabajadores minusválidos; dando así origen normativo a lo que es el empleo protegido que hoy se desarrolla a través de los Centros Especiales de Empleo.

Con el Decreto 2531/1970, de 22 de agosto, sobre empleo de trabajadores minusválidos, aparece en una norma que aún nos acompaña la reserva a favor de los minusválidos del 2% de puestos de trabajo de las empresas con más de 50 trabajadores. Se trata de una regulación genérica que se aparta de la perspectiva de favorecimiento exclusivo de los mutilados de la Guerra Civil. Además, se inaugura con esta regulación una de las principales vías de actuación en materia de política de empleo de los discapacitados: las bonificaciones de las cuotas de Seguridad Social por la contratación de este tipo de trabajadores.

La fase final en esta evolución da comienzo con la Ley 13/1982, de 7 de abril, de integración social de los minusválidos (LISMI). Se trata del desarrollo legal de lo

previsto por la Constitución española en su art. 49[24], de manera que pretende facilitar los medios legales para que los discapacitados puedan alcanzar una realización personal y su total integración social, así como establecer mecanismos de asistencia y tutela para aquellos discapacitados que lo requieran. En esta regulación legal se establecen normas destinadas a la prevención de las minusvalías, reglas sobre la valoración y diagnóstico de las discapacidades, reglas destinadas a favorecer las necesidades educativas de los discapacitados, así como a la movilidad y supresión de barreras arquitectónicas.

Por otra parte, encontramos la Ley 51/2003, de 2 de diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad. Se trata de una norma dedicada a regular la igualdad y no discriminación específicamente para los discapacitados. Esta norma supone, en el ámbito de los discapacitados, la transposición al ordenamiento español de lo dispuesto por la Directiva 2000/78/CE, así como el desarrollo legal de preceptos constitucionales como los arts. 9.2, 14 y 49. En esta regulación destacaba el principio de igualdad de oportunidades como eje fundamental de la misma, es decir, que en materia de discapacitados se pretende no sólo aplicar un principio tradicional de igualdad y no discriminación, sino dar un paso más y reclamar para este colectivo un efectivo principio de igualdad de oportunidades. En la actualidad, tanto la Ley 13/1982 como la Ley 51/2003 han sido derogadas, pues su regulación se ha refundido en un único texto legal, la LGDIS.

4. MARCO NORMATIVO

En cuanto a la regulación internacional, es básica la procedente de la Organización de Naciones Unidas, que ha elaborado dos Declaraciones de especial importancia: la Declaración de Derechos del Retrasado Mental[25], y la Declaración de Derechos de los Impedidos[26]. En ambos casos se reconoce el derecho al trabajo con el condicionamiento, no obstante, de que dicho derecho debe garantizarse en la medida en que las posibilidades del propio discapacitado le permitan desarrollar una prestación de trabajo.

[24] En este sentido J. GORELLI HERNANDEZ, en AA.VV., *Lecciones de Seguridad Social*, Tecnos, Madrid 2012, pp. 453 y ss.

[25] Resolución 2856 (XXVI) de la Asamblea General de la ONU de 20 de diciembre de 1971.

[26] Resolución 3447 (XXX) de la Asamblea General de la ONU de 9 de diciembre de 1975.

También tiene especial importancia la Convención sobre los derechos de las personas con discapacidad de 13 de diciembre de 2006[27]. Este instrumento establece fundamentalmente un principio de igualdad y no discriminación respecto de los ciudadanos discapacitados (arts. 4 y 5), cuidando especialmente de señalar que esa situación de discriminación es mucho más crítica respecto de las mujeres discapacitadas. Desde el punto de vista del trabajo y el empleo se dedica un precepto, el art. 27, donde se afirma el derecho de los discapacitados a trabajar en igualdad de condiciones con los demás, lo que supone facilitarlesel acceso al mercado de trabajo.

El acceso al empleo de los discapacitados también ha sido tratado por la OIT. Inicialmente se ha enfrentado a esta cuestión sobre todo a través del problema de la discriminación mediante el Convenio nº 111 sobre la discriminación (empleo y ocupación) de 1958[28]. También debemos tener en cuenta el Convenio nº 159 OIT, de 22 de junio de 1983, sobre la readaptación profesional y el empleo de personas inválidas.

Desde la perspectiva europea, resulta esencial el art. 15 de la Carta Social Europea, que plantea el problema del empleo y la necesidad de establecer medios adecuados para favorecer el acceso al empleo de este colectivo[29].

En cuanto al Derecho Social UE, el punto de partida antidiscriminatorio lo encontramos en el art. 10 TFUE[30], que incorpora la discapacidad como uno de los motivos de discriminación contra los que la UE debe luchar[31]. También la Carta de los

---

[27] Ratificada por España por instrumento de 23 de noviembre de 2007 (BOE de 21 de abril de 2008), habiendo sido ratificados tanto la Convención como el Protocolo Facultativo.

[28] Ratificado por España a través de instrumento de 26 de octubre de 1967 (BOE de 4 de diciembre de 1968).

[29] En 1996 se procedió a la revisión de la Carta, afectando la misma al art. 15 (si bien esta redacción no ha sido ratificada por España). En esta redacción se establece que los estados están obligados a promover todo tipo de medidas para que los empresarios contraten a ciudadanos de este colectivo, así como a adaptar las condiciones de trabajo a las necesidades del minusválido; y cuando no sea posible la contratación en razón de la minusvalía, a impulsar los mecanismos de empleo protegido, pudiendo también establecer servicios especializados de colocación.

[30] «En la definición y ejecución de sus políticas y acciones, la Unión tratará de luchar contra toda discriminación por razón de sexo, raza u origen étnico, religión o convicciones, discapacidad, edad u orientación sexual».

[31] De otro lado el art. 19.1 reitera lo que ya afirmaba el art. 6 A del Tratado de Ámsterdam: «Sin perjuicio de las demás disposiciones de los Tratados y dentro de los límites de las competencias atribuidas a la Unión por los mismos, el Consejo, por unanimidad con arreglo a un procedimiento legislativo especial, y previa aprobación del Parlamento Europeo, podrá

Derechos Fundamentales de la Unión Europea plantea la perspectiva antidiscriminatoria en su art. 21.1[32], así como la necesidad de garantizar la integración social y profesional (art. 26). El desarrollo de estos planteamientos antidiscriminatorios lo tenemos en la Directiva 2000/78/CE, si bien aplicado al ámbito del empleo y la ocupación: su art. 1 señala a la discapacidad como uno de los motivos de discriminación que deben ser evitados[33]. A partir de aquí la Directiva incorpora la discapacidad a la hora de configurar la discriminación indirecta (art. 2.2)[34]; mas aún, se afirma que respecto de las personas con una discapacidad determinada, el empresario está obligado, en virtud de la legislación nacional, a adoptar medidas adecuadas de conformidad con los principios contemplados en el artículo 5 para eliminar las desventajas que supone esa disposición, ese criterio o esa práctica. Este último precepto nos introduce en la importante cuestión de los «ajustes razonables para las personas con discapacidad» (art. 5 de la Directiva 2000/78/CE). La Directiva plantea también la cuestión de las acciones positivas a favor de los discapacitados, concretamente en su art. 7.2[35].

También se ha aprobado en el marco de la UE la Estrategia Europea sobre la discapacidad 2010-2020. Desde la perspectiva del empleo, se requiere incrementar el número de discapacitados integrados en el mercado de trabajo, especialmente en el mercado «abierto», para así evitar que los discapacitados entren en la cultura de las prestaciones por discapacidad.

---

adoptar acciones adecuadas para luchar contra la discriminación por motivos de sexo, de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual».

[32] «Se prohíbe toda discriminación, y en particular la ejercida por razón de sexo, raza, color, orígenes étnicos o sociales, características genéticas, lengua, religión o convicciones, opiniones políticas o de cualquier otro tipo, pertenencia a una minoría nacional, patrimonio, nacimiento, discapacidad, edad u orientación sexual».

[33] Este art. 1 afirma que «La presente Directiva tiene por objeto establecer un marco general para luchar contra la discriminación por motivos de religión o convicciones, de discapacidad, de edad o de orientación sexual en el ámbito del empleo y la ocupación, con el fin de que en los Estados miembros se aplique el principio de igualdad de trato».

[34] Así, su art. 2.2 afirma que a los efectos de lo previsto en su art. 1, existirá discriminación indirecta cuando una disposición, criterio o práctica aparentemente neutros puedan ocasionar una desventaja particular a personas con una religión o convicción, con una discapacidad, de una edad, o con una orientación sexual determinadas, respecto de otras personas.

[35] «Por lo que respecta a las personas con discapacidad, el principio de igualdad de trato no constituirá un obstáculo al derecho de los Estados miembros de mantener o adoptar disposiciones relativas a la protección de la salud y la seguridad en el lugar de trabajo, ni para las medidas cuya finalidad sea crear o mantener disposiciones o facilidades con objeto de proteger o fomentar la inserción de dichas personas en el mundo laboral».

En conclusión, creo que la normativa internacional y de la UE tiene la virtud de haber planteado el problema de la discapacidad desde dos puntos de vista diferentes pero que están íntimamente vinculados entre sí: la perspectiva antidiscriminatoria, y la integración social (especialmente a través del acceso al mercado laboral).

En cuanto al marco normativo interno, el punto de partida se localiza en el art. 49 de la Constitución, que establece que los poderes públicos realizarán una «política de previsión, tratamiento, rehabilitación e integración de los disminuidos físicos, sensoriales y psíquicos, a los que prestará la atención especializada que requieran y los amparará especialmente para el disfrute de los derechos que este Título otorga a todos los ciudadanos». Se trata de un principio rector de la actuación de los poderes públicos, y consecuentemente no genera un derecho subjetivo, de manera que para alegarlo judicialmente hay que estar al desarrollo legal que se realice del mismo. No obstante, no debemos restar relevancia a este precepto[36]. Al margen de su limitada eficacia jurídica, es una norma que asume los planteamientos de la regulación internacional y comunitaria, pues integra toda una serie de elementos diferentes: el planteamiento tradicional de realizar una política de prevención de la discapacidad, así como de tratamiento de la misma y rehabilitación de quienes la sufren; y junto con lo anterior, se plantea la necesidad de la integración de los discapacitados, para lo cual la incorporación al mundo del trabajo resulta ser un elemento clave. Además, el precepto finaliza señalando expresamente que la acción de los poderes públicos debe amparar especialmente que los discapacitados puedan disfrutar de los mismos derechos constitucionales que se predican con carácter general. Por lo tanto, los poderes públicos deben intervenir para que tales derechos sean realmente efectivos en el caso de los discapacitados.

Otros preceptos constitucionales esenciales son los que regulan de manera general la igualdad y no discriminación: el art. 14 de la Constitución que consagra el principio de igualdad ante la ley y la prohibición de discriminación por razón de nacimiento, raza, sexo, religión, opinión o cualquier otra condición o circunstancia personal o social; o el art. 9.2, a tenor del cual corresponde a los poderes públicos promover las condiciones para que la libertad y la igualdad del individuo y de los grupos en los que se integra sean reales y efectivas, para lo cual deberán removerse los obstáculos que impiden o limitan su plenitud[37].

---

[36] En este sentido, J.L. MONEREO PÉREZ y C. MOLINA NAVARRETE: «El derecho a la protección de las personas con minusvalías», en AA.VV., *Comentario a la Constitución socio-económica de España*, Comares, Granada 2002, p. 1762.

[37] En idéntico sentido V. CORDERO GORDILLO, *Igualdad y no discriminación de las personas con discapacidad en el mercado de trabajo*, Tirant lo Blanch, Valencia 2010, p. 56.

Desde el punto de vista legal, la regulación actual la encontramos en el reciente Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social (LGDIS). Como Texto Refundido, supone reunir en un único texto normativo diferentes normas legales preexistentes: fundamentalmente la Ley 13/1982, de 7 de abril de Integración Social de los Minusválidos (LISMI) y la Ley 51/2003, de 2 de diciembre, de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad. Además, con el Texto Refundido se pretende adaptar la normativa española a la Convención Internacional sobre los Derechos de las Personas con Discapacidad[38].

Desde la perspectiva de este trabajo resulta esencial la regulación que se establece en materia de empleo en la LGDIS. La nueva regulación reconoce el derecho al trabajo de los discapacitados, garantizando que sea apliquen los principios de igualdad y no discriminación (arts. 35 y 36), regulando expresamente los conceptos de discriminación directa e indirecta. Además la LGDIS establece un conjunto normativo (el Título II) dedicado a favorecer la igualdad de oportunidades y la no discriminación, regulando con carácter general la posibilidad de establecer medidas que garanticen ese derecho a la igualdad de oportunidades y medidas contra la discriminación. Dentro de las medidas a adoptar se establece la posibilidad de que los poderes públicos adopten medidas de acción positiva (arts. 67 y 68). No basta con la igualdad ante la ley, pues siglos de discriminación social han hecho que los discapacitados estén en una posición de desprotección que para ser superada requiere de auténticos privilegios respecto del resto de la población.

También desde la perspectiva del empleo hay que señalar a la Ley 56/2003, de 16 de diciembre, de empleo, entre cuyos fines se encuentra la integración laboral de los discapacitados (art. 2), entre otros colectivos; y en esta dirección el art. 19 octies señala los colectivos prioritarios para la actuación de los Servicios Públicos de Empleo, coincidiendo con los colectivos que acabamos de señalar. Por otra parte, con carácter general el art. 25 señala respecto de lo discapacitados que «se incentivará su contratación tanto en el empleo ordinario como en el empleo protegido a través de los Centros Especiales de Empleo (…) El Gobierno garantizará en la Estrategia Española de Empleo la igualdad de oportunidades para las personas con discapacidad en el acceso y el mantenimiento en el empleo».

[38] En este sentido L. ANTEQUINO EDO, "Aspectos laborales y de protección social incluidos en la nueva Ley General de Derechos de las Personas con Discapacidad", *Revista General de Derecho del Trabajo y de la Seguridad Social* nº 36 (2014), p. 2.

En cuanto a la negociación colectiva, es un mecanismo adecuado para facilitar el principio de igualdad de oportunidades, pues los negociadores son sujetos que están próximos a la realidad social y esa proximidad debe favorecer estos objetivos[39]. Sin embargo, la negociación colectiva española no suele regular esta cuestión, o lo hace de una manera muy marginal[40]. Hemos de recordar que el convenio colectivo no es sino el resultado de un acuerdo en el que se defienden los intereses de dos sujetos o grupos diferentes (empresarios y trabajadores), de manera que las materias negociadas y reguladas van a depender directamente de la voluntad de las partes y de esos intereses; con lo cual, incluso no es difícil encontrar regulaciones en los convenios colectivos que son contrarias a la propia normativa legal que se dirige a facilitar la contratación de los discapacitados[41]. Por lo tanto, la utilización del convenio colectivo para facilitar el acceso de los discapacitados al mercado de trabajo dependerá en buena medida de los intereses de los interlocutores sociales [42].

---

[39] En este sentido lo planteaba, si bien lo planteaba en relación al empleo femenino, M.F. FERNÁNDEZ LÓPEZ, "Principio de igualdad por razón de sexo y negociación colectiva", en AA.VV., *Jornadas del Consejo Andaluz de Relaciones Laborales. Recopilación de conferencias 2006*, CARL, Sevilla 2007, p. 44.

[40] Vid. a modo de ejemplo los trabajos de J. CABEZA PEREIRO, "La discriminación por motivos de discapacidad", en AA.VV., dirigidos por JOSÉ FERNANDO LOUSADA AROCHENA, *El principio de igualdad en la negociación colectiva*, Comisión Consultiva Nacional de Convenios Colectivos, Madrid 2008; AA.VV., dirigidos por R. ESCUDERO RODRÍGUEZ, *La negociación colectiva en España: una visión cualitativa*, Tirant lo Blanch, Valencia 2004; J. ESCRIBANO GUTIÉRREZ, "El mito de la responsabilidad social corporativa: el caso de los trabajadores discapacitados", *Relaciones Laborales* nº 5 de 2010; D. MORENO MENDOZA, "Acuerdos colectivos sobre responsabilidad social empresarial como nuevas experiencias de negociación colectiva laboral en España", en AA.VV., coordinados por RICARDO ESCUDERO RODRÍGUEZ, *Observatorio de la negociación colectiva. Empleo público, igualdad, nuevas tecnologías y globalización*, Ediciones Cinca, Madrid 2010; T. PÉREZ DEL RÍO, *Igualdad y género en el empleo*, CARL, Sevilla 2006; D. TOSCANI GIMÉNEZ, D.: "Relaciones y prelaciones de la ineptitud con la incapacidad permanente y la incapacidad temporal", *Documentación Laboral* nº 75 (2005).

[41] Un buen ejemplo de ello lo encontramos en la Sentencia de la Audiencia Nacional de 20 de enero de 1999, AS 208; donde se declaraba la nulidad de un artículo de un convenio colectivo que limitaba el cumplimiento de la obligación de contratar la cuota de discapacitados en una empresa de más de 50 trabajadores.

[42] En este sentido M.R. RUIZ CASTILLO, *Igualdad y no discriminación. La proyección sobre el tratamiento laboral de la discapacidad*, Editorial Bomarzo, Albacete 2010, p. 161.

5. PERSPECTIVAS JURISPRUDENCIALES SOBRE LA DISCRIMINACIÓN POR DISCAPACIDAD

El núcleo más relevante de la jurisprudencia en materia de discapacidad y acceso al mercado de trabajo es el relativo a la discriminación. Podemos diferenciar perfectamente entre dos vertientes muy diferentes de la jurisprudencia sobre esta cuestión: la relativa a situaciones de discriminación que sufren los discapacitados; y la jurisprudencia sobre medidas de igualdad de oportunidades previstas por el legislador para favorecer a los discapacitados sobre el resto de los trabajadores.

De entrada debemos señalar cómo la jurisprudencia constitucional ha superado el problema de la falta de referencia expresa en el art. 14 de la Constitución a la discriminación por discapacidad, considerando el Tribunal Constitucional que ha de entenderse incluida esta cuestión en la alusión a la discriminación por «cualquier otra condición o circunstancia personal o social», dado que la discapacidad es una de estas condiciones personales o sociales[43].

Uno de los principales problemas que se plantean es el de la prueba de la discriminación. El ordenamiento y la jurisprudencia española ha resuelto tradicionalmente la cuestión a través de un mecanismo de prueba indiciaria, a tenor del cual el trabajador que alega la discriminación no sufre la carga de una prueba plena de haber sido objeto de discriminación, siendo suficiente con poder probar indicios de que ha podido existir un clima discriminatorio. Esto supone una evidente comodidad probatoria para el discapacitado pero, en todo caso, el trabajador discapacitado que alega la discriminación debe probar esos indicios, no siendo suficiente con la simple

[43] En este sentido la Sentencia del Tribunal Constitucional 269/1994: «No siendo cerrado el elenco de factores diferenciadores enunciado en el art. 14 CE es claro que la minusvalía física puede constituir una causa real de discriminación». En su Fundamento Jurídico 4º ha señalado la vinculación entre los arts. 9.2 y 49 de la Constitución: «Precisamente porque puede tratarse de un factor de discriminación con sensibles repercusiones para el empleo de los colectivos afectados, tanto el legislador como la normativa internacional (Convenio 159 de la OIT) han legitimado la adopción de medidas promocionales de la igualdad de oportunidades de las personas afectadas por diversas formas de discapacidad, que, en síntesis, tienden a procurar la igualdad sustancial de sujetos que se encuentran en condiciones desfavorables de partida para muchas facetas de la vida social en las que está comprometido su propio desarrollo como personas. De ahí la estrecha conexión de estas medidas, genéricamente, con el mandato contenido en el art. 9.2 CE, y, específicamente, con su plasmación en el art. 49 CE».

alegación de ser discapacitado para que se traslade la carga de la prueba al empresario: sin los indicios la decisión empresarial será considerada perfectamente lícita[44].

En cuanto a la jurisprudencia relativa a las medidas de apoyo de los discapacitados, nos vamos a encontrar con el problema relativo a las cuotas de reserva. El Tribunal Constitucional resuelve la cuestión a través de la Sentencia 269/1994. La cuestión se planteó respecto del acceso a plazas de funcionarios en Administraciones Públicas, pero la lógica de esta sentencia es perfectamente trasladable al ámbito laboral. Señala esta Sentencia que la discapacidad o minusvalía es causa de discriminación, por lo que «(…) tanto el legislador como la normativa internacional (Convenio 150 de la OIT) han legitimado la adopción de medidas promocionales de la igualdad de oportunidades de las personas afectadas por diversas formas de discapacidad que, en síntesis, tiende a procurar la igualdad sustancial de sujetos que se encuentran en condiciones desfavorables de partida para muchas facetas de la vida social en las que está comprometido su propio desarrollo como personas". Desde este punto de vista, los mecanismos que están dirigidos a favorecer a los discapacitados para que puedan acceder al mercado de trabajo se vinculan no sólo al principio de igualdad y no discriminación (art. 14 CE), sino que son también manifestación del art. 9 de la Constitución, por el que se impone a los poderes públicos el deber de promover las condiciones para que la igualdad de los individuos y los grupos sea real y efectiva, removiendo cualquier obstáculo que la impida o limite. Teniendo este punto de partida la Sentencia afirma que «es claro que la reserva porcentual de plazas en una oferta de empleo, destinadas a un colectivo con graves problemas de acceso al trabajo (…), no vulnera el art. 14 CE, siendo por tanto perfectamente legítimo desde la perspectiva que ahora interesa y que además constituye un cumplimiento contenido en el art. 9.2 CE (…)».

En todo caso la cuota de reserva en las Administraciones Públicas no supone que los discapacitados deban concursar de manera esencialmente diferente respecto del resto de ciudadanos que pretenden acceder a la función pública, pues deben superar las pruebas selectivas igual que todos, demostrando así su aptitud para el puesto de trabajo ofrecido[45].

---

[44] La cuestión se ha planteado sobre todo desde la perspectiva de la extinción de los contratos de trabajo, así en el caso de la Sentencia del Tribunal Superior de Justicia de Cataluña de 3 de febrero de 2010, JUR 2010\157968, sobre despido colectivo; o la Sentencia del Tribunal Superior de Justicia de Andalucía de 19 de noviembre de 1997, AS 1997\5193, sobre extinción del contrato por ser declarado el trabajador inválido permanente total.

[45] En este sentido la propia STC 269/1994: «Los candidatos que podían optar a las plazas reservadas no fueron eximidos de acreditar su aptitud, superando las pruebas, y, sobre esta base

Desde una perspectiva estrictamente laboral podemos recordar la Sentencia de la Audiencia Nacional de 20 de enero de 1999[46], que en un *obiter dicta* considera que el establecimiento de cuotas de reserva a favor de los trabajadores discapacitados es una discriminación positiva a favor de los minusválidos.

Uno de los problemas de la política de cuotas es su falta de cumplimiento. Las Administraciones Públicas se han mostrado más receptivas al cumplimiento de estas medidas que las empresas privadas (de hecho la cuota es más elevada, pues alcanza al 7%). En este ámbito el principal problema jurisprudencial ha girado en relación a si la exigencia de una cuota tiene carácter individualizado en cada proceso de selección o tiene consideración de obligación general. La jurisprudencia se inclina por esta segunda respuesta, pudiendo distribuir esa cuota entre los diferentes procesos selectivos como consideren más oportuno[47].

6. PROHIBICIÓN DE DISCRIMINACIÓN, AJUSTES RAZONABLES Y ACCIONES POSITIVAS

6.1 Prohibición de discriminación e igualdad de oportunidades

Tal como hemos señalado, existen dos vertientes diferentes del principio de igualdad y no discriminación, ambos presentes en la regulación española. En primer lugar los discapacitados gozan, al igual que el resto de los ciudadanos, de la protección que otorga la prohibición de discriminación, y no pueden ser tratados de diferente manera que el resto de los ciudadanos por ser discapacitados.

Nuestro ordenamiento protege a los discapacitados tanto frente a discriminaciones directas como indirectas[48]. Esta distinción se plantea en el art. 2 de la

común, el acceso de éstos a las plazas tuvo lugar por riguroso orden de puntuación». Esta matización también se pone de manifiesto por la Sentencia del Tribunal Superior de Justicia de Murcia de 18 de diciembre de 2002, JUR 2003\16248, que resalta cómo la cuota de reserva supone que «es preciso superar las pruebas, esto es aprobar (…). No quiere decir ello que compita con todos los aspirantes, sino sólo con los de su condición, si es que los hubiere, pero en cualquier caso, se exige aprobar (…)».

[46] AS 1999\108.

[47] Vid. sobre todas estas cuestiones la STS de 5 de octubre de 2009, RJ 2009\5659.

[48] La distinción entre discriminación directa e indirecta es relativamente moderna en la regulación española. La inspiración procede de la Directiva 2000/78/CE, y concretamente de su art. 2.1. Establece este precepto que se entenderá por principio de igualdad de trato la ausencia de toda discriminación «directa o indirecta» basada en cualquiera de los motivos mencionados en el artículo 1, señalando a continuación que existirá discriminación directa

LGDIS, que de un lado afirma que la discriminación directa es «la situación en que se encuentra una persona con discapacidad cuando es tratada de manera menos favorable que otra en situación análoga por motivo de o por razón de su discapacidad» (letra c del citado artículo); y de otro afirma que la discriminación indirecta existe «cuando una disposición legal o reglamentaria, una cláusula convencional o contractual, un pacto individual, una decisión unilateral o un criterio o práctica, o bien un entorno, producto o servicio, aparentemente neutros, puedan ocasionar una desventaja particular a una persona respecto de otras por motivo de o por razón de discapacidad, siempre que objetivamente no respondan a una finalidad legítima y que los medios para la consecución de esta finalidad no sean adecuados y necesarios» (letra d del art. 2). En este sentido podemos señalar la reciente STJUE de 6 de diciembre de 2012[49] en la que se estima como situación de discriminación indirecta la de un régimen de previsión social de una empresa, a tenor del cual respecto de los trabajadores con más de 54 años que resultasen despedidos por causas económicas, tendrían derecho a una indemnización calculada de conformidad a la fecha más temprana posible de jubilación, y no en función de la antigüedad en la empresa, dándose la circunstancia de que cabía la posibilidad de jubilación anticipada por discapacidad. Ello suponía una discriminación indirecta para los trabajadores discapacitados, pues aún cuando se trata de una norma neutra, en la práctica reducía drásticamente sus indemnizaciones por despido respecto del resto de los trabajadores.

Pero, tal como ha destacado la doctrina laboral[50], junto a esta perspectiva de discriminación, existe una segunda, que a mi juicio es más importante: la igualdad de oportunidades[51]. La discapacidad aporta una importante diferencia social que ha

---

«cuando una persona sea, haya sido o pudiera ser tratada de manera menos favorable que otra en situación análoga por alguno de los motivos mencionados en el artículo 1», estando entre esos motivos la discapacidad. De otro lado, se considera que hay discriminación indirecta «cuando una disposición, criterio o práctica aparentemente neutros pueda ocasionar una desventaja particular a personas con una (…) discapacidad». De otro lado, el precepto (art. 2.3) considera también el acoso como una posible vía de discriminación cuando se produce como consecuencia de la discapacidad (entre otros motivos).

[49] TJCE\2012\372.

[50] Vid. V. CORDERO GORDILLO, op. cit., p. 62.

[51] A tenor del art. 2 a) de la LGDIS se considera igualdad de oportunidades «la ausencia de toda discriminación, directa o indirecta, por motivo de o por razón de discapacidad, incluida cualquier distinción, exclusión o restricción que tenga el propósito de obstaculizar o dejar sin efecto el reconocimiento, goce o ejercicio en igualdad de condiciones por las personas con discapacidad, de todos los derechos humanos, y libertades fundamentales en los ámbitos

generado la existencia de un colectivo tradicionalmente infravalorado por la sociedad, y el establecimiento de un simple principio de prohibición de la discriminación no es suficiente, pues este colectivo tiene como característica una situación de desventaja que se arrastra no sólo por su falta de aptitud o habilidad, sino también como consecuencia de un persistente y continuo rechazo social que se manifiesta prácticamente en todos los aspectos de la vida. Frente a esta situación un mero y simple principio de no discriminación es insuficiente[52].

Esta perspectiva supone la necesidad de la actuación de los poderes públicos para facilitar que los discapacitados puedan, de manera efectiva, acceder a una situación de igualdad real con el resto de los ciudadanos. Así la LGDIS establece todo un Título II (arts. 63 a 77) dedicado a la igualdad de oportunidades y no discriminación, y el art. 63 estima que supone una vulneración al derecho a la igualdad de oportunidades de las personas con discapacidad cuando «por motivo o por razón de discapacidad, se produzcan discriminaciones directas o indirectas, discriminación por asociación, acosos, incumplimientos de las exigencias de accesibilidad y de realizar ajustes razonables, así como el incumplimiento de las medidas de acción positiva legalmente establecidas». Más aún, como consecuencia de la necesidad de que los poderes públicos deban intervenir para promocionar y defender la igualdad de oportunidades, el art. 64 añade que para garantizar el derecho a la igualdad de oportunidades de las personas con discapacidad, los poderes públicos deberán establecer medidas contra la discriminación y medidas de acción positiva.

Se pretende no sólo aplicar un principio tradicional de igualdad y no discriminación, sino dar un paso más y reclamar para este colectivo un efectivo principio de igualdad de oportunidades. Para alcanzar este objetivo de igualdad de oportunidades, se plantea de manera expresa la necesidad de adoptar medidas de acción positiva orientadas a evitar o compensar las desventajas de una persona con discapacidad. En definitiva: para alcanzar una verdadera situación de igualdad no basta con la igualdad ante la ley, pues siglos de discriminación social han hecho que los discapacitados estén en una posición de desprotección que para ser superada requiere de auténticos privilegios respecto del resto de la población.

---

político, económico, social, laboral, cultural, civil o de otro tipo. Asimismo, se entiende por igualdad de oportunidades la adopción de medidas de acción positiva».

[52] En este sentido M.M. RUIZ CASTILLO, op. cit., pp. 66 y 67.

6.2 Prohibición de discriminación, necesidad de aptitud y ajustes razonables

Tanto el art. 4.2 c) ET como o el art. 16.2 ET declaran el derecho a no ser discriminado, pero a continuación añaden «siempre que se hallasen en condiciones de aptitud para desempeñar el trabajo o el empleo de que se trate». Es decir, no puede otorgarse a los discapacitados un trato peyorativo, salvo que estos no tengan la aptitud requerida para desempeñar el puesto de trabajo; y el problema está, justamente, en el hecho de que para ser discapacitado hay que sufrir una disminución de la capacidad de, al menos, el 33%. Lo lógico es que esta disminución pueda repercutir negativamente sobre la capacidad laboral.

¿Hasta que punto este hecho no genera en sí mismo una situación discriminatoria[53]? Desde mi punto de vista es necesaria una interpretación sistemática de nuestro ordenamiento. Recordemos que ya la Directiva 2000/78/CE establece en los arts. 2.2 y 5 que para eliminar las desventajas que sufren los discapacitados los empresarios están obligados a introducir «ajustes razonables para las personas con discapacidad»; es decir, deben tomar las medidas adecuadas para permitir a las personas con discapacidades acceder al empleo, desarrollarlo y progresar profesionalmente. Esta obligación empresarial no se impone en aquellos casos en los que tomar esa medida suponga una excesiva carga para el empresario. En el ordenamiento español el art. 2.m) LGDIS establece que han de entenderse por ajustes razonables «las modificaciones y adaptaciones necesarias y adecuadas del ambiente físico, social y actitudinal a las necesidades específicas de las personas con discapacidad que no impongan una carga desproporcionada o indebida, cuando se requieran en un caso particular de manera eficaz y práctica, para facilitar la accesibilidad y la participación y para garantizar a las personas con discapacidad el goce o ejercicio, en igualdad de condiciones con las demás, de todos los derechos». Desde la perspectiva laboral, existe la obligación empresarial de adoptar las medidas adecuadas para la adaptación del puesto de trabajo y la accesibilidad de la empresa, en función de las necesidades de cada situación concreta, con el fin de permitir a las personas con discapacidad acceder al empleo, desempeñar su trabajo, progresar profesionalmente y acceder a la formación, «salvo que esas medidas supongan una carga excesiva para el empresario» (art. 40.2 LGDIS).

[53] Así se lo plantea M.M. RUIZ CASTILLO, op. cit., pp. 67 y 68.

La interpretación que ha realizado el TJUE de esta cuestión ha supuesto admitir una definición amplia de lo que ha de entenderse por ajuste razonable[54], estimando que se refiere a la eliminación de las barreras que dificultan la participación plena y efectiva de las personas discapacitadas en la vida profesional en igualdad de condiciones con los demás trabajadores[55], incluyendo dentro de los ajustes la posibilidad de la reducción del tiempo de trabajo[56].

Pues bien, entiendo que sólo es factible determinar si el discapacitado carece de la aptitud para desempeñar el trabajo o el empleo de que se trate, una vez que el empresario haya cumplido con sus obligaciones en relación a la necesidad de aplicar los ajustes razonables. Esto implica que el empresario debe realizar modificaciones en el puesto de trabajo o en el proceso productivo para permitir de esa manera que el discapacitado tenga las mismas oportunidades que un trabajador con plena capacidad para poder desarrollar su prestación de trabajo, lo que incluye modificaciones en las instalaciones del centro de trabajo para que tanto el centro como el puesto de trabajo sean accesibles para el discapacitado, adaptaciones del puesto de trabajo a su concreta discapacidad, modificaciones en el proceso de producción, alteraciones en materia de tiempo de trabajo incluyendo el trabajo a tiempo parcial (por ejemplo para facilitar que pueda acudir a rehabilitación); u otros medios que faciliten el desarrollo del trabajo por parte del discapacitado (cursos formativos específicos, permitir la asistencia de intérpretes, o alterar para los discapacitados los sistemas de control o supervisión del trabajo desarrollado, etc.)[57].

Los ajustes deben ser razonables, lo que implica que no puede exigirse al empresario una carga excesiva. Con ello se pretende facilitar un cierto equilibrio entre

---

[54] Vid. la STJUE de 11 de abril de 2013, TJCE\2013\122, apartado 53.

[55] STJUE de 11 de abril de 2013, TJCE\2013\122, apartado 54.

[56] STJUE de 11 de abril de 2013, TJCE\2013\122, apartado 64.

[57] Señala CORDERO GORDILLO que es factible agrupar los diferentes ajustes en cuatro grandes categorías: a) cambios en las instalaciones, ya se trate del puesto de trabajo o del resto de instalaciones en la empresa; b) adaptaciones del equipamiento de trabajo o facilitar o facilitar personal de apoyo; c) reestructuración del trabajo, desde las tareas asignadas a la alteración del tiempo de trabajo; d) asignación de puesto de trabajo vacante que resulte más compatible con la situación del trabajador, op. cit., p. 139. Por su parte, J. FARGAS FERNÁNDEZ considera que la adaptación de puestos de trabajo de una persona con discapacidad implica fundamentalmente tres tipos de medidas: adaptación del tipo de trabajo a realizar, lo que incluiría la adaptación del puesto de trabajo; adaptación de la cantidad de trabajo; y adaptación del sistema de comunicaciones con el público y con el resto de compañeros y superiores. "Mercado de trabajo y personas con discapacidad", en AA.VV., *Anuario de conferencias del CARL. Primer semestre de 2007*, CARL, Sevilla 2008, p. 265.

los intereses del discapacitado y del empresario, permitiendo que el empresario incumpla lícitamente una obligación impuesta por el legislador cuando hay motivos que lo justifican[58]. Lógicamente, una interpretación más o menos flexible de lo que se considere por carga excesiva determina una mayor o menor exigencia en la obligación de realizar los ajustes razonables[59].

Para responder a la anterior cuestión hemos de tener en cuenta que el legislador español, siguiendo a la Directiva 2000/78/CE, ha establecido una serie de indicios para determinar si la carga exigida al empresario es excesiva o no (art. 40.2 in fine LGDIS): se tendrá en cuenta si la carga que estas medidas suponen para el empresario es paliada en grado suficiente mediante las medidas, ayudas o subvenciones públicas para personas con discapacidad, así como los costes financieros y de otro tipo que las medidas impliquen y el tamaño y el volumen de negocios total de la organización o empresa. En definitiva, se trata fundamentalmente de una cuestión de costes económicos del ajuste concreto.

6.3 Acciones positivas

La acción positiva es un instrumento que pretende facilitar una igualdad efectiva y la igualdad de oportunidades para aquellos colectivos que tienen inicialmente una situación de retraso o desventaja respecto del resto de la sociedad; en este caso, en el acceso al mercado de trabajo[60]. Desde la perspectiva que nos ocupa (discapacitados y acceso al mercado de trabajo), la acción positiva se configura como una ventaja competitiva a ese concreto colectivo, que no es atribuida con carácter general al resto de los ciudadanos. La acción positiva va a suponer el establecimiento de un mecanismo que privilegia a un colectivo respecto del resto de la ciudadanía. Se trata, por tanto, de una discriminación que se considera lícita por pretender alcanzar una igualdad

[58] En este sentido CORDERO GORDILLO, V., op. cit., p. 146.

[59] Vid. E. GARRIDO PÉREZ, "Prohibición de discriminación y la razonable adaptación de los puestos de trabajo", en AA.VV., *Anuario de conferencias del CARL. Primer semestre 2007*, CARL, Sevilla 2008, p. 277.

[60] En este sentido, el art. 2 b) del Real Decreto Legislativo 1/2013 establece al conceptuar la igualdad de oportunidades, que «Asimismo, se entiende por igualdad de oportunidades la adopción de medidas de acción positiva». Por su parte, el art. 63 establece que se producen violaciones al derecho a la igualdad de oportunidades cuando se incumplen las medidas de acción positiva establecidas legalmente. De otro lado, el art. 67 reconoce la necesidad de que los poderes públicos adopten medidas de acción positiva, cuyo contenido se delinea con carácter general en el art. 68.

efectiva: se introduce un tratamiento favorable a un colectivo que ha mantenido una tradicional situación de desventaja, para conseguir que esa situación desaparezca y haya una situación de auténtica igualdad de oportunidades.

El art. 17 ET admite la posibilidad de que por ley puedan establecerse exclusiones, reservas y preferencias para ser contratado libremente; más aún, su apartado tercero señala que el Gobierno podrá regular medidas de reserva, duración o preferencia en el empleo que tengan por objeto facilitar la colocación de trabajadores demandantes de empleo, pudiendo otorgar también subvenciones, desgravaciones y otras medidas para fomentar el empleo de grupos específicos de trabajadores que encuentren dificultades especiales para acceder al empleo. De otro lado la LGDIS nos ofrece un concepto sobre qué debemos entender por medidas de acción positiva en su art. 2.g): «son aquellas de carácter específico consistentes en evitar o compensar las desventajas derivadas de la discapacidad y destinadas a acelerar o lograr la igualdad de hecho de las personas con discapacidad y su participación plena en los ámbitos de la vida política, económica, social, educativa, laboral y cultural, atendiendo a los diferentes tipos y grados de discapacidad». Por otra parte, el art. 40.1 LGDIS declara que «para garantizar la plena igualdad en el trabajo, el principio de igualdad de trato no impedirá que se mantengan o adopten medidas específicas destinadas a prevenir o compensar las desventajas ocasionadas por motivo de o por razón de discapacidad».

Desde la perspectiva de la contratación y acceso al empleo, esas medidas de acción positiva pueden ser fundamentalmente de dos tipos: de un lado, mecanismos promocionales para fomentar la contratación de los discapacitados, es decir, ayudas económicas (subvenciones o bonificaciones a la cotización de Seguridad Social) para hacer más atractiva la contratación de este colectivo. Este es un instrumento común en la política de empleo, pues se aplica no sólo a los discapacitados, sino también al resto de colectivos que requieren de una especial atención. De otro lado, encontramos la imposición de cuotas. Tal como ha señalado la doctrina se trataría del mecanismo de acción positiva más incisivo con el que cuenta el legislador español[61]. No obstante, debemos reconocer que hay un permanente y sistemático incumplimiento de esta medida, lo cual cuestiona su eficacia[62].

Ciertamente la cuota de reserva es una medida mucho más radical que otras posibles medidas, por lo que ha generado muchas más polémicas que otros

[61] En este sentido M.M. RUIZ CASTILLO, op. cit, p. 69.

[62] Así, J. ESCRIBANO GUTIÉRREZ, "El mito de la responsabilidad social corporativa: el caso de los trabajadores discapacitados", *Relaciones Laborales* nº 5 de 2010.

mecanismos dirigidos a favorecer la igualdad de oportunidades, si bien ha sido admitida por parte de la doctrina jurisprudencial española[63].

7. INSERCIÓN LABORAL DE LOS DISCAPACITADOS. CRISIS DE EMPLEO Y POLÍTICAS ACTIVAS DE EMPLEO

La inserción laboral es uno de los principales elementos para favorecer una igualdad de oportunidades a los discapacitados, de ahí que la LGDIS haya establecido, como no podía ser menos, una regulación expresamente dedicada a garantizar el derecho al trabajo de los discapacitados (arts. 35 a 47), tomando como punto de partida que las personas con discapacidad tienen derecho al trabajo en condiciones que garanticen la igualdad de trato y la no discriminación (art. 35).

El instrumento fundamental para desarrollar ese derecho es la política activa de empleo dirigida específicamente a los discapacitados, que ha generado la elaboración por parte del Gobierno español de una Estrategia Global de Acción para el Empleo de las Personas con Discapacidad (2008-2012). En líneas generales, con esta Estrategia se pretende disminuir los niveles de desempleo y elevar las tasas de actividad de los discapacitados, y especialmente de las mujeres.

La Estrategia establece dos objetivos fundamentales: aumentar las tasas de actividad y de ocupación, incrementando consecuentemente la inserción laboral de los discapacitados; y en segundo lugar la mejora de la calidad del empleo y las condiciones de trabajo. Estos objetivos generales se desarrollan a través de siete objetivos operativos diferentes[64].

---

[63] Podemos citar una Sentencia importante, como fue la STC 269/1994, si bien se refería a los funcionarios y no en relación al ámbito laboral.

[64] 1º La remoción de las barreras socioculturales, legales, físicas o de comunicación que dificultan el acceso al empleo de estos trabajadores. 2º Potenciar la educación y formación de los discapacitados para incrementar su empleabilidad. 3º Diseño de nuevas políticas activas de empleo adaptadas a las necesidades de las personas con discapacidad. 4º Promover la contratación ordinaria de los trabajadores con discapacidad. Es el objetivo de mayor peso en esta Estrategia. 5º Renovar el empleo protegido. 6º Mejorar la calidad del empleo y de las condiciones de trabajo de los trabajadores discapacitados, actuando directamente así sobre las situaciones de discriminación. 7º Mejora de los sistemas de recogida, análisis y difusión de la información en materia de empleo de las personas discapacitadas, favoreciendo una mayor coordinación de las políticas públicas de empleo.

Para ello se han venido utilizando todo un conjunto de mecanismos diferentes, con los que se pretende favorecer la incorporación a puestos de trabajo y empresas ordinarias, lo cual supone la aplicación a los trabajadores de la normativa laboral común, la misma regulación que se aplica al resto de los trabajadores. Por el contrario, la inserción mediante empleo protegido busca el acceso al mercado de trabajo a través de empresas específicamente destinadas a facilitar empleo a discapacitados, lo que implica también una regulación específica y propia sobre las relaciones laborales de los discapacitados que prestan sus servicios en dichas empresas. El empleo ordinario es la vía prioritaria y fundamental para facilitar el empleo a los discapacitados, siendo el empleo protegido una vía a la que se acude en aquellos casos en los que por las circunstancias de la propia discapacidad no es posible el recurso del empleo ordinario. Analicemos ahora los diferentes mecanismos existentes en el ordenamiento español. Con carácter general el art. 39.2 LGDIS señala que se fomentará el empleo de las personas con discapacidad mediante subvenciones o préstamos para la contratación, la adaptación de los puestos de trabajo, la eliminación de barreras arquitectónicas que dificulten el acceso, la movilidad o la comunicación, y las bonificaciones a las cuotas a la Seguridad Social. De entre estas diferentes medidas podemos destacar las que desarrollamos a continuación.

7.1 Incentivos económicos a la contratación de discapacitados

La utilización de incentivos económicos persigue fundamentalmente otorgar al empresario un aliciente económico para conseguir que tenga un mayor interés en la contratación de este tipo de trabajadores. Lógicamente, ello implica que los trabajadores que se ven beneficiados por este tipo de medidas se colocan en una posición de cierto privilegio respecto del resto de trabajadores no afectados por el mecanismo. El de los discapacitados no es precisamente el único de los colectivos que se beneficia de este tipo de incentivos económicos a la contratación, siendo una regla común a los diferentes colectivos que se caracterizan por tener especiales dificultades de acceso al mercado de trabajo (mujeres, jóvenes, parados de larga duración, mayores de 45 años, personas en situación de exclusión social, inmigrantes y, por supuesto, los discapacitados).

La utilización de este tipo de mecanismo también conlleva ciertos elementos críticos, como el efecto sustitución de trabajadores ordinarios por trabajadores beneficiarios de medidas económicas de inserción. Por otra parte, también hay importantes dudas existentes en la doctrina laboral sobre la eficacia de este tipo de instrumento como mecanismo de creación de empleo.

Estos incentivos económicos son, normalmente, de dos tipos: reducciones en la cotización a la Seguridad Social (bonificaciones), con lo que se consigue abaratar uno de los costes económicos del factor trabajo; o bien aportaciones económicas (subvenciones).

Debido a que el mercado de trabajo español se caracteriza por la excesiva utilización del contrato de trabajo temporal, lo normal es que se utilicen las medidas de fomento del empleo fundamentalmente dirigidas a la contratación indefinida, si bien hay ámbitos residuales donde, por las especiales dificultades de acceso al mercado de trabajo, se utiliza también el fomento de la contratación temporal, siendo uno de estos casos la contratación de trabajadores discapacitados.

En cuanto al fomento de la contratación indefinida podemos encontrar la existencia de subvenciones económicas por la contratación de un trabajador discapacitado[65], pero es más habitual la utilización de bonificaciones en la cotización a la Seguridad Social que recaen sobre los empresarios: vid., por ejemplo lo dispuesto por el art. 2 de la Ley 43/2006[66]. De esta regulación resalta que se ha optado por establecer una cuantía concreta en las bonificaciones, abandonando el sistema tradicional de fijar porcentajes de reducción[67]. Otro elemento característico del sistema

[65]Vid. por ejemplo las reguladas en el Real Decreto 1451/1983, de 11 de mayo sobre empleo selectivo y medidas de fomento de empleo de trabajadores minusválidos, a tenor del cual las empresas que contraten por tiempo indefinido y a jornada completa a trabajadores minusválidos tendrán derecho a una subvención de 3.907 euros por cada contrato de trabajo celebrado.

[66] Se bonifica la contratación indefinida o conversión de contrato temporal en indefinido: bonificación durante la vigencia del contrato de 375 euros al mes (4.500 euros al año). Esta bonificación asciende a 425 euros al mes (5.100 euros al año), cuando se realicen contratos o conversión de contratos temporales en indefinidos en los casos de personas con parálisis cerebral, enfermedad mental, discapacidad intelectual, con grado de minusvalía reconocida igual o superior al 33%; o bien en los casos de personas con discapacidad física o sensorial, en grado de minusvalía reconocida igual o superior al 65%. Además, las bonificaciones anteriores se incrementarán en 100 euros al mes (1.200 euros al año) si el trabajador con discapacidad tiene cuarenta y cinco años o más; o se incrementarán en 70,83 euros al mes (850 al año) si se trata de una mujer. No obstante, no se pueden sumar las bonificaciones entre sí en caso de ser mayor de 45 años y mujer.

[67] Ese sistema suponía una diferente bonificación en función de la retribución del trabajador (a mayor salario, mayor reducción), lo que generaba una tendencia a contratar por esta vía a los trabajadores de mayor salario y normalmente más cualificados, dificultando la contratación de los que tenían menos cualificación y salario. En este sentido O. MOLINA HERMOSILLA, M. GARCÍA JIMENEZ, y C. MOLINA NAVARRETE, "La nueva reforma laboral para la mejora

español es que se ha optado por otorgar unas bonificaciones más elevadas a aquellos discapacitados que se encuentran con mayores dificultades para acceder a un puesto de trabajo.

También se fomenta, aunque de manera residual, la contratación temporal, utilizando bonificaciones a las cuotas de la Seguridad Social[68]. Así, el art. 2.2 nº 4 de la Ley 43/2006[69].

En la más reciente evolución de la normativa de política de empleo, hemos de señalar los mecanismos que se establecen por la Ley 11/2013, de 26 de julio, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo. En líneas generales allí se establecen diferentes mecanismos de fomento de empleo destinados a empresas en general, pequeñas empresas o trabajadores autónomos, que contraten fundamentalmente trabajadores jóvenes (treinta años)[70], extendiéndose estas bonificaciones a la contratación de trabajadores con una discapacidad igual o superior al 33% y que sean menores de treinta y cinco años (Disp. Adic. 9ª).

---

del crecimiento económico y la calidad del empleo: ¿mucho ruido y pocas nueces?", *Estudios Financieros. Revista de Trabajo y Seguridad Social*, nº 280 (2006), p. 16. Del mismo modo, V. CORDERO GORDILLO, *Régimen jurídico del empleo de las personas con discapacidad*, Tirant lo Blanch, Valencia 2012, p. 179.

[68] Además, hay que tener en cuenta que algunas CCAA, han establecido mecanismos consistentes en subvenciones económicas por la contratación de discapacitados, aún cuando se realice a través de contratos de carácter temporal. Sobre la cuestión vid. V. CORDERO GORDILLO, op. cit., p. 179.

[69] Concretamente, en la Ley 43/2006 se establecen las siguientes bonificaciones: en el caso de que las personas con discapacidad sean contratadas mediante el contrato temporal de fomento del empleo, la bonificación ascenderá a 291,66 euros/mes (3.500 euros/año) durante toda la vigencia del contrato. La bonificación es mayor si se trata de trabajadores con parálisis cerebral; o bien si se trata de personas con discapacidad física o sensorial, con un grado de minusvalía reconocido igual o superior al 65% (en estos casos la bonificación alcanza los 341,66 euros/mes, 4.100 euros/año). Si además el trabajador tiene en el momento de la contratación 45 o más años, o si se trata de una mujer, la bonificación que corresponda de acuerdo con los párrafos anteriores, se incrementará, en ambos supuestos, en 50 euros/mes (600 euros/año).

[70] Concretamente se establecen los siguientes supuestos: incentivos a la contratación a tiempo parcial con vinculación formativa (art. 9), contratación indefinida de un joven por microempresas y empresarios autónomos (art. 10), incentivos a la contratación en nuevos proyectos de emprendimiento joven (art. 11), primer empleo joven (art. 12), incentivos al contrato en prácticas (art. 13), e incentivos a la incorporación de jóvenes a entidades de economía social (art. 14).

Junto a las bonificaciones o a las subvenciones, encontramos la posibilidad de regular deducciones fiscales y específicamente el impuesto de sociedades. Concretamente debemos acudir al art. 41 del Real Decreto-Legislativo 4/2004, de 15 de marzo, por el que se aprueba el Texto Refundido de la Ley del Impuesto sobre Sociedades[71].

7.2 Cuotas de reserva y medidas alternativas

El art. 42 de la LGDIS establece la obligación para empresas públicas y privadas de cumplir con una cuota de puestos de trabajo reservados para discapacitados, a tenor de la cual, si estas emplean a un número de 50 o más trabajadores, vendrán obligadas a contratar al menos al 2% de trabajadores discapacitados. El cómputo se realizará sobre la plantilla total de la empresa correspondiente, cualquiera que sea el número de centros de trabajo de aquella y cualquiera que sea la forma de contratación laboral que vincule a los trabajadores de la empresa. Se incluye en dicho cómputo a los trabajadores con discapacidad que se encuentren prestando servicios en la empresa en virtud de contratos de puesta a disposición celebrados entre la empresa y una empresa de trabajo temporal[72].

Es posible cumplir la obligación de contratación de una cuota de discapacitados a través de medidas alternativas. La posibilidad se recoge expresamente en el mencionado art. 42 de la LGDIS. Es necesario que esta vía alternativa sea acordada a través de la negociación colectiva sectorial estatal o de nivel inferior, o bien por opción voluntaria del empresario; si bien dado el carácter excepcional de esta medida, el RD

[71] Este precepto establece la deducción de la cuota íntegra del impuesto de la cantidad de 9.000 euros por cada persona/año que suponga un incremento del promedio de plantilla de trabajadores con discapacidad en un grado igual o superior al 33% e inferior al 65%, contratados por el sujeto pasivo, experimentado durante el período impositivo, respecto a la plantilla media de trabajadores de la misma naturaleza del período inmediato anterior. La cuantía se eleva a 12.000 euros por cada persona/año de incremento del promedio de plantilla de trabajadores con discapacidad en un grado igual o superior al 65%, contratados por el sujeto pasivo, experimentado durante el período impositivo, respecto a la plantilla media de trabajadores de la misma naturaleza del período inmediato anterior.

[72] Con anterioridad (vid. epígrafe nº 5) nos hemos referido al problema que plantea la cuota como instrumento antidiscriminatorio y su constitucionalidad, por lo que nos remitimos a lo allí señalado.

364/2005 (art. 1.2) limita esta posibilidad a los siguientes supuestos: cuando los servicios públicos de empleo competentes, o las agencias de colocación, no puedan atender la oferta de empleo presentada (inexistencia de trabajadores o bien que existiendo no estén interesados en la oferta); o cuando se acrediten por la empresa obligada cuestiones de carácter productivo, organizativo, técnico o económico que suponen una especial dificultad para incorporar trabajadores con discapacidad a la plantilla de la empresa.

Las medidas alternativas pueden ser las siguientes:

a) La celebración de un contrato mercantil o civil con un centro especial de empleo, o con un trabajador autónomo con discapacidad, para el suministro de materias primas, maquinaria, bienes de equipo o cualquier otro tipo de bienes necesarios para el normal desarrollo de la actividad de la empresa que opta por esta medida.

b) La celebración de un contrato mercantil o civil con un centro especial de empleo, o con un trabajador autónomo con discapacidad, para la prestación de servicios ajenos y accesorios a la actividad normal de la empresa.

c) Realización de donaciones y de acciones de patrocinio, siempre de carácter monetario, para el desarrollo de actividades de inserción laboral y de creación de empleo de personas con discapacidad, cuando la entidad beneficiaria de dichas acciones de colaboración sea una fundación o una asociación de utilidad pública cuyo objeto social sea, entre otros, la formación profesional, la inserción laboral o la creación de empleo en favor de las personas con discapacidad que permita la creación de puestos de trabajo para aquellas y, finalmente, su integración en el mercado de trabajo.

d) La constitución de un enclave laboral, previa suscripción del correspondiente contrato con un centro especial de empleo.

Se exige que la medida alternativa represente un determinado coste económico mínimo para la empresa: si se trata de medidas contempladas en los apartados a) b) y c) antes señalados, los contratos mercantiles o civiles habrán de suponer un coste económico equivalente a tres veces el indicador público de renta de efectos múltiples (IIPRM) anual por cada trabajador con discapacidad dejado de contratar por debajo de la cuota del dos por ciento. Si estamos ante una de las medidas previstas en el apartado c) habrá de ser, al menos, de un importe de 1,5 veces el IPREM anual por cada trabajador con discapacidad dejado de contratar por debajo de la cuota del dos por ciento.

Para las Administraciones Públicas, el art. 59.1 de la Ley 7/2007, de 12 de abril, del Estatuto Básico del Empleado Público establece que en las ofertas de empleo

público se reservará un cupo no inferior al siete por ciento de las vacantes para ser cubiertas por personas con discapacidad, siempre y cuando superen los procesos selectivos y acrediten su discapacidad y la compatibilidad con el desempeño de las tareas, porcentaje que se mantendrá hasta que se alcance el dos por ciento de los efectivos totales en cada Administración Pública. Además, se precisa que la reserva del mínimo del siete por ciento se realizará de manera que, al menos, el dos por ciento de las plazas ofertadas lo sea para ser cubiertas por personas que acrediten discapacidad intelectual, y el resto de las plazas ofertadas lo sea para personas que acrediten cualquier otro tipo de discapacidad.

7.3 Empleo con apoyo

A tenor del art. 41 del LGDIS, los servicios de empleo con apoyo se configuran como el conjunto de acciones de orientación y acompañamiento individualizado en el puesto de trabajo, que tienen por objeto facilitar la adaptación social y laboral de personas trabajadoras con discapacidad con especiales dificultades de inserción laboral en empresas del mercado ordinario de trabajo. El empleo con apoyo se regula en la actualidad a través del Real Decreto 870/2007. Se define como el conjunto de acciones de orientación y acompañamiento individualizado en el puesto de trabajo, prestadas por preparadores laborales especializados, que tienen por objeto facilitar la adaptación social y laboral de trabajadores con discapacidad con especiales dificultades de inserción laboral en empresas del mercado ordinario de trabajo, de manera que los discapacitados puedan desarrollar su trabajo en condiciones similares al resto de los trabajadores que desempeñan puestos equivalentes (vid. art. 2.1 RD 870/2007)[73].

[73] A tenor de lo previsto en el art. 2.2 del citado RD 870/2007, las medidas de apoyo podrán consistir en: a) Orientación, asesoramiento y acompañamiento a la persona con discapacidad, elaborando para cada trabajador un programa de adaptación al puesto de trabajo. b) Labores de acercamiento y mutua ayuda entre el trabajador beneficiario del programa de empleo con apoyo, el empleador y el personal de la empresa que comparta tareas con el trabajador con discapacidad. c) Apoyo al trabajador en el desarrollo de habilidades sociales y comunitarias, de modo que pueda relacionarse con el entorno laboral en las mejores condiciones. d) Adiestramiento específico del trabajador con discapacidad en las tareas inherentes al puesto de trabajo. e) Seguimiento del trabajador y evaluación del proceso de inserción en el puesto de trabajo. Estas acciones tendrán por objeto la detección de necesidades y la prevención de posibles obstáculos, tanto para el trabajador como para la empresa que le contrata, que pongan en peligro el objetivo de inserción y permanencia en el empleo. f) Asesoramiento e información a la empresa sobre las necesidades y procesos de adaptación del puesto de trabajo.

Los discapacitados recibirán un programa individualizado, según su situación y sus necesidades, para prepararlos a asumir un puesto de trabajo ordinario. Estos trabajadores deben ser contratados por empresas ordinarias y serán empleados para el desarrollo de actividades propias del proceso productivo de la empresa[74]. Dichas empresas tendrán derecho a los beneficios previstos en la normativa sobre contratación de trabajadores con discapacidad en los términos establecidos en la misma, es decir, se beneficiarán de las bonificaciones y subvenciones que hemos señalado *supra*.

Los programas de apoyo se desarrollarán a través de entidades promotoras de tal actividad, que podrán ser bien asociaciones, fundaciones y otras entidades sin ánimo de lucro que suscriban el correspondiente convenio de colaboración con la empresa que va a contratar a los trabajadores con discapacidad; o bien a través de Centros Especiales de Empleo (CEE) que suscriban convenios de colaboración con las empresas que van a contratar a los trabajadores discapacitados. Tales entidades promotoras se beneficiarán de las subvenciones reguladas en el RD 870/2003[75]. La actividad de apoyo a los discapacitados la efectúan de manera directa los preparadores laborales[76].

---

[74] Pueden ser contratados bien mediante un contrato indefinido o de duración determinada, siempre que la duración del contrato sea en este caso, como mínimo, de seis meses. En el supuesto de contratación a tiempo parcial, la jornada de trabajo será al menos del 50% de la jornada de un trabajador a tiempo completo comparable.

[75] Vid. lo dispuesto por el artículo 8 de este RD 870/2003, que fija cuantías entre 6.600 euros anuales y 2.500 euros anuales por cada trabajador, en función del tipo de discapacidad. Estas subvenciones se reducirán proporcionalmente en función de la duración del contrato de cada trabajador con discapacidad, así como en función de su jornada en el supuesto de que el contrato sea a tiempo parcial. Estas subvenciones se concederán por períodos máximos de un año, siendo prorrogables previa solicitud.

[76] El tiempo de atención a cada trabajador con discapacidad no podrá ser inferior a los porcentajes siguientes de la jornada de trabajo de los discapacitados: a) Un tercio en el caso de trabajadores con parálisis cerebral, con enfermedad mental o con discapacidad intelectual, con un grado de minusvalía reconocido igual o superior al 65%. b) Un quinto en el caso de trabajadores con parálisis cerebral, con enfermedad mental o con discapacidad intelectual, con un grado de minusvalía reconocido igual o superior al 33% e inferior al 65%. c) Un octavo en el caso de trabajadores con discapacidad física o sensorial con un grado de minusvalía reconocido igual o superior al 65%.

7.4 El empleo protegido de los discapacitados: los Centros Especiales de Empleo

El empleo protegido se menciona expresamente en el art. 37.2 de la LGDIS y tradicionalmente se ha considerado como un mecanismo de carácter secundario frente a la modalidad principal que es el empleo ordinario, y específicamente diseñado a favor de aquellos discapacitados que por razón de la naturaleza o de las consecuencias de sus minusvalías no pueden, provisional o definitivamente, ejercer una actividad laboral en las condiciones ordinarias.

Esta posibilidad se desarrolla en el art. 43 LGDIS. Los Centros Especiales de Empleo (CEE) se definen como aquellos cuyo objetivo principal es facilitar que los discapacitados con limitaciones para acceder al empleo ordinario puedan desarrollar un trabajo productivo, participando regularmente en las operaciones del mercado, y teniendo como finalidad asegurar un empleo remunerado y la prestación de servicios de ajuste personal y social que requieran sus trabajadores. Los CEE están diseñados para facilitar la integración de los discapacitados en el régimen de trabajo normal; es decir, sirven como trampolín para que los discapacitados después de desarrollar esta experiencia laboral puedan saltar al empleo ordinario[77]. Es requisito esencial que la plantilla de los CEE esté constituida por el mayor número de trabajadores minusválidos que permita la naturaleza del proceso productivo y, en todo caso, por un mínimo del 70% de aquella (art. 43.2 LGDIS).

El ordenamiento laboral ha regulado específicamente una relación laboral especial para los discapacitados que prestan sus servicios en los CEE, es decir, un régimen laboral específico para estos trabajadores, recogido en el Real Decreto 1368/1985. Las especialidades de esta relación laboral son ciertamente muy importantes: los discapacitados que desean acceder a un empleo de estas características deben inscribirse en los Servicios Públicos de Empleo y los empresarios deberán solicitar la contratación a tales Servicios, describiendo detalladamente en las ofertas que formulen los puestos de trabajo que vayan a cubrir, las características técnicas de los mismos y las

[77] En este sentido, el art. 43.1 del Real Decreto Legislativo 1/2013 señala que «Los centros especiales de empleo son aquellos cuyo objetivo principal es el de realizar una actividad productiva de bienes o servicios, participando regularmente en las operaciones de mercado, y tienen como finalidad el asegurar un empleo remunerado para las personas con discapacidad; a la vez que son medio de inclusión del mayor número de estas personas en el régimen de empleo ordinario (…)».

circunstancias personales y/o profesionales que deben reunir los trabajadores. El contrato debe realizarse obligatoriamente por escrito, pudiendo utilizarse cualquier tipo de modalidad. En materia salarial se establecen peculiaridades interesantes respecto a los complementos de productividad o rendimiento, estableciéndose incluso la posibilidad de contratar «a bajo rendimiento» (inferior al normal en un 25%). Se prohíbe la realización de horas extraordinarias y se flexibilizan los permisos para poder acudir a rehabilitación médico-funcional. En cuanto al régimen del despido, se establecen ciertas modificaciones en relación a la extinción por falta de adaptación a las modificaciones en el proceso productivo, a la ineptitud sobrevenida, o en materia de faltas de asistencia al trabajo.

Los CEE deberán prestar, a través de unidades de apoyo, los servicios de ajuste personal y social que requieran los discapacitados (los que permitan superar barreras, obstáculos o dificultades que tengan los discapacitados para incorporarse a un puesto de trabajo, así como la permanencia y progresión en el mismo, art. 43.2 de la LGDIS)[78].

Como complemento a esta normativa se establece por el art. 46 LGDIS la figura de los enclaves laborales, mecanismo establecido para facilitar la transición al empleo ordinario de quienes padecen una discapacidad que genera especiales dificultades para el acceso al empleo ordinario. El desarrollo reglamentario se encuentra en el Real Decreto 290/2004, de 20 de febrero. A tenor del art. 1.2 del citado Real Decreto, se entiende por enclave laboral el contrato entre una empresa del mercado ordinario de trabajo, llamada empresa colaboradora, y un CEE, que tiene como objetivo la realización de obras o servicios que guarden relación directa con la actividad normal de aquella y para cuya realización un grupo de trabajadores con discapacidad del centro especial de empleo se desplaza temporalmente a la empresa colaboradora.

En cuanto a los trabajadores discapacitados que se integrarán en el enclave de empleo, serán seleccionados entre sus trabajadores por el CEE, y el 60% de ellos, como mínimo, deben presentar especiales dificultades para el acceso al mercado ordinario de trabajo[79]. El resto de los trabajadores del enclave deberá tener un grado de discapacidad igual o superior al 33%.

---

[78] Se incluyen en el art. 43.2 los servicios dirigidos a la inclusión social, cultural y deportiva; lo cual excede evidentemente del ámbito estrictamente laboral.

[79] A estos efectos se van a entender por trabajadores con especiales dificultades: a) las personas con parálisis cerebral, las personas con enfermedad mental o las personas con discapacidad intelectual, con un grado de minusvalía reconocido igual o superior al 33%; b) las personas con discapacidad física o sensorial, con un grado de minusvalía reconocido igual o superior al 65%; c) las mujeres con discapacidad no incluidas en los apartados anteriores con un grado de minusvalía reconocido igual o superior al 33%.

Laboralmente es importante señalar que las empresas colaboradoras en el enclave podrán contratar en cualquier momento (preferentemente a través de contratos indefinidos) a los discapacitados. Además, como mecanismo de seguridad para la situación laboral de los trabajadores, se establece que los contratados por la empresa colaboradora pasarán automáticamente a situación de excedencia voluntaria en el CEE, por lo que si se extingue su nuevo contrato podrían volver al CEE. Hay que tener en cuenta que la contratación a través de enclaves laborales supone el acceso a importantes incentivos económicos para las empresas colaboradoras que decidan contratar tras la finalización del enclave a los trabajadores discapacitados[80].

7.5 Fomento del trabajo autónomo

La Orden del Ministerio de Trabajo 1622/2007, de 5 de junio (Orden TAS/1622/2007), establece un conjunto bastante amplio de subvenciones para aquellos trabajadores desempleados, inscritos en el Servicio Público de Empleo como demandantes de empleo, que decidan establecerse como trabajadores autónomos (subvenciones financieras destinada a reducir los intereses de los préstamos, subvención para asistencia técnica, o subvención para formación). Algunas de estas subvenciones contemplan expresamente la situación de los discapacitados, de manera que se incrementan las cuantías de las mismas[81].

De otro lado, los discapacitados que decidan establecerse como autónomos también pueden ser beneficiarios de bonificaciones a las cuotas de Seguridad Social, posibilidad que se regula en la Disposición Adicional 11ª de la Ley 45/2002[82], a tenor de la cual pueden obtener una bonificación sobre la cuota por contingencias comunes durante los cinco años siguientes al momento en que reproduzca el alta en el Régimen Especial de Seguridad Social de Trabajadores Autónomos. Dicha bonificación es del 80% los primeros 6 meses y del 50% el resto del período; siendo la cuota a reducir el

[80] Vid. arts. 12 y 13 del Real Decreto 290/2004.

[81] Así, en la subvención por el establecimiento como trabajador autónomo, la cuantía básica es de 5.000 euros, pero si se trata de desempleados con discapacidad, asciende a 8.000 euros, y si se trata de mujeres desempleadas con discapacidad, la cuantía asciende a los 10.000 euros. Por otra parte, en caso de subvención financiera, las cuantías que acabamos de señalar se repiten, ascendiendo de la cuantía base de 5.000 euros a los 8.000 o 10.000 euros si es desempleado discapacitado, o si a ello se suma ser mujer.

[82] Vid. la última redacción de esta norma, introducida por la Ley 11/2013, de 26 de julio, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo (BOE de 27 de julio).

resultado de aplicar a la base mínima de cotización que corresponda el tipo mínimo de cotización vigente en cada momento[83].

8. UNIVERSIDAD, ORIENTACIÓN AL TRABAJO E INSERCIÓN DE TRABAJADORES DISCAPACITADOS

Encontramos una importante dificultad en relación a la presencia de discapacitados dentro de la Universidad, pues los datos que se han podido obtener sobre esta cuestión son realmente antiguos. Proceden de la Encuesta sobre Discapacidades, Deficiencias y Estado de Salud (EDDES) del INE, que data de finales del Siglo XX. No obstante, ofrece una perspectiva de interés sobre el nivel educativo de las personas con discapacidad. De estos datos cabe destacar, en primer lugar, la diferente distribución de la población en relación al nivel educativo (medido en función de los estudios más elevados terminados), entre la población con y sin discapacidad. Así, si entre los primeros, teniendo en cuenta a la población de 10 a 64 años, la tasa de analfabetismo es del 10,8% (11,7% entre las mujeres), entre los segundos es casi diez veces menor (1,3%). Lo contrario ocurre en relación al porcentaje de personas con estudios universitarios finalizados, casi cuatro veces menor entre las personas con alguna discapacidad: 3,6% frente al 12,7% del resto de la población. Probablemente la principal tarea en este punto sea favorecer la demanda potencial de estudios universitarios entre los discapacitados, pues son escasos (en comparación con el resto de la población) los que terminan los estudios de secundaria

[83] Los discapacitados que pueden beneficiarse serán aquellos que tengan un grado de discapacidad igual o superior al 33%, y que causen alta inicial en el Régimen Especial de la Seguridad Social de los Trabajadores por Cuenta Propia o Autónomos; o bien los que tengan un grado de discapacidad igual o superior al 33%, tengan menos de 35 años de edad y causen alta inicial o no hubieran estado en situación de alta en los cinco años inmediatamente anteriores, a contar desde la fecha de efectos del alta, en el Régimen Especial de la Seguridad Social de los Trabajadores por Cuenta Propia o Autónomos.

que dan acceso a la Universidad[84]. Ello pone de manifiesto la escasa presencia de discapacitados que desarrollan estudios universitarios[85].

De otro lado, cuando el nivel educativo se analiza teniendo en cuenta el tipo de discapacidad, se observa la bajísima tasa de estudios universitarios entre las personas con deficiencias mentales y visuales (1,8% y 2,0%, respectivamente). Al contrario, las personas con deficiencias del lenguaje, el habla o la voz han terminado sus estudios universitarios en una proporción cercana a la del conjunto de la población[86].

En cuanto a la distribución por razón de sexo, los datos apuntan a que acceden a la universidad un 10% más de varones discapacitados que de mujeres, aun cuando las mujeres discapacitadas sean más numerosas que los hombres en esa situación[87].

La Disposición Adicional 24ª de la Ley Orgánica 6/2001, de 21 de diciembre, de Universidades establece que las Universidades deben garantizar la igualdad de oportunidades de los estudiantes y demás miembros de la comunidad universitaria con discapacidad, proscribiendo cualquier forma de discriminación y estableciendo medidas de acción positiva tendentes a asegurar su participación plena y efectiva en el ámbito universitario. De esta manera, los estudiantes no podrán ser discriminados por razón de su discapacidad ni directa ni indirectamente en el acceso, el ingreso, la permanencia y el ejercicio de los títulos académicos y de otra clase que tengan reconocidos. Se cumple así el principio general de igualdad y no discriminación.

Al margen de los problemas de accesibilidad a los edificios, destaca sobre todo que prácticamente todas las Universidades españolas cuentan con programas de atención personalizada para los discapacitados, que incluyen actuaciones de toma de

---

[84] En efecto, si entre los jóvenes de 15 a 19 años y de 20 a 24 años sin discapacidad un 70% y un 54%, respectivamente, han terminado los estudios secundarios y podrían, por tanto, acceder a la universidad, entre las personas con discapacidad los porcentajes son sensiblemente menores (38% y 37%); vid. al respecto A. PERALTA MORALES, *Libro Blanco sobre Universidad y Discapacidad*, Real Patronato sobre Discapacidad, con la colaboración del Ministerio de Educación y Ciencia, Fundación Vodafone, ANECA y el CERMI, Madrid 2007, p. 23.

[85] Del total de la población discapacitada en edad universitaria (entre 20 y 29 años), sólo el 4% realiza estudios universitarios, frente al 20% del total de la población en esa franja de edad.

[86] Desde el punto de vista del tipo de discapacidad, la mayoría de los discapacitados que acceden a la universidad (datos de 2005-2006) tienen una discapacidad física (el 40% del total), seguidos muy de lejos por los discapacitados visuales (13,1%). Los discapacitados psíquicos son mucho más reducidos (9,5%), al igual que los auditivos (6,7%); pero, en todo caso, los que menos acceden a la universidad son los discapacitados con enfermedad mental (sólo el 1,4%). Pueden verse estos datos en A. PERALTA MORALES, op. cit., p. 33.

[87] A. PERALTA MORALES, op. cit., pp. 32 y 33.

contacto con la universidad, acogida del alumno discapacitado de nuevo ingreso, monitorización individualizada del discapacitado, ayudas al transporte, deportes adaptados, tutorización, facilitar apoyo a través de otros estudiantes mediante el voluntariado, o bien mediante alumnos de apoyo que perciben becas y, por supuesto, diferentes acciones en materia de accesibilidad y supresión de barreras arquitectónicas[88].

Desde la perspectiva del empleo, sin embargo, hay que reconocer que la LO 6/2001 nada establece en relación a que las universidades puedan asumir algún papel en materia de colocación de sus estudiantes. Sin embargo, esta cuestión sí es posible encontrarla en la regulación universitaria de las CCAA[89]. Pero sobre todo, han sido las propias Universidades las que de una u otra manera han ido establecido algún tipo de instrumento dirigido a favorecer la inserción laboral de sus alumnos discapacitados[90], que normalmente pueden consistir en alguno de los siguientes instrumentos específicamente destinados a los discapacitados: la utilización de programas específicos de inserción laboral o programas de prácticas en empresas[91], existiendo de diferentes

[88] Vid. una amplia enumeración de los recursos universitarios a disposición de los discapacitados en C. MOLINA, y J. GONZALEZ-BADIA, *Universidad y discapacidad. Guía de Recursos,* Ediciones Cinca, Madrid 2006.

[89] A modo de ejemplo, la Ley 15/2003, de 22 de diciembre, de Universidades de Andalucía, establece en su artículo 18, dedicado a las funciones del Consejo Social de la Universidad (órgano de intervención de la sociedad en su conjunto en la gestión de la Universidad), que una de ellas es, justamente, la de «promover el establecimiento de convenios entre universidades y entidades públicas y privadas orientadas a completar la formación del alumnado y facilitar su empleo»; o la de «establecer programas para facilitar la inserción profesional de los titulados universitarios». De otro lado, el art. 73 de esta regulación legal, al regular las funciones del Consejo Andaluz de Universidades, establece que entre ellas se encuentra la de «promover medidas y políticas generales de empleo activo e inserción laboral para los estudiantes y egresados universitarios».

[90] Sobre esta cuestión, vid. C. MOLINA, y J. GONZÁLEZ-BADÍA, *Universidad y discapacidad. Guía de recursos*, *op. cit.*.

[91] A modo de ejemplo, hemos encontrado cómo la Universidad de Almería cuenta a través del Secretariado de Asuntos Sociales con un programa de inserción laboral de estudiantes con discapacidad, para poder acceder al mercado laboral en el momento en que hayan acabado sus estudios. Dicho programa se desarrolla en colaboración con la Federación Almeriense de Asociaciones de Minusválidos, y plantea la posibilidad de realizar prácticas en empresas, así como un programa de experiencia profesional en empresas a través de becas, o bien un programa de inserción a través de CEE. Las diferentes actuaciones cuentan con financiación pública. Por su parte, la Universidad de Granada cuenta con un programa propio de prácticas

tipos; la creación de agencias de colocación o instrumentos similares dirigidos a mediar en la colocación de alumnos con discapacidad, incluidas las bolsas de trabajo[92]; o bien

en empresas, consistente en la bonificación a las empresas que contraten estudiantes con discapacidad. También la Universidad de Barcelona tiene un programa para establecer contacto con centros de integración laboral y favorecer el acceso al mundo laboral de sus estudiantes discapacitados. Por su parte, la Universidad de Salamanca participa en el programa COPÉRNICO, proyecto piloto para mejorar la inserción profesional de los discapacitados sensoriales y físicos, que se enmarca en el programa Europeo LEONARDO DA VINCI. Con él se persigue efectuar una serie de actuaciones de formación e información con el objetivo de mejorar las habilidades y competencias individuales de los discapacitados (realizar estudio de recursos disponibles, materiales formativos dirigidos a este colectivo, actividades de formación para mejorar las aptitudes, sensibilización de las empresas, intermediación laboral, y prácticas tuteladas). También la Universidad Carlos III mantiene un programa específico dirigido a la inserción profesional de estudiantes con alguna discapacidad; o la Universidad Complutense de Madrid mantiene un programa de realización de prácticas en empresas de alumnos discapacitados. Por último, la Universidad Rey Juan Carlos mantiene convenios con empresas y fundaciones para facilitar prácticas y la contratación de alumnos discapacitados.

[92] La Universidad de Sevilla cuenta con una Agencia de colocación, que gestiona prácticas en las empresas, así como intermedia en caso de que las empresas requieran personal cualificado con la condición de poseer discapacidad legalmente reconocida. La Universidad de Cantabria procede a facilitar información a sus alumnos discapacitados de las bolsas generales de prácticas o empleo, así como de las ayudas específicas a las que pueden optar los alumnos con discapacidad. La Universidad de Valladolid dispone de un servicio de empleo que facilita información sobre medidas y entidades que favorecen el empleo de los discapacitados. En la Universidad de Gerona existen acuerdos con asociaciones dedicadas a la búsqueda de empleo para personas con discapacidad, y específicamente con la Asociación Catalana para la Integración Sociolaboral de Discapacitados. La Universidad Politécnica de Cataluña mantiene un programa de ayuda al empleo a través del cual se dispone una bolsa de trabajo, en la que empresas que demandan titulados discapacitados puedan cumplir con su obligación de cuota de reserva. Por último, la Universidad Miguel Hernández mantiene un servicio de inserción laboral, realizándose una actuación individualizada para los alumnos que lo solicitan, teniéndose en cuenta la discapacidad como elemento fundamental a la hora de buscar trabajo.

el establecimiento de mecanismos que facilitan información u orientación laboral a los discapacitados[93].

Juan Gorelli Hernández
Catedrático de Derecho del Trabajo y de la Seguridad Social
de la Universidad de Huelva (España)
juan.gorelli@dam.uhu.es

[93] La Universidad de Las Palmas de Gran Canaria no dispone de programa alguno, pero facilita información de interés al alumnado con discapacidad. La Universidad Rovira i Virgili tiene un servicio de promoción de empleo en el que específicamente facilita información y guías para la búsqueda de empleo. La Universidad Autónoma de Madrid cuenta con un Programa de Asesoramiento al Empleo para alumnos con discapacidad, con el objetivo de promocionar el empleo de este colectivo de alumnos. Las actividades fundamentales son el asesoramiento a los alumnos con discapacidad para la búsqueda de empleo, y la creación de una página web y un portal de empleo para alumnos con discapacidad, especializado en conocimientos y habilidades para facilitar la inserción en el mundo laboral, incluyendo becas para alumnos con discapacidad y una bolsa de empleo, así como enlaces en materia de empleo. Además, se realiza la canalización de prácticas dirigidas a este colectivo de estudiantes, y se han firmado acuerdos con empresas, entidades no lucrativas. También se desarrollan actividades de carácter formativo especialmente dirigidas a este colectivo. La Universidad de La Coruña mantiene un Servicio de Asesoramiento y Promoción del Estudiante que ofrece orientación laboral individualizada. Se han elaborado programas propios y específicos para personas con discapacidad, firmándose convenios con distintas entidades públicas o privadas que actúan en el ámbito de la promoción de los discapacitados. La Universidad de Santiago de Compostela mantiene un servicio de orientación laboral que informa de ayudas y apoyos específicos, existiendo un convenio con la Confederación Gallega de Minusválidos que permite un mejor apoyo para la inserción laboral. La Universidad Politécnica de Cartagena mantiene ayudas para favorecer el empleo de las personas con discapacidad, concretamente destinadas a la orientación específica y apoyo a la inserción, así como información sobre contratos y sobre bolsas de empleo específicas.

INFORME UK

(UK REPORT)

INCLUDING PEOPLE WITH DISABILITIES IN THE LABOUR MARKET: THE NUTS AND BOLTS OF THE UK DISABILITY LEGISLATION AND POLICIES

KATARZYNA GROMEK-BROC
Leader of Postgraduate Taught Programme
Law School, University of York

Fecha de recepción: 17-09-2014
Fecha de aceptación: 02-10-2014

SUMMARY: 1. DISABILITY LEGISLATION. 1.1. Medical or social model of disability? 1.2. Areas covered. 1.3. Meaning of discrimination.1.4. Disability and Equality Act 2010. 1.5. Components of the definition of disability. 1.6. Prohibited forms of discrimination. 2. THE UK POLICIES: HOW COULD UK POLICIES ADDRESS THE STRUCTURAL DISADVANTAGE THAT DISABLED PEOPLE ARE CONFRONTED WITH IN THE LABOUR MARKET? 2.1. Employability. 2.2. Underemployment. 2.3. Skills and qualifications. 2.4. The UK policy: strategies. 2.5. Programmes. 2.6. Incentives. 2.7. The policies for the years ahead. 3. THE POLICY IN HIGHER EDUCATION. SPECIFIC EXAMPLE: THE UNIVERSITY OF YORK. 4. CONCLUSION

RESUMEN: Este artículo analiza temas de discapacidad en el Reino Unido fijándose en el marco legal, las políticas sobre la materia y algunos aspectos de su aplicación en la educación superior, concretamente en la Universidad de York. Sostiene que la reciente legislación, la EqA 2010, es decepcionante, ya que sólo contempla mejoras de menor importancia en la situación de las personas con discapacidad. La legislación actual se centra excesivamente en la discapacidad, más que en la eliminación de barreras, y la definición se sigue construyendo rigurosamente alrededor del modelo médico de discapacidad. Por el contrario, las políticas del Reino Unido parecen hacer una incursión significativa en las prácticas de empleo. El artículo también examina las prometedoras propuestas del Gobierno de Coalición, que

proponen cambios en los patrones de carrera profesional de las personas con discapacidad. Por último, este trabajo analiza algunas de las medidas y estrategias empleadas por la Universidad de York, que la sitúan en la parte superior de la clasificación en cuanto al trato de las personas con discapacidad.

ABSTRACT: This article considers disability issues in the UK looking at the legal framework, policy considerations and some aspects of their implementation in the higher education -namely at the University of York-. It argues that the recent legislation, the EqA 2010, is disappointing, since it only provides for the minor improvements in the situation of disabled people. The current legislation focuses excessively on the impairment rather than on the removal of barriers, and the definition is still rigorously constructed around the medical model of disability. In contrast, the UK policies seem to make a significant inroad into employment practices. The article also considers quite promising proposals of the Coalition Government proposing changes in the career patterns of people with disability. Lastly, this article looks at some measures and strategies employed by the University of York that place it at the top of the league table regarding its treatment of people with disabilities.

PALABRAS CLAVE: discapacidad, legislación laboral en el Reino Unido, políticas de empleo en el Reino Unido.

KEYWORDS: Disability, UK employment law, UK employment policy.

Disability discrimination in the UK had been an ongoing problem for decades, but only in 1995 the government came with a specific piece of legislation: the Disability Discrimination Act. The UK was always holding back the European Union with its minimalist approach to social rights, but this time the UK came in lead as one of only three European Members States having legislation on disability in employment. Surprisingly, in light of the past experience this time the UK's DDA offered some insights to the drafters of the EU Equal Treatment in Employment directive 2000/78/EC, adopted five years later. The current legal framework on disability is incorporated in the new legislation: Equality Act 2010 which in turn absorbed the main lines and structure of the DDA.

This paper will assess the current legal framework arguing that EqA 2010 provides very little improvement in comparison with the previous legislation, and it does not address the major critiques of the DDA. The paper will argue that the

definition is overloaded and complicated; it is also very hermetic and rigorously constructed around the medical model of disability. The critical assessment of the current legislation focuses on drawing attention to the impairment rather than the barriers. The paper discusses also the UK policies which are sometimes inconsistent but quite satisfactory and made in the end a change in the lives of disabled people. It also considers the policies for the years ahead drafted by the Coalition Government prioritising the career pattern and better qualifications for disabled people. The paper also analyses the policies implemented by the University of York and the Law School arguing that York University should be at the top of the league tables regarding its treatment of people with disabilities.

1. DISABILITY LEGISLATION

The EqA 2010 is a major consolidation of different pieces of legislation on equality. In relation to disability the EqA 2010 makes some changes to the definition of disability, bringing it to line with the definitions that govern other grounds. It strengthens the clause on reasonable adjustment. The EqA 2010 is disappointing on the stand-still on a medical model of disability –the model that informed the DDA–. In 2009 the UK ratified the UN Convention on the Rights of Persons with Disabilities that fosters a wide concept of disability. The EqA 2010 unfortunately does not reflect the Convention's vision.

1.1. Medical or social model of disability?

The discussion on disability model goes back to the Disability Discrimination Act. This came into force in December 1996, and made it unlawful to discriminate against disabled people in employment and in access to goods, services, transport and education. Disabled rights activists had originally campaigned for the adoption of the Civil Rights (Disabled Persons) Bill, which was opposed by the government. The main difference between that Bill and the Act was the concepts of equality which informed the DDA. Disability campaigners had argued that the law should recognise what is called a "social model" of disability. The definitions contained in the DDA tend to protect only disabled persons who come within a 'medical model' of disability. What this means in practice is that, when cases are litigated, expert medical opinion will be needed to decide if someone has in fact been discriminated against on grounds of their disability, or whether their disability was sufficiently serious to be protected by the law. The government's objection to a 'social model' of disability was based on the

perception that the criteria for a wider coverage of disability in the statutory instrument, including other forms of disability were too vague and confusing. Therefore, the lack of clearly defined or open-ended situations of disability could only add the cost of litigation procedures. The DDA ended the system that operated so far under the Disabled Persons (Employment) Act introduced in 1944 attributing quota to disabled workers. The 1944 Act was inspired by the Tomlinson Committee Report on rehabilitation and resettlement of disabled people.[1] The 1944 Act established a register for disabled people, assessment, and it introduced training facilities and a duty for the employers employing 20 of more employees to reserve 3% quota for disabled workers and some sort of protection from dismissal. The Act itself and the quota system was heavily criticised over the years and appeared to be ineffective. It was repealed by the DDA. The Government position started to be swayed more towards the disabled people rights' approach. This transpired from the government's response to the EU Commission's Green Paper of European Social Policy in which the UK Government recognised that "the most effective way to promote jobs opportunities for people with disabilities is to get employers to recognise the abilities of disabled people and the business case for employing them".[2]

The DDA 1995 in line with a medical model of disability made the terms "disability" and "disabled person" central to the Act: only someone who meets the definition of disabled person could enjoy the rights the DDA confers. Section 1(1) defined a disabled person as someone who has "a physical or mental impairment which has a substantial and long-term adverse effect on his [or her] ability to carry out normal day-to-day activities". The effect of this definition, adopting the medical model of disability, may well be to exclude from the Act's protection many individuals who regard themselves as disabled or who are treated by others as if they were disabled.

1.2. Areas covered

What areas were initially covered by the Act? The first point to note is that there was a major concession to the argument that discrimination law should not place an unduly heavy financial burden on business. Therefore, there was a small business exemption contained in section 7, and the Act did not apply where there were fewer

[1] http://www.psi.org.uk/publications/archivepdfs/Victims/VV8.pdf.

[2] P. Thornton, N. Lunt, *Employment for Disabled People: Social Obligation or Individual Responsibility?*, 1995, York University Publications, 5 (cited from Employment Department, 1994a, Annex 2).

than 20 employees when the Act was introduced. Where the Act did apply, as with the law on race and sex, it made it unlawful for employers to discriminate in *all* aspects of employment, for example, in recruitment, in the terms and conditions of employment, or in dismissal. However, the meaning of "discrimination" in section 5 of the DDA differed in several respects from that used in the sex and race discrimination law.

1.3. Meaning of discrimination

Discrimination under the DDA occurred when an employer treated a disabled person less favourably; the less favourable treatment must have related to the person's disability; and the employer could not show that this treatment was justified.

What this meant in practice is that the concepts of direct discrimination and indirect discrimination were merged. The important thing to note is that, in the context of disability discrimination, it was open to an employer to justify both direct and indirect discrimination. The fact that employers could justify direct discrimination could have a very serious impact, limiting the effectiveness of the law. However the DDA introduced a very important duty: employers had to abide by an obligation contained in section 6, to make "reasonable adjustments" to the workplace in order to accommodate a disabled employee. If an employer fails to make reasonable adjustments, then he will not be able to justify the discrimination. The Employment Tribunal decisions illustrated how the justification defence was working in practice. In *Tarling* v. *Wisdom Toothbrushes*, the tribunal found that an employee with increasing difficulties with a congenital club foot had been discriminated against on grounds of disability. He had been dismissed, ostensibly for incapability, which would normally be a fair reason for dismissal. But the employer had not taken steps to make reasonable adjustments. The evidence was that the employer had sought advice from a specialist, which was available, but had not acted on this advice, even though the cost was not great. Employers could apply for government grants to help them with the cost of making reasonable adjustments.

Sections 5(3) DDA and 6 together meant that if an employer thought there might have been a relevant and substantial reason for less favourable treatment of a disabled person, he must have considered whether the reason could be overcome, or made it less substantial by making a reasonable adjustment. In order to show how the justification defence would work in practice, the government issued the first Code of Practice in 1996. Two examples from the Code should suffice here. **First**, an employer seeking a clerical worker turns down an applicant with a severe facial disfigurement

solely on the ground that other employees would be uncomfortable working alongside him. This will be unlawful because the reaction by other employees will not in itself justify less favourable treatment of this sort. The same would apply if it were thought that a customer would feel uncomfortable. **Second**, someone who has psoriasis (a skin condition) is rejected for a job involving modelling cosmetics on a part of the body which in his case is severely disfigured by the condition. That would be lawful if his appearance would be incompatible with the purpose of the work. This is a substantial reason which is clearly related, indeed material, to the individual circumstance.

1.4. Disability and Equality Act 2010

The DDA was amended in 2003 and 2005 but its main lines have survived in EqA 2010. The main changes in the new legislation concern the definitions of direct and indirect discrimination. The concepts have been separated in sections 13 and 19 of the EqA 2010. The concept of "disability related discrimination" has been preserved but in the reinforced version as "discrimination arising from disability" which is wider. The formulation has been boosted to include the situations that otherwise might have been outside of the definition. Similarly, the duty on the employers to make reasonable adjustment appears in the more compelling form. The new legislation endorses at least to an extent a rights-based approach, underlying ability and not disability of people with a health condition. The definition of disability in 2010 EqA has retained, however, most of its original drafting.

Under EqA 2010 s.6 "a disabled person is a person who has a disability" or had it in the past. The disability is defined as "a physical or mental impairment that has a substantial and long-term adverse impact on the employee's ability to carry our normal day-to-day activities". Section 6 (2) is an expression of the initial and somehow "dépassé" construct of the disability discrimination. This concept, nonetheless, informed the EU legislation on disability that is visible in the directive 2000/78. Fraser Butlin criticises this approach as one misplacing emphasis and loosing priorities. "It is the person with disability" that is in the centre of attention, the person with disability is a "problem" and needs to be supported by the protected legislation instead of focusing on the barriers that society imposes that should be eliminated.[3] Similarly, the EqA refers to "protected characteristic" which again is evidence for the emphasis on disability rather than reducing its effect. Butlin argues that his approach downgrades the person, underlying the person inability to fully participate in society rather than

[3] Fraser, Butlin S., "The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 measure up to UK International Commitments?", 2011, 40 (4) *ILJ*, 434.

his/her ability to do the job. It is disability that comes first.[4] We need a fundamental shift in how the person is perceived making the most of ability of the person to perform in employment. The UN Convention in its Article 1 takes this approach since it proclaims that the purpose of the Convention is to ensure "the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities [...] and to promote respect for their inherent dignity". The EqA 2010 states that the treatment amounts to discrimination when an employer treats a disabled person unfavourably because of disability or in consequence of disability and the employer cannot show that the treatment is proportionate. The Code of Practise to EqA 2010 provides further guidance on what is considered as "unfavourable treatment". Unfavourable treatment of a disabled employee means to put him/her at disadvantage: "A person may be refused a job, denied a work opportunity or dismissed". "Unfavourable treatment" may arise in consequence of disability such as an inability to walk unaided or inability to use certain work equipment.[5] The UN Convention on the Rights of Persons with Disabilities (CRPD) ratified by the UK on the 8 June 2009 is quite radical, fostering social model of disability in the sense that focuses on barriers imposed by the society as opposed to the medical model that focuses on the impairment.[6] Butlin explains that the scope of Article 1 of the Convention opens up the possibility to cover those who have no impairments but whose participation in society is still hampered.[7] In addition, the Preamble of the Convention underlines the removal of the "attitudinal and environmental barriers" and in a different passage, the Preamble reaffirms that people with disabilities cannot be neatly categorised, making *people* central rather than their impairment. Regrettably, the Equality Act 2010 sticks with the medical definition of disability. Therefore, it is necessary to demonstrate an impairment assessed medically and the impact of this impairment on an ability to carry out day-to day activities. This approach has been reiterated by the courts quite recently by Lord Hope in *Packaging Ltd v Boyle* in 2009.[8] In addition, an impairment needs to be "substantial" and "long lasting". There has been on-going debate in order to diminish requirement for an impairment to be "substantial" and "long lasting" but efforts were unsuccessful since the conditions remain in the current legislation. In particular, a condition for an impairment to last 12 months in case of severe

[4] *Ibid*., Fraser, Butlin 435.
[5] Equality Act 2010 Code of Practice, Equality and Human Rights Commission, 2011, 71.
[6] *Ibid*., Fraser Butlin S., 430.
[7] *Ibid*., Fraser Butlin, 432.
[8] Packaging Ltd v Boyle [2009] ICR 1059.

depression was contested but not changed.[9] But, the EU Directive 2000/78, as mentioned previously, based on medical model of disability also focuses on impairment and not on the barriers. However, very recently the ECtHR in *Kiss* seems to adopt a more flexible approach relaxing the strict text of medical model.[10] Thus, in light of current legislation, only those who satisfy the definition of disability can be protected by the EqA 2010.

1.5. Components of the definition of disability

It helps to look at some components of the definition such as impairment, adverse impact, long term effect and impact on normal day to day activities.

Impairment:

Impairment lacks the definition in the Act but the Disability Guidance 2011 specifies that impairment does not have to arise from illness and the cause of this impairment is irrelevant.[11] However, it does specify that impairment needs to be medically assessed. The non-exhaustive list of impairments has been developed by the case law and it includes dyslexia discussed in *Patterson* case[12], dyspraxia and learning disability, mental illness such as depression considered by the Court in *Tarbuck* case,[13] or schizophrenia. In addition multiple sclerosis, cancer, HIV are automatically recognised as disability by EqA 2010. Equality Act (Disability Regulations) 2010 excluded from the definition of impairment, seasonal allergic rhinitis (hay fever), pyromania, kleptomania, exhibitionism, voyeurism, addiction to alcohol, nicotine or other substances or tendency to sexual abuse.[14]

Substantial adverse effect:

Another aspect in the definition refers to "substantial adverse effect" that the impairment has had on the person ability to work. This requirement puts again emphasis on the person's disability and on the differences between people. The Disability Guidance to the Act explains that the word "substantial" reflects the general understanding of disability as a limitation going beyond the normal differences in ability to perform work.[15]The Guidance gives some more indications to the meaning

[9] *Ibid.,* Butlin 434.
[10] ECtHR), May 2010, Application no. 38832/06.
[11] *Ibid.,* Disability Guidance, 2011, para 3.
[12] Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763.
[13] Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664.
[14] Equality Act (Disability) Regulations 2010, SI 2010/2128, regs 3-5.
[15] Disability Guidance, 2011 para B1. http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf.

of substantial considering various factors such as the time invested for the activity, the manner in which an activity is carried out, cumulative effect of impairment, changes in the personal behaviour and effect of the working environment.[16] The Guidance makes a distinction between an impairment that can be cured, and in that circumstance it is not substantial, contrary to the situation where the treatment could only provide a temporary improvement and in that case it would fall within the scope of the Act.[17]The progressive diseases such as dementia or muscular dystrophy are considered as having substantial effect and falling within the ambit of the Act, even if at some stage there is no adverse impact on day-to-day activities. Multiple Sclerosis, cancer and HIV come automatically within the scope of the Act.

Long term effect:

Another component of the definition refers to long term effect. The Act imposes that "long term effect is an effect that; lasted for at least 12 months" or is likely to last for at least 12 months. The House of Lords in *SCA Packaging Ltd* explained that "likely" means something that "could well happen".[18] The interesting point concerns fluctuating effects that occur in some illnesses such as schizophrenia, bipolar affective disorder, epilepsy and certain types of depression. The Disability Guidance clarifies that the effect does not need to be the same throughout all the period, and even if it disappears temporarily it can still be considered as long term.[19]

An effect on normal day-to-day activities:

The last element of the definition of disability refers to an effect on normal day-to-day activities. The Act does not define it but the Disability Guidance mentions some factors such as to what degree it impacts on carrying out activities on a daily or frequent basis. This can relate to work as well as activities outside work.[20]

[16] Disability Guidance, 2011 . http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf p15-18
[17] Disability Guidance, 2011 . http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf para B 18.
[18] SCA Packaging Ltd. V Boyle [2009] IRLR 746.
[19] http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf para C7.
[20] http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf para D4.

1.6. Prohibited forms of discrimination

The EqA 2010 in the disability context outlaws direct discrimination, duty to make reasonable adjustments, discrimination arising from disability and indirect discrimination.

Direct Discrimination:

Direct discrimination does not allow justification, it is wrongful *per se* and it is prohibited regardless the motif. The use of comparators has also become more flexible. The comparison is still necessary but the comparator is a person similarly situated to the individual that does not have this condition and the comparator does not have to be real, s/he can also be hypothetical. The flexibility of approach has been recently endorsed by the Court of Appeal. In *Aylott v Stockton-on-Tees Borough Council*, an employee with bipolar affective disorder was dismissed for incapacity mainly due to the problems to work towards the deadlines. The Employment Tribunal found that this was direct discrimination and the appropriate comparator was a person without disability but affected by disability related reasons such as a surgical procedure. The EAT took a different view and the appropriate comparator was a person whose work record had caused similar concerns but the Court of Appeal restated the ET judgment.[21]

Duty to make reasonable adjustments:

Another form of discrimination under EqA 2010 s.20 is when employer does not comply with a duty to make reasonable adjustments. The employer is under the duty to "'take such steps as it is reasonable to avoid the disadvantage" that a disabled person might suffer, where a physical feature puts a disabled person at disadvantage in comparison with not disabled person and there is an obligation on the employer to take reasonable steps to provide aid. Nonetheless, section 15 of EqA removes some complexities on comparators introduced by the *Malcolm* decision.[22] Thus, employer needs to provide information in an accessible format. Under section 20, EqA 2010, the disadvantage suffered by a disabled person needs to be substantial and the accommodation should not impose a disproportionate or undue burden on the employer.

Discrimination arising from disability:

The third form of discrimination under section 15 of EqA 2010 is discrimination arising from disability. The employer treats an employee unfavourably as consequence

[21] Aylott v Stockton-on-Tees Borough Council [2010] IRLR 994.
[22] London Borough of Lewisham v Malcolm [2008] UKHL 43.

of the employee's disability. This is an important improvement in comparison with previous legislation, simplifying the law because it does not require a comparator. Only a causal connection between less favourable treatment and the employee's disability is required.

Indirect Discrimination:

The last prohibited form in section 19 EqA 2010, is indirect discrimination. The lines are clearly set for the first time between direct and indirect discrimination in the context of disability. This section could in future give rise to addressing a group disadvantage. Section 19(2)d EqA 2010, however, allows justification of an indirectly discriminatory provision, criterion or practice if there is a proportionate means of achieving a legitimate aim.

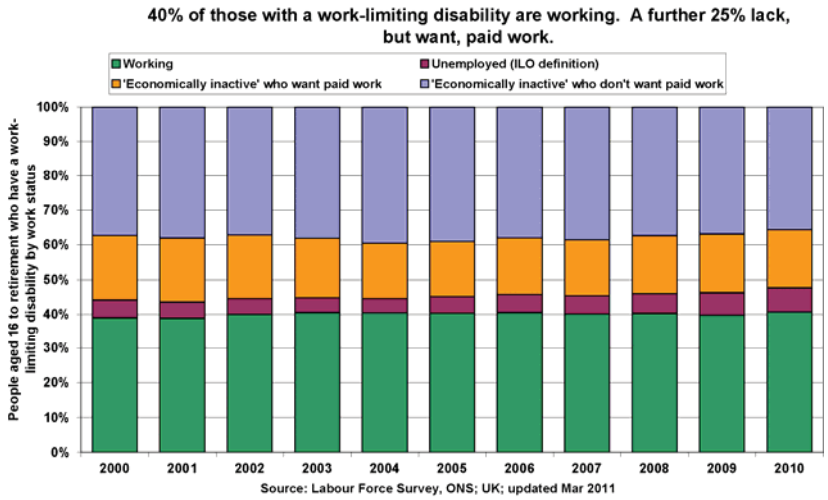
2. THE UK POLICIES: HOW COULD UK POLICIES ADDRESS THE STRUCTURAL DISADVANTAGE THAT DISABLED PEOPLE ARE CONFRONTED WITH IN THE LABOUR MARKET?

Since the Disabled Person Act (Employment) 1944 till the DDA 1995, a dramatic alteration in perception about employability of disabled people could be observed. This is clearly visible in changes in the policies. Many disabled people can compete with their non-disabled counterparts and get the job on their own merits if only stereotypes and discrimination are overcome.[23]The changes in the government policies reflect the shift from the general responsibility of the Welfare State towards individuals who are well equipped with effective discrimination laws so they can compete in the labour market. The changes in policy orientation have been coupled with the general reluctance of the Government to interfere in the regulation of the labour market and to impose a too heavy burden on the employers. In addition, the disabled people movement strongly opposed patronising policies advocating against prejudice and opinion seeing a disabled person as incapable, needing care and special treatment. Those policies have had in the past a detrimental effect on the position of disabled people in employment, deepening the social fissure and preventing them from equal participation in employment opportunities.

[23] P. Thornton, N. Lunt N, Employment for Disabled People Social Obligation or Individual Responsibility, University of York publication, 1995.

2.1. Employability

Nonetheless, it is unquestionable that we need strong and effective policies that to an extent would be able to unite the desire of the disabled people to self-determination with some level of protection offered by law. The available statistics collected prior to the DDA demonstrated a high level of unemployment and underemployment of disabled people. The data show that the rate of unemployment among disabled people is three times higher that among non-disabled workers.[24] In addition, 22% of disabled but economically active people wanted to take up a job, which is double the number in comparison with the non-handicapped unemployed population.[25] In 2009, there were 1.3 million disabled people in the UK, nearly one in five people of working age who have a disability amounted to a total of 18.6% of working population who wanted work, and only 50% of them are employed compared with 80% of those without a disability. The employability of disabled people varies according to their disability. The lower rate, 20% of employability, is found amongst people with mental health problems.[26]



The average gross hourly pay for disabled employees is £11.08 compared to £12.30 for non disabled employees. Source: Office for National Statistics Labour Force Survey, Jan-March 2009[27].

[24] P. Prescott-Clarke, *Employment & Handicap*, 1990, London Social and Community Planning Research.

[25] *Ibid.*, P. Precott-Clarke.

[26] Office for National Statistics Labour Force Survey, Jan-March 2009.

[27] Source: Office for National Statistics Labour Force Survey, Jan - March 2009.

2.2. Underemployment

The second important problem in relation to disabled workers is underemployment.

The study undertaken before the DDA, revealed that the quality of participation was very low, the disabled people were "poorly paid, low-skilled, low status job which were both unrewarding and undemanding".[28] Other signs of underemployment consist of poor possibility of career advancement and insufficient utilisation of disabled peoples skills or lack of opportunities for training. There is a general perception that disabled people because of their impairment need to be in "low-stress jobs" which means jobs without responsibility. And again, the perception is that because of their disability they evoke insecurity and instability because their condition could deteriorate. Their work is conceived as less worthy and easily replaceable. Their employability is more based on charity than on real merits. They are in low skilled and low paid jobs. The number is disproportionately high in comparison with non disabled workers. Consequently they have no job security. The very recent data (2012) show that 23% of disabled people have no qualifications compared to 9% of workers not affected with a disability. In 1993 there were only 12% of disabled people in managerial positions compared with 21% of people without a disability.[29] 28% of disabled people in the same survey believed that that their chances for promotion were very slim because of their disability.[30] More recent statistics demonstrate that situation is improving. For example, in 2008, 13.3% of councillors were disabled compared to 10.5% in 1997.[31] The recent Radar statistics show that non disabled workers are twice as likely to be a Board level Director, three times as likely to be a Director or Head of Department and also three times more likely to earn £80,000 or more.[32]

---

[28] C. Barnes, Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation, (1991, Hurst and University of Calgary Press).

[29] www.radar.org.uk/ (Radar 1993).

[30] *Ibid.,* Thornton Report, p.3.

[31] National Census of Local Authorities Councillors 2009 at http:www.lga.gov.uk/aio/1399651.

[32] Disabled people and supported employment: A research and discussion paper by Anne Kane and Caroline Gooding. (http://www.radar.org.uk/radarwebsite/RadarFiles/publications/supported%20employment%20final%20report%20july.doc)

2.3. Skills and qualifications

It has rightly been pointed out that to improve the participation of disabled people in the labour market it is necessary to help them to obtain better qualifications. In 2008-2009, one in ten students on undergraduate courses was disabled. The research has also proved that disabled students are as likely as non-disabled students to obtain a good degree.[33]

However, although the situation is certainly better than a few years ago, a lot still needs to be done particularly in relation to young people. Twice as many young disabled people are not in work or training in the 19-21 year range; 44% of disabled people are not in education, training or employment as compared to not disabled; and 23% disabled adults are half as likely to have a degree.[34] There could be some objective reasons that could justify the lower participation. For example, 17% of adults with disabilities experience restrictions in participating in learning opportunities compared to 9% of adults without a disability.[35]

The data obtained by Radar 2011 make it clear that disabled people have far less opportunities in choosing their occupation. 50% of disabled people in occupational age work as compared to 79% of not disabled. The pay gap between disabled workers and not disabled is 20% for men and 12% women (Radar 2011).[36] The lowest percentage in employment is for people with learning disabilities and mental health conditions.

In recent years there has been a lot of emphasis on tackling the problem in its early stages in order to offer more support to young people. Health Survey for England (2003) reports that 5% of men and women aged 16-34 have a disability or multiple disabilities such as locomotor, seeing, hearing, communicating, personal care, and 1% of them have a serious disability. Among all those in this age group, 26% have

[33] ECRC Triennial Review How Fair is Britain at http://www.equalityhumanrights.com/key-projects/how-fair-is-britain/.
[34] Ibid.
[35] ONS statistical bulletin 2010.
[36]http://www.radar.org.uk/radarwebsite/RadarFiles/publications/supported%20employment%20final%20report%20july.doc.

two disabilities.[37] The Government's manifesto of 2004, the year of Children Act 2004, expressed clear concerns about disabled children and their future and identified five goals that should help them to fare better in life. They should be able to hope for the improvement of their health condition, feel secure, reach their goals and make a positive contribution to the society, and achieve economic well-being.[38] In education, the Government underlined that the barriers should be brought down between mainstream and special schools.[39] In addition, sufficient financial resources should assist all actions to help disabled children to enter into professional life. In 2005, £ 3.5 billion, accounting for 17% of gross expenditure,[40] were spent on children in need, of which 15% were disabled. The Independent Living Fund provides for direct payments to carers and disabled children. Since the adoption of The Carers and Disabled Children Act 2000, the access to direct payment was made available to disabled young people between 16-17 years of age. In 2005, 2,265 direct payments were made to carers and 495 to disabled young people between 16-17 years of age.[41] It has also been observed that the aspiration of disabled young people for better education and career patterns has drastically improved in the last 30 years. Burchardt found out that in the 70's the proportion of disabled young people in semi-skilled or unskilled job was six times higher than non disabled in the same age group. In 2005, 62% of disabled youngsters at the age of 16 envisaged further education.[42] Burchardt's research revealed that in the same year, among those aged between 16-34, 74% of non disabled men were in employment, compared with 47% of disabled men, and 61% of non-disabled women compared with 39% of disabled.[43] She also claims that in 2005 a disabled person between 16-26 was four times more likely to be unemployed. The earnings of disabled people by age 26 were 11% lower than non-disabled people.[44]

---

[37] M. Knapp, M. Perkins, J. Beecham, S. Dhanasiri, C. Rustin, "Transition pathways for young people with complex disabilities: exploring the economic consequences", 2008, 32 (4) *Child: care, health and development*, 512-520.

[38] Ibid., Knapp et al.

[39] Ibid., Knapp et al.

[40] DfES 2006 in *Ibid*., Knapp et al, p.516.

[41] (CSCI 2006) in *Ibid*., Knapp et al. p.516.

[42] T. Burchardt, Frustrated Ambition: The Education and Employment of Disabled Young People, 2005 (Rowntree Foundation, York).

[43] *Ibid.,* T. Burchardt.

[44] *Ibid.,* T. Burchardt.

2.4. The UK policy: strategies

The UK policies in the late 90's put a lot of emphasis on changes in the employers' practices. Thornton points out that employers could be persuaded by financial incentives, increased status or the potential of disabled employee for business gain.[45]The financial incentives could amount to a relief of employers' national insurance contributions, tax deduction or some financial bonuses for employing disabled workers, or state grants. The employers are occasionally praised by government for employing disabled people as an example of a good practice. But, this goes against the idea that we should focus on merits and ability to work of disabled people rather than to underline their impairment and to make them less worthy. Therefore, incentives could potentially have negative impact on the development of policies of "inclusion" and move away from the traditional perception of disability. Nonetheless, the UK provided financial support that could take many forms. There are some forms of financial rewards for employing disabled people. In 1977, a Job Introduction Scheme was set up according to which an employer was paid a grant towards the wages. The scheme helped in 1988/1989 to employ over 2,000 disabled people.[46] The scheme has been considered very successful. In 2012, the scheme provided for a job trial lasting 13 weeks. This is an opportunity for the employer to check if the skills of a disabled person correspond with the job's profile. The current grant offered to employers is £ 75 per week. The job could be full-time or part-time and should be expected to be permanent or last at least 32 weeks. The trial will be reviewed by the Employment Service Adviser, meeting both employers and employees.

2.5. Programmes

Currently, Disability Employment Service provides support to employers to hire disabled people or to keep the employees in their jobs if they encounter health problems in their jobs. The DES offers some programmes to increase employability of disabled people. Apart, already discussed in *Job Introduction Scheme* (JIS), the DES is in charge of the *Access to Work Programme* that offers practical help to assist disabled people to remain in employment. The support covers special equipment or adaptation to existing equipment, assistance with travel to work or other forms of assistance.[47] There is no charge for the assistance provided unless it brings a clear benefit to the

[45] *Ibid*., Thornton Report, p. 24.
[46] *Ibid*., Thornton Report, p. 27.
[47] http://www.nidirect.gov.uk/disability-employment-service.pdf.

business.[48] Furthermore, the DES supports disabled people with *the Workable programme* that assists workers to adapt to a particular job, to raise awareness in the workplace or to provide an extra training.[49] Another initiative sponsored by the DES is *Pathways to Work*, that deals with helping people with disabilities to return to work. Everyone affected with disability can participate in this initiative on a voluntary basis. The *Pathways to Work* offers assistance to progress towards getting a job and finding a suitable employment or to return to previous job. The Pathways to work is supported by the Condition Management Programme, Return to Work Credit And Advisers Discretionary Fund.[50] The DES provides information, guidance and advice to employers through a Disability Awareness Pack.[51] In relation to other financial compensation, the UK was reluctant to introduce subsidies for reduced productivity. Such a subsidy would endorse an old approach that disabled people are less worthy, less capable and a subsidy would open the gate to consider them as cheap labour.[52] Nonetheless, in case of severe disability where an employee cannot compete with the others the subsidy could be the only option. The UK launched the *Supported Placement Scheme* where the employer pays only partially the wages, and the State pays the reminder.[53]

2.6. Incentives

A much more convincing approach that gains popularity across the UK are policies that try to persuade employers that business would benefit rathen than lose by employing disabled people. The government preferred to take a non-interventionist approach which focuses on voluntary actions rather than constraints. This can be seen in the willingness to opt for the voluntary partnership in promoting and sharing good employment practices instead of statutory intervention. The way forward is to go ahead with the best business practices, with less emphasis on financial support or statutory constraints. The aim is to encourage rather than force employers to hire disabled people. In the past several initiatives have been taken.

---

[48] *Ibid.,* Thornton Report, 28.
[49] http://www.nidirect.gov.uk/disability-employment-service.pdf.
[50] www.nidirect.gov.uk/work-schemes-and-programmes.
[51] http://www.nidirect.gov.uk/disability-employment-service.
[52] *Ibid.*, Thornton Report, p. 28.
[53] *Ibid.,* Thornton Report, p. 28.

Fit to Work:

In the 80's, a "*Fit to Work"* campaign granted awards to companies with outstanding achievements in the employment of disabled people. Their performance was measured by six guidelines such as recruitment, retention, training, career development, modification and adaptation of the work place. The asset of this campaign was to instil in employers good business practice.[54]

The "two ticks" symbol:

The "*Fit to work"* campaign was replaced by the *"two ticks"* symbol awarded for good employment opportunities for disabled people. The "*two ticks"* symbol is displayed on the recruitment advertisements. The symbol is conferred by Job Centre Plus to employers for their commitments in employing disabled people. The award is assessed according to five commitments in recruiting, training, retention, consultation and disability awareness. Employers need to demonstrate an exemplary attitude towards disabled workers. They have an obligation to interview all disabled candidates who meet the criteria for a job, to discuss with them their performance at least once a year, to discuss how to improve their abilities and to review their own commitments each year. In the first 3 years when the campaign was launched the number of employers conferred with a symbol had tripled. The general statistics for 2012 confirm that 20% of the employers in the UK are interested in this campaign.[55] The "two ticks" symbol has become very popular.

The UK policies since the 90s have become very proactive, aiming at spreading a good business practice and changing the employers' perception about the potential of disabled employees. The policies aimed to convince employers that having disabled employees would provide a good image for the firm. The idea behind was to demonstrate that there is an unquestionable value for the business to employ them. The long lasting campaign had tried to attract employers' attention on the ability of disabled persons and not on their disability. The argument was that employing a disabled person could be sometimes more profitable for the business than hiring a non-disabled one. RADAR Statistics proved that the attitude of disabled workers at work was 43% better than that of able-bodied workers; as to their attendance, in 70% of the cases it was as good as that of non-disabled.[56]

---

[54] Thornton, 29 White Paper 1995: 300 employers using the symbol in 1993, and 950 by the end of 1995.

[55] http://www.rnib.org.uk/livingwithsightloss/working/lookingforwork/Pages/finding_vacancies.aspx#H2Heading8.

[56] *Ibid.,* Thornton Report, p. 31.

Supported Placements:

Nonetheless, there are situations, in particular for people with severe disabilities and progressive conditions, where it is hard to convince employers that they could be competitive. In 1994 Supported Placements have been created where the State contributes to the payment of wages. Disabled people are usually employed by a local authority or *Remploy*. *Remploy*'s mission is to diminish barriers for disabled people. In 2010/11, *Remploy* helped to find jobs for more than 20,000 disabled people.[57] The Thornton's research carried out in the 90's revealed that the majority of people in Supported Placements had learning difficulties and the placements were usually in low status and not well-paid jobs.[58] The UK has not been inclined to use financial support to encourage employers to take on disabled people however the policies aimed at positive action and voluntary good practices.

Training and Learning:

The UK policies focused on training organised by the Training and Enterprise Councils. There are Governmental Schemes offered by the local authorities aiming at training the youth and accommodating people with special needs. The Disabled people have priorities on *Training for Work Scheme* in Scotland, and *Workable NI*, Residential *Training for Adults with Disabilities*, fighting long term unemployment and aiming at improving their skills.[59] Another scheme is *Learning for Living and Work* that helps them to get qualifications.[60] The UK Government Strategy was outlined in the LSC document which considers that disabled people's choices in employment will increase by 2025. The policy aims at improving the positions of learners with difficulties aged between 16-25.[61] The new programme: *Through Inclusion to Excellence* establishes a comprehensive system of planning, funding and placement to enable disabled learners to achieve the maximum progress and the maximum possible level of independence.

The UK Government seems to make a continuous trade off between business efficacy and the strategies to insert and keep disabled people in employment. In particular, in recent years there is much more emphasis on making an individual with a disability more competitive. This is coupled with anti-discrimination legislation and

[57] http://www.remploy.co.uk/about-us.ashx.

[58] *Ibid.,* Thornton Report, p.32.

[59] http://www.nidirect.gov.uk/index/information-and-services/people-with-disabilities/employment-support/work-schemes-and-programmes.htm.

[60] http://readingroom.lsc.gov.uk/lsc/National/learning_for_living_and_work_complete_2.pdf.

[61] http://readingroom.lsc.gov.uk/lsc/National/learning_for_living_and_work_complete_2.pdf.

an individual right not to be discriminated against. Nonetheless, the Equality Act 2010 does not go as far as the UN Convention discussed before. Job placements for disabled workers are quite limited and offered only to those whose severe disability impede them to become competitive in the labour market.

2.7. The policies for the years ahead

The UK policies have been boosted up by the disabled people movement. In 2010, the disabled people activists have identified a number of goals to be achieved. The first one relates to decent pay. It has been underlined at several occasions that disabled workers should at least be paid National Minimum Wage which is £6.19/hour in 2012 in the UK.[62] The unpaid trainees and intern roles should be limited to three months with a maximum extension of another three months. Meah and Thornton pointed out that a fair pay gives disabled people a sense of value. A fair pay makes them feel that their position in society becomes stronger since they contribute to it rather than taking out of it in form of welfare benefits.[63] Another issue is a pay gap between disabled and non-disabled workers. In 2010, the disability pay gap between disabled and not disabled men was 20% and 12% between disabled and non disabled women.[64] One way to go forward to close the gap is to enable disabled workers to compete in open employment with some sort of support. There is no clear evidence that that people who require more support are less competitive in open employment. However, another study demonstrated that 45% of people on *Individual Placement or Support* never get to open employment.[65] The discussion around disabled workers has become more concentrated on their careers.

The new UK policy aims at higher job security, or rather career security. The policy for the years ahead is to endow disabled workers in marketable skills and experience to enable them to be confident enough to find another job if for any reason their employment is terminated. Evidence shows that only 38% of disabled men without qualifications are in employment.[66] The UK Commission for Employment and Skills would like to see more managerial and professional jobs for disabled workers. The new *Initiative Valuing People and Research* concentrates on improving

[62] https://www.gov.uk/national-minimum-wage-rates.

[63] A. Meah, P. Thornton, Desirable Outcomes of Workstep; user and provider views, 2005, DWP.

[64] Hills J., An Anatomy of Inequality in the UK, 2010, Government Equalities Office.

[65] www.radar.org.uk 2010.

[66] *Ibid.,* Hills J., 2010.

skills of people with learning difficulties. More mentoring would enhance chances of promotion and provide a more sustainable career. This is related to another goal, which is to improve their status in employment. This can be coupled with a third disabled people manifesto: to feel respected, valued, not discriminated or bullied. The last target relates to social interaction and open employment. It should allow disabled people to interact socially in a fully integrated way.[67] The disabled people activists argue that there is no relationship between diagnosis or severity of impairment and the success in employment. It is important to break the link between different kinds of support and the job settings. The emphasis should be on the career pattern and not on the employment settings. In the future there is much to be done in relation to the choices made by individuals that should align with the individual interests. The Government policies should aim at personalised approach. This should take into account individual learning and social care and long term care, as well as broader social participation.[68] In addition, those workers with severe impairments and low productivity should have access to voluntary work and time limited-internship with a prospect to be advised on the possibilities of development and moving into a paid job. The new plan is to go ahead with individual placement. The Coalition Government's Plan aims at supporting sustainable careers for disabled people. The plan for the future is to provide more support for disabled job seekers, also to reduce benefit disincentives to employment through a gradual decrease of benefits.[69] The firms are encouraged to maximise choices for disabled workers to engage them to work with Trade Unions in partnership and more importantly to take up disability equality impact assessments.[70] The new strategy aims also at a better understanding of all kinds of barriers and difficulties that disabled people struggle with. The new governmental policy envisages to create support systems which are inclusive, enhancing programme participation and addressing inequalities between disabled and non disabled workers. The research conducted in 2009 and 2010 revealed strong evidence of inequality in employment participation. Similarly to previous years, the situation has not changed for those with mental health problems, and only 20% of them are in employment as compared to 60% of disabled workers with other impairments. In addition, there is a very high number of people with mental health problems on incapacity benefits, 43%, and only

[67] www.radar.org.uk.
[68] www.radar.org.uk accessed October 2012.
[69] Ibid., 7.
[70] Ibid., 7.

0.7% of them are involved in the *Access to Work Programme*.[71] The Perkins report recommends better information and awareness raising for those with mental condition. They usually fear losing the Disability Living Allowance, believing that entering employment might trigger a review of their individual situation. The policy should be clear, reassuring them that taking up employment does not have any consequences on a review of their Disability Living Allowance. Another recommendation concerns free prescriptions for medication for people with mental health condition for a long period over 6 months without distinction if they are in employment or not. This is available in Scotland but not in the UK. Once they enter employment they need to pay for prescriptions in the UK. This has a dissuasive effect on the people with mental impairment's attitude to take up jobs.[72] Again, the report stresses the importance of career development, training and apprenticeship. The professional development for people with mental conditions is offered through *Train to Gain programme* and more willingness for younger people to engage in it. There are also strong recommendations on adjustments for people with mental health conditions such as reduced hours, breaks, and the additional time for assignments. New initiatives should be launched and funding provided for learning support, but monitoring progress and general outcomes is also crucial for the new strategy.

As previously discussed, people with mental conditions suffer all sorts of disadvantages. There is a lot to be done to improve their chances to find employment.

[71] Perkins R et al, Realising Ambition: Better Employment Support for People with Mental Health Conditions, 2009 at dwp.gov.uk.
[72] *Ibid*., Perkins, 76.

The table below illustrates earnings of people with mental conditions

Table: Illustrative examples of gains to work calculations: Return to work at 16 hours per week on the National Minimum Wage* Workers with mental condition									
	Out of Work Income			In-work Income			Personal contribution to housing when entering work (assuming out-of-work HB/CTB of £90/£15)	Gain to work	
	Income Support/ JSA	Tax credits and Child Benefit	Total	Earnings at 16 hours National Minimum Wage	Tax credits and Child Benefit	Total		Excluding housing costs	Including housing costs
Single person	£64.30	0	£64.30	£92.80	0	£92.80	£20.00	£28.50	£8.50
Single person with 1 child	£64.30	£73.30	£137.60		£145.20	£238.00	£32.70	£100.40	£67.70
Single disabled person**	£91.80	0	£91.80		£84.80	£177.60	£41.60	£85.80	£44.20
Single severely disabled person***	£158.10	0	£158.10		£105.40	£198.20	£2.80	£40.10	£37.30

* 2009/10 Benefit Rates and October 2009 National Minimum Wage Rate: £5.80 per hour.

** Receiving the Disability Premium in IS and qualifying for the Disabled Worker Element of Working Tax Credit.

*** With maximum disability-related premiums for Income Support and maximum disability-related help in Working Tax Credits. Disability Living Allowance is not included in either in or out of work income as this benefit can be received in or out of work[73].

Besides a particularly low rate in employment of people with mental health problems, other groups such as religious or ethnic minorities experience problems if combined with disability. Only 47% of disabled Muslim men and 24% Muslim women are employed, mainly due to lack of information.[74]

3. THE POLICY IN HIGHER EDUCATION. SPECIFIC EXAMPLE: THE UNIVERSITY OF YORK

The University of York can be proud of some particularly good practices regarding students and staff with disabilities. The Disability Equality Scheme 2009-2012 was designed to help all students and staff to achieve their full potential and its

[73] *Ibid.*, Perkins R., 4.

[74] Hills J., An Anatomy of Inequality in the UK, Government Equalities Office 2010.

implementation seems to be very satisfactory. The scheme was followed by the Action Plan 2009-2012 and aimed to address the problems identified in the previous policies. Its progressive approach picks up on the major backdrops of the national policies and addresses at the University level some lacunas visible in the current legislation. The issues considered at the beginning of this contribution, such as social model of disability or shifting from the impairment towards the removal of barriers, have been addressed in the York University documents. Thus, the University of York adopts Social Model of disability with the main emphasis on the removal of barriers. Its policy favours the individual approach to different types of disability such as dyspraxia or hearing disorders. In 2012, there were 900 students with disability, 40 from the EU and 70 from overseas, monitored by students support committees. The University of York has currently 13,000 students and 3,200 staff. The buildings and access to them satisfy the disability policy requirements. All new infrastructures have the exemplary disability facility.

The University contributes financially to treating every case separately and provides access to Learning Funds for the staff and for the students trying to match their individual needs. It pays a lot of attention to monitoring the implementation of those policies and recording progress. The Action Plan in Section 7 assigns the role to senior managers who have overall responsibility to monitor the disability policy. The Disability Equality Scheme Working Group has been formed to support the senior managers, staff and committees in the application of this policy.

One of the roles of Disability Equality Scheme Working Group is to supervise and overlook progress related to the following issues: involvement of people with impairments, aid with assessments, identifying a need for new or revised objectives, and identifying barriers which are outside the University's control. Another issue concerns gathering relevant information from the departments and sharing good practice. Annual progress reports on the Disability Equality Scheme are intended to be discussed at the Equality and Diversity Committee and later they should be available on the University website.[75] The University adopts a holistic approach ensuring that the disability policy permeates at every action plan at all levels and that the Disability Equality Duty is embedded in the University's highest-level planning and that our actions to support it are transparent. The policies are reviewed regularly. The next revision of The Disability Equality Scheme is planned for the autumn of 2014. The last Disability Equality Scheme 2009-12 was organised according to the priority themes, some sections have been revised to take account of information gathered throughout the past three years. For example, "E-Accessibility" (added to the Action

[75] http://www.york.ac.uk/student-support-services/disability-services/.

Plan in January 2008) has been included in Communications and a new "Monitoring" section has been created. From the last revision it has emerged that there is a large support network for students with disabilities, but the support for staff with impairments needs to be improved. The policy has changed accordingly "Student Support" is now "Student and Staff Support" and action points have been added to address this need. The Law Department is relatively new, since it was created in 2008, and this gave us opportunity to design our departmental disability policy from scratch. The building where the Law School is located was built two years ago with the newest technology, and it is endowed with the impressive facilities suitable to accommodate disabled students and staff. This academic year 2013/2014, we have 32 students with disabilities studying law, and their disability covers a wide range of issues such as Dyslexia, Dyspraxia, Crohns, Diabetes, Nystagmus, Irritable bowel syndrome, cerebral palsy Bi-polar, Aspergers, Irlen syndrome, HIV and PTSD. Students with dyslexia and dyspraxia get help with organising from central support, and within the Law School we do not penalize them for spelling or grammar; we give them extra time in exams and make sure they have materials in advance to help them. The help for other forms of disability varies vary from allowing them to take medication into exams, being near a toilet for exams, or having extra time for them. If they are having a bi-polar episode there is nothing we can do except give them another opportunity for exams. The examination arrangements depend on the students' needs. The special examination arrangements include extra time, use of a scribe, use of a word processor, a sticker to say they should not be penalised for bad spelling and grammar, sitting in a room on their own so they can move around and be close to a toilet if they have IBS. In relation to the teaching methods we make sure that lecture slides are available on the VLE 24 hours prior to the sessions, we allow students to record sessions and some of them have scribes to take notes in the sessions. The teaching staff should make sure that they use the correct size and colour for slides and hand-outs so they can be read easily. Other support can be obtained from the Open Door team, so they can help with things that can be brought on by stress or depression. Recently our disability Officer drafted a new policy regarding disabled students' applications to the Special Circumstances Committee. There will be a sub-committee reviewing the cases of disabled people, the procedure will be shorter and simpler if the application is related to their disability. Finally, our Law School is very committed to increasing employability of our students. We work closely with some law firms that offer them work placement and a variety of summer placements. We are currently offering a placement to two disabled students, one in second year and the other in third year, with one of the of the world's leading law firms, Herbert Smith Freehills. We have a

career officer, a member of staff in charge of 'making our students more employable' who reassures our disabled students that their disability is not an obstacle in their future career. He works closely with EmployAbility, very present in our Law School.[76] EmployAbility, a non-profit organisation looks after students and graduates with all disabilities, including dyslexia or long term health conditions, and provides all sorts of measures to ease the transition from education to employment.[77]

4. CONCLUSION

This paper intends to elucidate some nuts and bolts of disability legislation, the policy considerations and its inconsistency, and the York University Policy towards students and staff with disabilities.

The first point to make that draws from the content regards the disability legislation. The Equality Act 2010 mainly incorporated previous legislation on disability and the changes to the definition, and some clarifications overall appeared mainly cosmetic. The Act could be considered to an extent as a lost opportunity to align the concept of disability with the UN Convention on the same subject. The definition still focuses on impairment and it is unnecessarily complex. It does not go beyond medical model of disability.

The second point that merits attention regards the governmental policies. Initially, they focused on incentives and financial support involuntarily accentuating the difference between disabled and not disabled, thus, aggravating exclusion not inclusion. Nonetheless, this negative impact of government policies has been certainly minor than on continent due to the generally non-interventionist government approach into the regulation of the employment market. After 2005 the policies were generally good, and significantly improved the employability of disabled people. Nonetheless, some issues need to be addressed. Employability of people with mental health problems is very low. Re-employability of disabled people should also be improved and more emphasis should be placed on young people in their first jobs. One of the points to be addressed in the future is to concentrate on the career pattern. There is a lot of incongruence between disabled people skills and the needs of the current and future economy. The Coalition Government's plan aligns with the EU Commission strategy on fighting poverty, and it advocates that integrated support for disabled people careers would make a huge improvement in the quality of life of disabled people.

[76] http://www.employ-ability.org.uk.

[77] http://www.employ-ability.org.uk/students/services.

The final point refers to the York University Policy and the York Law School. The policy is regularly reviewed and up-dated. It emphasises the importance of monitoring and supervision. Furthermore, the York University offers training and workshops on disability to raise awareness and sensitivity towards disability. The Law School accommodates the disabled students with care and attention and is improving its policy on a case by case basis. Comparing with other Universities on continent I would like to say that our policy is exemplary, partially because we are a new Law School and were offered a new infrastructure. We are also a small Law School, a fact that allows us to offer an individual approach to any disability.

Katarzyna Gromek-Broc
Leader of Postgraduate Taught Programme
Law School, University of York
katarzyna.gromek-broc@york.ac.uk

ACCESS TO, AND RETENTION OF, EMPLOYMENT OF DISABLED PERSONS – THE BRITISH LEGAL FRAMEWORK

PROFESSOR JO CARBY-HALL
Director of International Legal Research
Centre for Legislative Studies. University of Hull

Fecha de recepción: 04-09-2014
Fecha de aceptación: 02-10-2014

RESUMEN: Este capítulo analiza y evalúa la noción de discriminación en el empleo por motivos de discapacidad. Se divide en nueve apartados en los que: (i) se intenta definir el concepto de discapacidad; (ii) se trata la noción de conducta prohibida y sus diversas facetas; (iii) se realizan evaluaciones de la importancia de los

comparadores, (iv) la irrelevancia de las características del presunto discriminador, (v) los ajustes para personas con discapacidad, (vi) el acoso, (vii) la persecución, y (viii) contratación y encuestas sobre discapacidad; (ix) este análisis se completa con unas reflexiones finales.

ABSTRACT: This chapter analyses and evaluates the notion of discrimination in employment arising from disability. Divided into nine parts (i) a definition of the disability concept is attempted; (ii) the notion of prohibited conduct and its various facets is discussed; evaluations of (iii) the significance of comparators, (iv) the irrelevance of alleged discriminator's characteristics, (v) adjustments for disabled persons, (vi) harassment, (vii) victimisation and (vii) recruitment and enquiries on disability follow. (ix) Concluding thoughts round up this analysis.

PALABRAS CLAVE: concepto de características protegidas, concepto de discapacidad, conducta prohibida, comparadores.

KEYWORDS: concept of protected characteristic, disability concept, prohibited conduct, comparators.

1. PRELUDE

It is in contravention of British law for employers to discriminate against a disabled person whether it be in relation to access to employment or during the course of employment. The Equality Act 2010 protects the disabled by covering areas such as application forms, interview arrangements, aptitude and proficiency tests, job offers, terms of employment and pay, promotion, transfer and training opportunities, dismissal and redundancy, discipline and grievances. The British law on access to employment and during employment arising from disability is thus governed by the 2010 legislation and based on the notion of discrimination.[1]

Prior to 2010 there had been substantive and important legislation treating various aspects of discrimination in the employment field.[2] As a result of that legislation numerous important cases on various aspects of disability discrimination have been heard in the British tribunals and courts.[3] The Equality Act 2010[4], which

---

[1] See the Disability Rights UK publication entitled "Disability Rights Handbook" (39th Edn) April 2014-April 2015, which is a guide to benefits and services for all disabled persons, their families, carers and advisers.

[2] For example the now repealed or revoked Equal Pay Act, 1970; the Sex Discrimination Acts 1975 and 1986; the Race Relations Act, 1976; parts of the Employment Act, 1989; the Disability Discrimination Act, 1995; the Employment Equality (Religion and Belief) Regulations, 2003; the Employment Equality (Sexual Orientation) Regulations, 2003; the Equality Act, 2006 and Employment Equality (Age) Regulations, 2006. For a fuller and more general discussion on this legislation the reader is referred to I.T.Smith and G.Thomas "Smith and Woods Industrial Law" particularly the 7th Edn. 2000 Butterworths chapter 5 entitled "Discrimination in Employment" (as well as the 8th Edn.).

[3] In the field of disability discrimination see, *inter alia*, *Kapadia v London Borough of Lambeth* [2000] IRLR 14 (EAT); *O'Neill v Symm & Co.Ltd* [1998] IRLR 420 (EAT); *British Sugar v Kirker* [1998] IRLR 624 (EAT); *Clark v Novacold* Ltd. [1999] IRLR 318 (CA); *J.F.Heinz Co.Ltd. v Kenrick* [2000] IRLR 144 (EAT); *Kenny v Hampshire Constabulary* [1999] IRLR 76 (EAT; *S.Coleman v Attridge Law and Steve Law* Case C-303/06 (Preliminary ruling referred to the ECJ on Directive 2000/78/EC Arts. 1 and 2(1) and (3) and in the EAT [2010}ICR 242); *Borough of Lewisham v Malcolm* [2008] UKHL 43 (HL); *The Child Support Agency (Dudley) v Truman* [2009] ICR 576; *Vicary v British Telecommunications plc*.[1999] IRLR 680 (EAT); *Goodwin v Patent Office* [1999] IRLR 4; *Quinlan v B&Q plc*.(EAT 1386/97).

[4] 2010 (ch. 15).

came into force on 1st. October 2010, repealed or revoked most of the previous legislation.

The Equality Act 2010 consolidates all previous legislation relating to discrimination into one Act which covers all fields of public life and, which includes the novel concept of *"protected characteristic*"[5] of age, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation, employment and disability.[6] This chapter will focus solely on the employment "protected characteristic" relating to disabled persons.[7] The reader should note that the disability discrimination case law heard under the previous legislation, some of which will be discussed briefly in this text, continues to apply until it is either confirmed or modified through the interpretation given by the judges taking into account the 2010 legislative provisions. Previous case law should thus be treated with caution until the tribunal or court has confirmed or otherwise a particular case. In at least one case, the 2010 Act has replaced a decision taken by the House of Lords case of *Borough of Lewisham v Malcolm* in 2008.[8]

The consolidation made by the 2010 Act of the repealed or revoked legislation on discrimination has an important advantage. Whereas there were some legislative inconsistencies in the previous discrimination laws, which consequently led to inconstant decisions being made by the tribunals and courts, the 2010 Act encourages *uniformity* throughout the judicial decision-making process in the area of the "protected characteristics" of discrimination.

In the field of employment, the Equality Act 2010 aims (a) at protecting disabled persons and (b) at preventing disability discrimination. The Act provides legal rights

---

[5] As termed by the Equality Act 2010 s. 4.

[6] The Equality Act 2010 is very complete and consists of 218 sections and 28 schedules. Furthermore, and unlike other legislation, this Act is drafted in plain language and has explanatory notes (which do not form part of the legal phraseology of the Act and are therefore **not** part of the law) for each of its parts. This, by reason of clarity to the layman making its contents more "user friendly."

[7] Enacted in ss. 6, 13 (direct discrimination), 14 (combined discrimination: dual characteristics), 15 (discrimination arising from disability), 19 (indirect discrimination) 20-22 (duty to make adjustments); 27 (victimisation); 28 (harassment); 60 (enquiries regarding disability and health) and appropriate Schedules of the Equality Act, 2010.

[8] [2008] UKHL 43. See the judgment of Lord Bingham, with whom the other judges concurred, and note Lord Scott's dictum regarding this appeal "raising difficult questions which have not previously come before the House as to the correct construction, or […] application, of provisions of the Disability Discrimination Act, 1995." Reference to this case will be made later on in this text.

by way of protection and "prohibited conduct"[9] by way of prevention for the disabled in numerous areas.[10]

Divided into nine parts (following a prelude), this chapter proposes to analyse and evaluate the notion of discrimination in employment arising from disability. With this in mind the chapter will attempt a definition of the expression "disability." There will then follow a discussion on the notion of "prohibited conduct" concept and its various facets. An evaluation of the significance of comparators, irrelevance of alleged discriminator's characteristics, adjustments for disabled persons, harassment, victimisation and recruitment and enquiries about disability will follow. An epilogue proposes to round up this analysis.

2. DEFINITION OF THE "DISABILITY" CONCEPT

Under the 2010 legislation[11] persons have a disability if (i) they have a physical[12] or mental impairment;[13] and (ii) the impairment[14] has a substantial[15] and long term[16]

---

[9] See chapter 2 of the 2010 Act ss. 13 (treating direct discrimination); 14 (combined discrimination: dual characteristics); 15 (disability discrimination); 19 (indirect discrimination); and 20 (adjustments) and so on, all of which will be treated presently.

[10] Namely, employment, education, access to goods, services and facilities including larger private clubs and land based transport services, the purchasing and renting of land and property and functions of public bodies such as the issuing of licences.

[11] Equality Act 2010 s. 6 (1) (a) (b).and Sch. 1.

[12] The expression "physical" means exactly that. In *Rugamer v Sony Music Entertainments UK Ltd*. [2002] ICR 1498 (CA) it was held that imaginary and unreal psychological manifestations do not constitute physical impairments. Although the case was decided under a repealed statute and therefore caution is recommended, it is thought that such a decision would nevertheless be followed by the tribunals and courts when interpreting the 2010 Act provisions.

[13] Mental health conditions or mental illnesses can include, *inter alia*, schizophrenia, eating disorders, depression, bipolar affective disorders, personality disorders, self-harming behaviour, and obsessive compulsive disorders.

[14] It is not necessary to consider how the impairment is caused even if the cause is the consequence of a condition which is excluded. For example liver disease as a result of alcohol dependency would count as a impairment although alcohol is excluded from the scope of the definition. What a tribunal or court has to consider is *the effect of an impairment, not its cause. See Power v Panasonic UK. Ltd.* [2003] IRLR 151.

[15] This word means more than a trivial or minor disability. Thus, stress, depression and every day frustrations at work or in a person's private life do not constitute physical or mental disability *per se* because these impairments are of a temporary duration and minor nature and are unlikely to qualify under the "substantial and long term adverse effects" legislative

adverse effect on their ability to perform normal day-to-day activities.[17] Persons who experienced a disability in the past are also included in the definition[18], but only if that past disability fulfilled at that time the definition of disability.

Progressive conditions[19] such as persons suffering from HIV, multiple sclerosis, cancer,[20] amyotrophic lateral sclerosis, muscular dystrophy, forms of dementia and lupus (SLE) are protected under this legislation *from the point of diagnosis*, and persons with visual impairments are automatically deemed to be disabled.[21] Also protected are

---

requirements. In *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19 it was suggested that a tribunal should not ask itself what the person can perform; rather it should ask itself what that person cannot perform or can only perform with difficulty. In *Kapidia v London Borough of Lambeth* [2000] All ER (D) 785 it was held that "substantial adverse effect" should be examined in the light of the person not receiving any treatment for the impairment. Thus a person suffering from anxiety and who is receiving treatment for that complaint from a councillor is deemed not to be receiving such treatment.

[16] "Long term" means that the effect of the impairment has lasted or is likely to last for at least twelve months or for the rest of the life of the person affected. Equality Act 2010 Schedule 1 Part 1 para. 1(a) (b) (c). The reader should note that special rules, to be discussed below, exist for disabilities which fluctuate or are of a recurring nature.

[17] Day-to-day activities treat a day's normal activities such as walking, shopping, eating, having a bath/shower, *etc*… Whereas it is normal for a female to make herself up, that can constitute a day-to-day activity (see *Ekpe v Metropolitan Police Commissioner* [2001] ICR 1084) However, taking part in sports is not a normal day-to-day activity for everyone. Being confined only to certain groups of people, sports do not therefore constitute day-to-day activities. (See *Coca-Cola Enterprises Ltd. v Shergill.* Unreported EAT case heard on 2nd September, 2002). Performing one's work may constitute day-to-day activities. (See *Law Hospital NHS Trust v Rush* [2001] IRLR 611) but compare the case where a person's impairment fluctuates because of conditions at work. In these circumstances the person's ability to perform day-to-day work needs to be taken into account when examining whether or not the impairment has a "substantial and long term adverse effect." (See *Cruickshank v VAW Motorcast Ltd.* [2002] ICR 729). The reader is invited to note too The Equality Act 2010 (Guidance on the Definition of Disability) Appointed Day Order. 2011 S.I. 2011 No.1159.

[18] Equality Act 2010 s. 6 (4((a) (b) and Schedule 1 Part 1 para. 9 (1) (2).

[19] *Ibid.* Schedule 1 Part 1 Para 8 (1) (2) (3).

[20] It is suggested that certain types of cancers which are quickly and easily curable over a short period of time could well be excluded by ministerial guidance made under s. 5 of the 2010 Act.

[21] There is thus no requirement to establish that blindness or partial blindness has "a substantial […] adverse effect on a person's ability to carry out normal day-to-day activities" (under s.1 (b) of the 2010 legislation). See too the Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003 which provided for certified or registered blind or partially sighted persons being deemed to be disabled. It should be noted that some conditions

persons who have physical or mental impairments which *fluctuate* or have *recurring effects*[22], which are *developmental*[23] or *organ specific.*[24]

An impairment which consists of *severe disfigurement* is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities.[25] Ministerial Regulations may however be made to exclude severe disfigurement in prescribed circumstances or in situations where the severe disfigurement is deliberately acquired.[26]

The impairment is to be treated as having a substantial adverse effect of the ability of the person concerned to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it and (b) but that, it would be likely to have that effect.[27] Measures include, in particular, medical treatment and the use of prosthesis or other aid but not, in connection with a person's sight to the extent that the impairment is correctable by spectacles, contact lenses or other way as may be prescribed.[28]

Two matters arise in connection with the definition of physical or mental impairments. In the first instance, case law decided under the repealed legislation indicates that where the parties are in dispute as to whether or not there exists a

---

are specifically excluded from the definition. These include persons who have a tendency to be pyromaniacs or have addiction to medically non-prescribed substances, e.g. drugs, alcohol, nicotine or seasonal allergic rhinitis (as, for example, hay fever) unless it aggravates the effect of another condition. Also excluded are persons who have a tendency to physical or sexual abuse towards other persons, or are prone to exhibitionism or voyeurism.

[22] Equality Act 2010 Schedule 1 Part 1 para. 2(2). The reader should note what is said in that paragraph, namely "likely to recur". This means that the physical or mental impairment, although non-existent at the moment could recur in the future. It therefore meets the impairment condition under the 2010 Act. See *SCA Packaging Ltd. V Boyle* [2009 ICR 1056 (HL). Examples of recurring conditions are rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), epilepsy, depression, fibromyalgia, *etc*… The recurrence is only valid if it happened at the time when discrimination took place and not subsequently. See *Richmond Adult Community College v McDougall* [2008] ICR 431 (CA). The reader is reminded that caution is required until the pre-2010 cases have been confirmed or otherwise by the tribunals and courts.

[23] As, for example, autistic spectrum discordus (ASD), dyslexia and dyspraxia.

[24] For example respiratory conditions such as asthma or cardiovascular diseases including thrombosis, heart disease and strokes.

[25] Equality Act 2010 Schedule 1 Part 1 para. 3 (1).

[26] *Ibid.* para. 3 (2) (3) respectively.

[27] *Ibid.* para. 5 (1) (a) (b).

[28] *Ibid.* para. 5 (2) (3).

physical or mental impairment, the burden of proof lies on the claimant to show that s/he suffers from either of the particular impairments.[29] The second matter treats medical opinion. A tribunal or court will take into account medical opinion expressed by a practitioner or specialist consultant on a particular physical or mental condition, but that medical opinion is neither final nor determinative that such condition actually exists. The tribunal or court will decide for itself as to whether or not a claimant suffers from a physical or mental disability as defined by the Act.[30]

3. PROHIBITED CONDUCT

The protected characteristics of which there are nine have been pointed out above.[31] The concept of "protected characteristics" is a new one introduced by the 2010 legislation. These "protected characteristics" are of importance because they indicate the areas of discrimination covered by the Equality Act 2010. Disability features therein as one of those areas of discrimination and it is that characteristic which this chapter focuses upon. The different kinds of prohibited conduct in relation to disability discrimination will be evaluated and analysed. The concept of "prohibited conduct" has been created by the 2010 legislation and includes direct discrimination,[32] harassment,[33] victimisation,[34] combined discrimination,[35] discrimination arising from disability[36] and indirect discrimination.[37] Although not in the order they appear here, it is proposed to analyse below each of those "prohibited conduct" issues.

3.1. Direct discrimination

A person discriminates against another if because of a protected characteristic, (in this case disability) that other is treated less favourably than he treats or would treat

[29] See *Millar v Inland Revenue Commissioners* [2006] IRLR 112.
[30] See *Abadeh v British Telecommunications plc*. [2001] ICR 156.
[31] See p.1.
[32] Equality Act 2010 s. 13.
[33] *Ibid.* s.28.
[34] *Ibid*. s.27.
[35] *Ibid.* s.14 which is a new concept introduced by the 2010 Act.
[36] *Ibid.* s.15.
[37] *Ibid.* s.19.

others.[38] That statutory definition makes clear that direct discrimination is unlawful; but there exist other shades of discrimination also which are considered to constitute direct discrimination.

3.1.1. Direct discrimination by association

One of those shades is discrimination because of their association with a disabled person. In *S.Coleman v Attridge Law and Steve Law,* Ms. Coleman's son Oliver was born disabled. He suffered from a rare impairment affecting his breathing and his hearing. Coleman brought an action against her employer claiming that she was forced to resign as a legal secretary by reason of (a) harassment by her employer and (b) being refused flexible time which other employees were granted. She claimed to have been targeted because she had a disabled son whereas her colleagues without disabled children were granted flexible working arrangements. Prior to giving its judgment, the Employment Tribunal sought a preliminary ruling from the European Court of Justice (ECJ) to determine whether the Directive[39] protects employees who are treated less favourably or harassed because of their association with a disabled person. In June 2008 the ECJ held[40] that discrimination by association in the workplace was unlawful.[41] Non-disabled employees can thus bring a claim for associative direct discrimination (and harassment).[42]

---

[38] *Ibid.* Chapter 2 Prohibited Conduct s. 13(1). This new definition applies to all the protected characteristics including disability discrimination.

[39] Council Directive 2000/78/EC of 27th November, 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16 -22 Arts. 1 and 2 (1) and (2).

[40] [2008] ICR 1128.

[41] The ECJ in Case 306/06 said that the Directive "must be interpreted as meaning that the prohibition of direct discrimination is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation and it is established that the less favourable treatment of that employee is based on the disability of his child whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Arts. 2(2)(a)."

[42] The Employment Tribunal's decision in the *Coleman* case was, on appeal, upheld by the Employment Appeal Tribunal (EAT). It said that the concept of associated discrimination is an extension of the scope of the Act (at that time the now repealed Disability Discrimination Act 1995) and "fully in conformity with the aims of the legislation as drafted." Words could thus be read in (the now repealed) Disability Discrimination Act 1995 to give effect to European Union law. See Underhill J.'s dictum in E*BR Attridge LLP (formerly Attridge L*aw) and *another*

3.1.2. Direct discrimination by perception

The concept of perceptive discrimination constitutes an innovation made by the Equality Act 2010 in relation to direct discrimination. The perception that a person suffers from a disability could well constitute unlawful discrimination. This is direct discrimination against a person by reason of others thinking that such a person is disabled. This concept applies whether or not that person is disabled.

3.1.3. Deferred direct discrimination

Where an employer expresses the view that persons with a particular protected characteristic, such as disability, would not be considered for employment, such conduct could well constitute deferred direct discrimination. It should be noted that this type of discrimination is *intended* by the 2010 legislation by reason of the expression "or would treat" which is found in s.13 (1) (3). A tribunal or court would thus interpret the legislative intent as including this type of discrimination. For this type of discrimination to be effective the claimant must show (a) that s/he had the firm *intention* of applying for the job and (b) that s/he had the necessary *qualification* for that job. Where both these requirements exist, the claimant would have been shown to have suffered from less favourable treatment.

3.2. More favourable treatment of a disabled person

Where the prohibited characteristic is disability there will be no discrimination made where a disabled person is treated, or would be treated, in a manner allowed by the 2010 Act and another person who is not disabled is not treated in the same manner.[43] Thus treatment which is more favourable to the disabled person is allowed under the legislation and therefore does not constitute discrimination. To put it another way, non-disabled persons cannot claim that they are being discriminated.[44]

---

v Coleman [2010] ICR 242. The 2010 Act therefore need not contain additional provisions as these are not required.

[43] Equality Act 2010 Chapter 2 Prohibited Conduct s. 13 (3).

[44] See too Employment – Statutory Code of Practice. Equality and Human Rights Commission, 2011 (hereinafter entitled "the Code of Practice") which explains in some detail and gives excellent guidance on the provisions of the Equality Act 2010. The main purpose of this Code of Practice is to provide "a detailed explanation of the Act." It assists tribunals and courts "when interpreting the law and helps lawyers, advisers, trade union representatives, human resources departments and others who need to apply the law and understand its

3.3. The occupational requirements exception

A new exception has been enacted by the 2010 legislation to what would otherwise constitute direct discrimination. Where there is an occupational requirement that a disabled person is to perform a particular type of work, and the disabled person does not meet that occupational requirement, this would not amount to disability discrimination if s/he is rejected. It should be noted that the "application of the requirement is a proportionate means of achieving a legitimate aim".[45]

3.4. Combined discrimination; dual characteristics

The new concept of combined discrimination dual characteristics has been introduced by the Equality Act 2010: «A person discriminates against another "if, because of a combination of two relevant protected characteristics" he treats a person "less favourably" than he "treats or would treat a person who does not share either of those characteristics"».[46] What this means is a less favourable treatment in respect of a combination of two relevant protected characteristics. Such characteristics may include disability[47], as well as one of the other protected characteristics, namely age, gender reassignment, race, religion or belief, sex and sexual orientation.[48] Two combinations only are permitted under the Act (which talks of dual characteristics), for example, disability discrimination and one other kind of discrimination which can be either age,

---

technical details." (para. 1.9.). The Equality and Human Rights Commission issued this Code under the Equality Act 2006 provisions. "It is a statutory Code. This means [that] it has been approved by the Secretary of State and laid before Parliament." (para. 1.2.) The Code "does not impose any legal obligations. Nor is it an authoritative statement of the law; only tribunals and courts can provide such authority. However the Code can be used in evidence in legal proceedings….Tribunals and courts must take into account any part of the Code [which] appears to them relevant to any questions arising in proceedings." (para. 1.13.)

[45] Equality Act 2010 Sch. 9 Part 1 para. 1 (a) (b) (c). This exception applies not only in relation to employers but also in relation to others such as contract workers and employment agencies, etc… An example of such a situation could be where an organisation which runs homes for the mentally retarded advertises to recruit or employs a disabled person who shares those characteristics to act as a helper. The fact that s/he does not meet the occupational requirement and is rejected does not constitute direct disability discrimination.

[46] *Ibid.* s. 14(1).

[47] *Ibid*. s .14(2).

[48] Dual discrimination claims cannot be made in respect of the prohibited characteristics of marriage and civil partnership and pregnancy or maternity because a comparator is not required for those prohibited characteristics.

sex, race and so on. Thus the claimant may make three claims, one relating to combined discrimination and two *separate* claims relating to each of the other protected characteristics. The comparator for less favourable treatment is a person who does not share any of those two characteristics.[49] Multiple discrimination claims in circumstances where no contravention has taken place under the 2010 legislation is respect of *one* of the protected characteristics cannot be brought. Furthermore, a claim cannot be upheld by a tribunal or court if the employer is able to prove that the treatment did not amount to direct discrimination with regard to either of the prohibited characteristics. Thus indirect discrimination and harassment cannot apply to dual discrimination claims.

3.5. Discrimination arising from disability

A person discriminates against a disabled person if (a) s/he treats the disabled person unfavourably, (b) this treatment is in consequence of the disabled person's disability and (c) s/he cannot show that the treatment was a proportionate means of achieving a legitimate aim.[50] There is however no disability discrimination if it is shown that the alleged discriminator did not know, and could not reasonably been expected to know, that the person had a disability.[51]

This provision inserted into the 2010 legislation is innovative in that it did not exist as such under the previous (repealed/revoked) legislative provisions. The accompanying explanatory notes to the 2010 Act state that s.15 aims[52] "at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability and providing an opportunity for an employer or other person to defend the treatment."[53]

---

[49] See *Bahl v Law Society* [2004] EWCA Civ. 1070 (CA). The Vice-President of the Law Society claimed that she had been discriminated against on the grounds that she was (a) a female and (b) of Asian origin. Both the EAT and the Court of Appeal (CA) (disagreeing with the Employment Tribunal (ET) decision that she could compare herself with a white male) held that each ground of complaint was to be treated *separately*.

[50] Equality Act 2010 s. 15 (1) (a) (b).

[51] *Ibid*. s. 15 (2).

[52] See too the Statutory Code of Practice 2011 Chapter 5 at pp. 71-72 where useful guidance will be found on this topic.

[53] See to the House of Lords case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43. The provisions of the Disability Discrimination Act 1995 which formed the legal basis for the *Malcolm* case decision has now been revoked and replaced by s.15 of the 2010 Act. The House of Lords in *Malcolm* rejected the reasoning in *Clark v TDG Ltd.t/a Novacold [*1999] ICR 951.

Thus direct discrimination occurs where the employer treats someone less favourably because of disability itself. By contrast the discrimination arising from disability is whether the disabled person has received unfavourable treatment because of something arising in consequence of his/her disability. Unfavourable treatment does not amount to discrimination arising from disability if the employer can show that the treatment is a "proportionate means of achieving a legitimate aim." If the employer can show that he did not know of the disabled person's disability and could not have reasonably expected to know that the disabled person had a disability, the unfavourable treatment does not amount to discrimination arising from disability.[54] Furthermore, s.15 of the 2010 Act makes it clear that a comparator is not required. The employer who wishes to defend the claim will need to prove that the action taken, as for example dismissal, is proportionate to achieving the legitimate aim.

3.6. Indirect discrimination

A person discriminates against another if s/he applies a provision, criterion or practice which is discriminatory in relation to that other's protected characteristic.[55] A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic if (a) it is applied or would apply, to persons who do not share that characteristic; (b) it puts, or would put,[56] persons who actually do share that characteristic[57] at a particular disadvantage[58] compared with persons who do not share it;[59] (c) it puts or would put a person with that characteristic at a disadvantage; and (d)

[54] Paraphrase of paras. 5.3; 5.11-12 and 5.13 of the Code of Practice, 2011.

[55] Equality Act 2010 s.19(1).

[56] "would put" applies to provisions, criteria and practices which have not yet occurred but which would have a discriminatory effect if they did occur. See explanation in the Code of Practice para. 4.7.

[57] i.e., persons who have the same disability.

[58] The word "disadvantage" is not defined in the Equality Act 2010. It could mean the denial of an opportunity or choice, deterrence, rejection, or exclusion. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss, whether economic or otherwise. It is sufficient that the worker can reasonably say that s/he would have preferred to be treated differently. The courts have found that the word "detriment", which is a similar (not identical) concept to "disadvantage" is something that a reasonable person would complain about. An unjustified sense of grievance would probably not qualify under the 2010 legislative provisions. See the Code of Practice para. 4.9.

[59] Once it is clear that there is a provision, criterion or practice which puts, or would put, workers sharing a protected characteristic at a particular disadvantage, the next stage is to consider a comparison between workers with a protected characteristic and those without it.

it cannot be shown by the employer that it is a proportionate[60] means of achieving a legitimate aim.[61]

It should be born in mind that it is not enough that the provision, criterion or practice puts, or would put, at a particular disadvantage a group of persons who share a protected characteristic. It must also have the effect (or be capable of having it) on the individual worker concerned. It is thus not enough for a worker merely to establish that s/he is a member of the relevant group. S/he must also show that s/he has personally suffered (or could suffer) the particular disadvantage as an individual.[62]

There is no definition in the Act of the expression "provision, criterion or practice". This expression would be construed widely to mean any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. The expression may also include decisions to perform something in the future, a one-off or discretionary decision by the employer.[63]

Six matters should be noted at the outset. Firstly, that indirect discrimination has been extended by the 2010 Act to apply to disability. Secondly, that the Act applies closely the definition given by the Directive. Thirdly, indirect discrimination applies

---

The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances. It is important to make clear which protected characteristic is relevant. Having regard to disability, this would not be disabled persons as a whole but persons with a particular disability –for example, with an equivalent level of visual impairment–.

[60] The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages: namely (i) is the aim of the provision, criterion or practice legal and non-discriminatory, and one which represents a real, objective consideration?; (ii) If the aim is legitimate, is the means of achieving it proportionate, i.e., appropriate and necessary in all the circumstances?

[61] Equality Act 2010 s. 19 (2)(a)(b)(c)(d). With regard to (d) above, if the person applying a provision, criterion or practice can show that it is "a proportionate means of achieving a legitimate aim then, it will not amount to indirect discrimination. This is often known as the "objective justification" test. The test applies, *inter alia*, to disability discrimination. The concept of legitimate aim is taken from the European Union law as well as relevant decisions of the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice (ECJ). The expression "legitimate aim" is not defined by the 2010 Act. It is suggested by the Code of Practice (para. 4.28) that the aim of the provision, criterion or practice should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The health and safety of individuals may qualify as legitimate ends provided that risks are clearly specified and supported by evidence.

[62] Source: The Code of Practice para. 4.23.

[63] These are some suggestions made by the Code of Practice at para. 4.5.

to all the protected characteristics apart from that of pregnancy and maternity.[64] Fourthly, an important distinction exists with regard to the defence of justification between direct and indirect discrimination. In the case of direct discrimination the defence of justification does not apply whereas indirect discrimination can be justified *if it is a proportionate*[65] *means of achieving a legitimate aim*. Fifthly, when deciding whether or not a "provision, criterion or practice" indirectly discriminates, the Employment Tribunal in applying an *objective* test needs to balance, on the one hand the discriminatory effect of the provision, criterion or practice and on the other, the employer's justified needs and interests.[66] Finally, discrimination by perception[67] is applicable to cases of indirect discrimination.

4. COMPARATORS

The 2010 Act provides that when comparing cases for the purposes of direct,[68] indirect[69] and combined[70] discrimination "there must be no material difference between the circumstances relating to each case".[71] It is not necessary however, for the circumstances of the persons being compared –namely the worker and the comparator– to be identical in every way. What matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Sometimes it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to

---

[64] Although in pregnancy and maternity situations indirect sex discrimination could apply.

[65] This word is not defined by the 2010 legislation! The word "proportionate" is taken from various EU Directives and its meanings have been clarified by the CJEU. EU law treats "proportionate" if it is an "appropriate and necessary means" of achieving a legitimate aim. Yet "necessary" does not mean that the provision, criterion or practice is the only way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means. (Source: Code of Practice para. 4.30 and 4.31.).

[66] i.e., there must be a real need for the provision etc. […] and furthermore it must be "a proportionate means of achieving a legitimate aim"; in other words, it must be reasonably necessary and appropriate. See *Network Rail Infrastructures Ltd v Gammie*. Unreported EAT case. March 2009, (Source: Financial Times).

[67] See p.5 *ante* for a definition.

[68] Equality Act, 2010 s.13. See discussion at pp. 5 et seq. *ante.*

[69] *Ibid.* s .19. See discussion at pp. 8 et seq. *ante.*

[70] *Ibid.* s. 14. See discussion at p. 7 *ante.*

[71] *Ibid*. s. 23(1).

be made by a *hypothetical comparator*.[72] In some instances a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless that treatment may help to construct a hypothetical comparator. Constructing a hypothetical comparator may involve considering elements of the treatment of several persons whose circumstances are similar, though not identical, to those of the claimant. When examining all those elements an Employment Tribunal may conclude that the claimant was *less favourably treated*[73] than a hypothetical comparator would have been treated.[74]

The comparator in direct disability discrimination is the same for other types of discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different.[75] An appropriate comparator would be a person who does not have the disabled person's impairment but who has the same abilities and skills as the disabled person (regardless of whether those abilities and skills arise from the disability itself).

5. IRRELEVANCE OF ALLEGED DISCRIMINATOR'S CHARACTERISTICS

It is irrelevant, as far as direct discrimination[76] is concerned, that the alleged discriminator enjoys the same protected characteristics as the person who is being discriminated against. It is equally irrelevant, in the case of combined discrimination[77] that the alleged discriminator has one or both of the protected characteristics.[78]

[72] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR337 (HL).
[73] In the case of "less favourable treatment" a comparator is required, whereas no comparator is required for "unfavourable treatment".
[74] Source: Code of Practice paras. 3.23, 3.24, 3.25 and 3.26.
[75] Equality Act 2010 s.23 (2) (a). Although not a disability case see *Eweida v British Airways* [2010] EWCA Civ. 80 (CA).
[76] Under the Equality Act 2010 s.13.
[77] *Ibid*. s. 14.
[78] *Ibid.* s. 24 (1) (2) (a) (b).

6. ADJUSTMENTS FOR DISABLED PERSONS

The 2010 legislation makes new and detailed provisions for reasonable adjustments[79] to be made in the case of disabled persons in employment. The employer's reasonable duty to make adjustments comprises three requirements.[80] Firstly, to avoid a substantial disadvantage where a provision, criterion or practice applied by or on behalf of an employer puts a disabled person at a substantial disadvantage compared to those who are not disabled.[81] Secondly, to remove or alter a physical feature[82] or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage[83] compared to those who are not disabled.[84] The third requirement (which is a new one) is that the employer is to

[79] The duty to make reasonable adjustments applies in recruitment and during all stages of employment, including dismissal. It may also apply after employment has ended. The duty relates to all disabled workers of an employer and to any disabled applicant for employment. The duty also applies in respect of a disabled person who has notified the employer that s/he may be an applicant for work. (Equality Act 2010 Schedule 8 paras. 4 & 5.

[80] *Equality Act 2010* s. 20 (2).

[81] *Ibid.* s. 20 (3).

[82] All physical features are covered whether they are temporary or permanent. Physical features include steps, kerbs, staircases, exterior surfaces, paving, building entrances and exits, emergency exits, internal and external doors, gates, toilets and washing facilities, lighting and ventilation, escalators and lifts, floor covering, signs, furniture and temporary and moveable items, and so on.

[83] A substantial disadvantage is one which is more than minor or trivial. Whether a disadvantage exists in a particular case is a question of fact (not law) which is assessed on an objective basis. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly –and unlike direct and indirect discrimination– under the duty to make adjustments there is no requirement to identify a comparator or a comparator group whose circumstances are the same or nearly the same as the disabled person's. (Equality Act 2010 s.23(1) and Code of Practice para. 6.16.

[84] Equality Act 2010 s. 20 (4) (9). A physical feature may consist of the design or construction of a building; an approach to, exit from or access to a building; a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises.; or any other physical element or quality [s.20(10)(a)(b)(c)(d)].

provide an auxiliary aid[85] or an auxiliary service where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled.[86] In each of those three situations the 2010 Act talks of "such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments…" What is meant by reasonable steps? The Act does not specify any particular steps which should be taken into account. What is a reasonable step for an employer to take will depend on the circumstances of each individual case.[87] What is certain is that the test of the "reasonableness" of any step an employer may have to take is an objective one.[88]

Where the provision, criterion or practice or the need for an auxiliary aid relates to the provision of information the employer must take reasonable steps to ensure that the information is provided in an accessible format.[89] An employer or other person who is subject to a duty to make reasonable adjustments is not, (subject to an express provision to the contrary), entitled to require the disabled person to pay for the costs of those adjustments.[90]

Limitations exist to the employer's duty to make reasonable adjustments. The employer has the duty to make reasonable adjustments if he knows or could reasonably be expected to know that a disabled person is, or may be, an applicant for work.[91] For disabled workers already in employment, an employer only has a duty to

---

[85] An auxiliary aid is something which provides support or assistance to a disabled person. It could include the provision of specialist equipment such as text to speech software, adapted keyboard, etc… The expression also includes auxiliary services such as sign language interpreter or the provision of a support worker for a disabled worker.

[86] Equality Act, 2010, s. 20 (5) and (11).

[87] Helpful factors which **might** be taken into account when deciding what is a reasonable step for the employer to take could include: (i) whether any particular steps would be effective in preventing the substantial disadvantage; (ii) the practicability of the step; (iii) the financial and other costs of making the adjustment and the extent of any disruption caused; (iv) the extent of the employer's financial and other resources; (v) the availability to the employer of financial and other assistance to assist in making the adjustment; and (vi) the type and size of the employer. (Source: The Code of Practice 2011 para. 6.28).

[88] See Code of Practice, 2011 para. 6.29. The Code treats "Reasonable adjustments in practice" and gives some excellent practical advice on this issue. (See paras 6.32 to 6.35).

[89] Equality Act 2010, s. 20 (6). An accessible format could include an audio tape or a text in Braille.

[90] *Ibid*. s. 20 (7).

[91] There exist restrictions on when health and disability -related enquiries can be made prior to making a job offer. In spite of those restrictions, questions are permitted to determine whether

make an adjustment if he knows or could reasonably be expected to know that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage.[92] If the employer does not know and could not reasonably be expected to know of the disability, he would have a defence.[93]

Should the employer not comply with the duty to make reasonable adjustments he would be liable for unlawful discrimination, thus entitling the disabled worker to take a claim to the Employment Tribunal.[94]

The Secretary of State may make Regulations which prescribe (i) matters to be taken into account in deciding whether it is reasonable for the employer to take a step for the purposes of a prescribed provision and (ii) descriptions of persons to whom the first, second and third requirement does not apply.[95] Furthermore, Regulations may treat such matters as to what is and what is not a provision, criterion or practice; things which are or are not to be treated as physical features or as alterations of physical features or as auxiliary aids.[96] Other matters might well include those forward looking and inspirational issues enumerated by the Code of Practice.[97] What is certain is that all these suggestions are illustrative. They are not exhaustive!

---

reasonable adjustments need to be made in relation to an interview or other process designed to assess a person's suitability for the job. See the discussion at pp. 14 & 15 *post.* (For further details see Code of Practice paras. 10.25 to 10.43).

[92] The employer must do all which is reasonable to find out of the worker's disability. What is reasonable will depend on the circumstances. The assessment of what is reasonable is an objective one.

[93] Equality Act 2010 Sch. 8 para. 20 (1) (a) and (b).

[94] *Ibid.* s.21 (1) (2) (3).

[95] *Ibid*. s.22 (1) (a) (b).

[96] *Ibid*. s.22 (2) (a) to (e).

[97] These include, inter alia, making adjustments to premises; allocating some of the disabled person's duties to another worker (see *Chief Constable of South Yorkshire Police v Jelic* [2010] unreported EAT case*)*; transferring a disabled worker to fill another vacancy; (see *Garrett v Lidl Ltd* [2009] unreported EAT case) altering the disabled worker's hours of work or training; assigning the disabled worker to a different place of work or training or arranging home working; allowing the disabled person to be absent from work or training hours for rehabilitation, assessment or treatment; giving, or arranging for, training or mentoring (whether for the disabled person or other worker); acquiring or modifying equipment; modifying equipment for testing or assessment; providing a reader or interpreter; providing supervision or other support; allowing a disabled worker to take a period of disability leave; participating in supporting employment schemes such as Workstep; employing a support worker to assist a disabled worker; modifying disciplinary or grievance procedures for a disabled worker; adjusting redundancy selection criteria for a disabled worker; modifying

Finally, it should be noted that if two or more persons are subject to a duty to make reasonable adjustments with regard to the same disabled person, each of them has an obligation to comply to the duty so far as is reasonable for each of them to do so.[98]

7. HARASSMENT

A person harasses another if s/he engages in unwanted conduct related to[99] a relevant protected characteristic and the conduct has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.[100]In deciding whether the conduct has the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, three matters need to be taken into account, namely the perception of the person allegedly harassed,[101] the other circumstances of the case and whether it is reasonable for the conduct to have that effect.[102]

The statutory provisions on harassment apply to seven prohibited characteristics,[103] and some sub-sections of the Act[104] treat harassment of a sexual

---

performance-related pay arrangements for a disabled worker; or a combination of steps. See Code of Practice 2011 paras. 6.33 and 6.34.

[98] Equality Act 2010 Sch 8 para. 2 (5).

[99] Unwanted conduct relating to a protected characteristic must be construed broadly. It does not have to be because of a protected characteristic. It could include conduct relating to the worker's own protected characteristic. For example if a worker who suffers from a hearing impairment is verbally abused because he wears a hearing aid, that could amount to harassment related to disability. It could also include conduct which has a connection with a protected characteristic as for example a worker who has a son with severe disfigurement. His colleagues at work make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability. Such a claim, it will be noticed, would be a claim based on *harassment by association*. Thus, those two examples taken from the Code of Practice (para. 7.9) show that there is a *connection* with a protected characteristic and so the worker can bring a claim for harassment by reason of disability.

[100] Equality Act 2010 s.26 (1) (a) (b) (i) (ii).

[101] In ascertaining the perception of the worker the test needs of necessity to be *subjective* as it depends as to how the worker regards the violation of his/her dignity, intimidation, etc… It may therefore be said that *harassment by perception* is certainly included.

[102] Equality Act, 2010, s. 26 (4) (a) (b) (c).

[103] Namely, age, disability, gender, reassignment, race, religion and belief, sex and sexual orientation. [*Ibid*. s.26 (5)].

[104] Equality Act 2010 s. 26 (2) (3).

nature. Harassment in this chapter is evaluated only in respect of disability. Some changes to the law on harassment by reason of disability have been made by the 2010 legislation and the definition of harassment is new. Thus the definition talks (as we have seen above) of "related to"[105]disability whereas the repealed legislation talked of "on the grounds of" disability.[106]

There could be circumstances where employers may be liable for harassment of their employees or job applicants by third parties, (for example clients or customers), who are not under the employer's direct control. The employer has a duty to prevent third part harassment from arising where the employee or job applicant has been harassed by a third party on at least two previous occasions and the employer is aware of the harassment but fails to take reasonable practical steps to prevent such third party harassment.[107] The employer will be liable for harassment by a third party whether or not the harassment has been committed by the same third party or another third party.

The employer may have a defence against third party harassment liability if he can show that he took reasonable steps to prevent it happening.[108]

8. VICTIMISATION

It is victimisation for an employer to subject a worker to a detriment because a worker has done a "protected act" or because the employer believes that the worker has done or may do a protected act in the future.[109] The protected acts include (i) bringing proceedings under the Equality Act 2010; (ii) giving evidence or information in connection with proceedings under that Act; (iii) doing any other thing for the purposes of and in connection with that Act; and (iv) making an allegation (whether

[105] *Ibid*. s.26 (1) (a).

[106] This change of phraseology could have an important effect on the burden of proof in cases relating to harassment by reason of disability.

[107] Equality Act 2010 s. 40 (1) to (4).

[108] The Code of Practice (para. 10.24) gives examples of reasonable steps which the employer may take. They include having a policy on harassment; notifying third parties that employee harassment is unlawful; including a term in commercial contracts notifying customers (third parties) of the employer's policy on harassment and requiring them to adhere to it; encouraging employees to report acts of harassment by third parties; taking action on every complaint of harassment by a third party.

[109] Equality Act 2010, s. 27 (1) (a) (b).

or not express) that another person has contravened that Act.[110] A worker need not have a particular characteristic in order to be protected against victimisation under the Act. To be unlawful, victimisation has to be linked to a "protected act."[111] For example a non-disabled worker gives evidence at an Employment Tribunal hearing on behalf of a disabled colleague where disability discrimination is claimed. If the non-disabled colleague is subsequently refused promotion because of that action, s/he would suffer victimisation in contravention of the Act.[112] The 2010 Act definition of victimisation is a new one.[113]

The word "detriment" in the context of victimisation is not defined by the Act. The Code of Practice suggests that a detriment consists of anything which the individual concerned might reasonably consider that changes his position for the worse or puts him/her at a disadvantage.[114] A "detriment" might also include a threat made to the complainant which s/he takes seriously and it is reasonable for him/her to take seriously.[115] An unjustified sense of grievance on its own would not constitute a detriment. Detrimental treatment amounts to victimisation if a "protected act" is one of the reasons for the treatment, but it need not be the only reason.

Victimisation does not require a comparator. The worker need only show that s/he has experienced a detriment because s/he has done a protected act or because the employer believes (rightly or wrongly) that s/he has done, or intends to do, a protected act.[116]

---

[110] *Ibid*. s.27 (2) (a) to (d).

[111] *Ibid*. s.27 (2) (c) and (d).

[112] Protected acts can occur in any field covered by the Act and in relation to any part of the Act.

[113] There is no longer a requirement to **compare** treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act.

[114] A disadvantage could include being rejected for promotion, denied the opportunity to represent the organisation at external events, excluded from opportunities to take on training, overlooked in the allocation of discretionary bonuses or performance-related awards and so on. (Source: Code of Practice para. 9.8).

[115] There is no need to demonstrate physical and economic consequences. See *St. Helen's Borough Council v Derbyshire* [2007] ICR 841 (HL). The employer sent letters to female employees warning them that if they pursued their claim for equal pay and won the case, redundancies would occur. Hence, those letters constituted undue influence with the aim of making them give up the claim which constituted victimisation.

[116] There is no time limit within which victimisation must occur after a person has done a protected act.

Where a worker has acted in bad faith, such as acting maliciously giving false evidence or information or making a false allegation of discrimination, s/he cannot make a claim for victimisation.[117] If however a worker gives evidence or provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, s/he will be protected from victimisation.[118]

It should be noted that only an individual is enabled to make a complaint of victimisation.[119]

9. RECRUITMENT AND ENQUIRIES ABOUT DISABILITY AND HEALTH

A new provision has been enacted in the 2010 legislation to the effect that a prospective employer to whom an application for work is made must not ask about the health or disability of the applicant *before* offering the applicant (on a conditional or unconditional basis) work or where the prospective employer is not in a position to offer the applicant work, prior to including the applicant in a pool of applicants from whom the prospective employer intends to select a person to whom to offer work.[120] Thus it is unlawful for a prospective employer to ask questions on disability and health during the application process which includes the interview.

It is also unlawful for an employee or agent of the employer to ask questions on disability and health. This means that the employer cannot refer the applicant to an occupational health practitioner nor can he ask an applicant to fill in a questionnaire provided by the occupational health practitioner.

The reason for these statutory prohibitions is to ensure that disabled applicants are assessed objectively on their ability to perform the job applied for and that they are not rejected by reason of their disability.

There are however six exceptions to this general rule when the employer may lawfully ask questions on disability and health.[121] The first exception relates to the

[117] Equality Act 2010 s.27 (3).
[118] Source: Code of Practice paras. 9.12 to 9.14.
[119] Equality Act 2010 s. 27 (4).
[120] *Ibid.* s.60 (1) (a) (b).
[121] *Ibid.* ss.60 (6) (a) to (e) and (14).

reasonable adjustment required for the recruiting process. [122] The second exception relates to *monitoring purposes*.[123] The third exception treats the implementation of *positive action*[124] *measures*.[125] The fourth exception is to do with *occupational requirements*[126] while the fifth exception treats *national security.*[127] The final exception is to do with a *function which is intrinsic to the job.*[128]

---

[122] *Ibid.* s.60 (6) (a).The employer may ask questions which relate to *reasonable adjustments* necessary for the assessment and interview designed to assess the applicant's suitability for the job. This means that any information on disability or health obtained by the prospective employer for the purpose of making *adjustments* to recruiting arrangements should as far as possible, be held separately. Nor should that information form part of the decision-making process regarding an offer of employment, whether or not the offer is conditional.

[123] *Ibid.* s.60 (6) (c).It is lawful for the prospective employer to ask questions about disability and health for purposes of *monitoring* the diversity of applicants.

[124] Where an employer reasonably thinks that persons who share a protected characteristic (i) experience a disadvantage connected with that characteristic, [Equality Act 2010 s. 158 (1) (a)]; (ii) have needs that are different from the needs of persons who do not share that characteristic, [*Ibid*. s. 158 (1) (b)]; or (iii) have proportionally low participation in an activity compared to others who do not share that protected characteristic,[*Ibid*. s. 158 (1) (c)]; the employer may take action which is *proportionate* to meet the aims of the Act. These aims are: (i) to enable or encourage persons to share the protected characteristic to remedy or *minimise* that disadvantage [*Ibid.* s. 158 (2) (a)]; to *meet* those needs, [*Ibid*. 158 (2) (b)]; or (iii) to enable or encourage persons who share the protected characteristic to *participate* in that activity [*Ibid*. s. 158 (2) (c)].

[125] Equality Act, 2010. s.60 (6) (d). It is lawful for a prospective employer to ask whether a person is disabled in order that that latter may benefit from any measures aimed at *improving disabled persons' employment rates.* This could include the guaranteed interview scheme whereby any disabled persons who meet the essential requirements of a job are offered an interview. When asking questions about, for example, eligibility for a guaranteed interview scheme, the prospective employer should make clear that this is the purpose of the question.

[126] *Ibid.*s.60 (6) (e). There is a need to demonstrate an *occupational requirement* if a person with a *particular* impairment is needed for the job. Where the prospective employer can demonstrate that a job has an occupational requirement for a person with a specific impairment, it is lawful for the prospective employer to ask questions relating to a person's disability or health to enable the employer to establish that the applicant has that impairment.

[127] *Ibid*. s.60 (14). It is lawful for the prospective employer to ask disability or health questions where it is a requirement for the job that the applicant needs to be vetted for purposes of national security. There are various types of vetting but the most common ones are positive vetting for more delicate tasks and negative vetting for less delicate missions.

[128] *Ibid*. s.60 (6) (b). A prospective employer may ask about disability and health (before the offer of a job is made or before the applicant is put in a pool of candidates to be offered

Should an applicant disclose voluntarily information on his disability or health, the prospective employer should ensure that in responding to that disclosure he only asks further questions which are permitted (as explained herein).The employer must not respond by asking questions about the applicant's disability or health that are irrelevant or outside the parameters of legality.

Can the employer lawfully make enquiries *after* a job offer has been made? Although job offers may be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, employers must ensure that they do not discriminate against a disabled job applicant on the basis of any such response.[129] If a prospective employer is not in a position to offer a job, but has accepted applicants into a pool of persons to be offered a job when a vacancy occurs, it is lawful for the employer to ask disability or health-related questions at that stage.[130]

10. EPILOGUE

By replacing the previous multitudinous anti-discrimination legislation with a single law thus making it easier to understand, and by strengthening protection in some situations, the Equality Act 2010 protects people from discrimination in the workplace and in wider society.

---

vacancies when they arise) where the question relates to an applicant's ability to carry out the function that is intrinsic to the job. Within the job description, only functions which are necessary to the job should be included. Where a disability or health-related question would determine whether a person can carry out this function with reasonable adjustments in place such a question is lawful.

[129] For example, it will amount to direct discrimination to reject an applicant purely on the grounds that a health check reveals that s/he has a disability. Employers should also consider at the same time whether there are reasonable adjustments which should be made in relation to any disability disclosed by the enquiries or health checks.

[130] An employer can avoid discriminating against applicants to whom he has offered jobs subject to satisfactory health checks by ensuring that any health enquiries are relevant to the job in question and that reasonable adjustments are made for disabled applicants. It is very important that occupational health practitioners who are employees or agents of the employer understand the duty to make reasonable adjustments. If a disabled person is refused a job because of a negative assessment from an occupational health practitioner during a process in which reasonable adjustments were not adequately considered, this could amount to unlawful discrimination if the refusal was by reason of disability.

With regards to disability, the 2010 Act has extended the protection to disabled persons against *indirect discrimination*;[131] it has introduced the concept of "*discrimination arising from disability*" to replace protection under previous legislation lost as a result of a legal judgment;[132] it applies the detriment model to protection against *victimisation*, aligned with the employment law approach;[133] it harmonised the thresholds for the duty to make *reasonable adjustments*[134] for the disabled person; it extended protection against *harassment*[135]of employees by third parties; it made it more difficult for disabled persons to be unfairly screened out when applying for jobs by restricting the circumstances in which employers can ask job applicants *questions on their disability or health*.[136]

The United Kingdom had adopted the United Nations Convention on disability rights[137] for the purpose of protecting and promoting the rights of the disabled. Having done so, the coalition government states that[138] "We want the UK to be a leader in equality… At our best we are defined by our tolerance, freedom and fairness. There is also a strong economic argument for equality. If people are not able to reach their full potential, the economy suffers. We are working towards a fairer society by improving equality and reducing discrimination and disadvantage for all at work, public and political life, in people's chances."

Professor Jo Carby-Hall
Director of International Legal Research
Centre for Legislative Studies
University of Hull
J.R.Carby-Hall@hull.ac.uk

[131] See pp. 8-10 *supra*.
[132] See pp. 2 and 7-8, and in particular p.8 *supra*.
[133] See pp. 14-15 *supra*.
[134] See pp. 11-13 *supra*.
[135] See pp. 13 - 14 *supra*.
[136] See pp. 15 - 17 *supra*.
[137] United Nations Convention on the Protection of the Rights and Dignity of Persons with Disabilities" (A /61/611).
[138] Source: "Creating a Fairer and More Equal Society" Department of Culture, Media, Sport.

INFORME DANÉS

(DANISH REPORT)

DANISH DISABILITY LAW AND POLICY IN THE FIELD OF EMPLOYMENT

MARIA VENTEGODT LIISBERG
Ph. D, Leader of Disability Team at
Danish Institute for Human Rights

Fecha de recepción: 23-10-2014
Fecha de aceptación: 06–11–2014

SUMMARY: 1. PREFACE. 1.1. Definition of disabled worker beneficiary of the employment policies and related juridical issues.1.2. Job-placement statistics. 2. SECTION I: JOB-PLACEMENT POLICIES. LEGAL FRAMEWORK AND CASE LAW. 2.1. The influence of European Union Law and International Law in Denmark. 2.2. Constitutional Law principles. 2.3. National legislation. 2.4. Employment with wage subvention 2.5. Support for persons with disabilities in employment. 2.6. Collective agreements. 3. SECTION II: DISABILITY DISCRIMINATION AND EMPLOYMENT. ACCESS TO WORK AND TERMINATION OF EMPLOYMENT. 4. SECTION III: EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB-PLACEMENT FOR DISABLED PERSONS. 4.1. Labour market crisis and active employment policies. 4.2. Job-placement for disabled persons and issues relating to gender. 4.3. Connection between welfare state and active labour market policies. 5. SECTION IV: CAREER COUNSELING AND JOB-PLACEMENT FOR DISABLED STUDENTS.

RESUMEN: En Dinamarca, el mercado laboral se ha regido tradicionalmente por el modelo danés de flexiguridad, que consiste en una protección relativamente débil contra el despido, y un apoyo relativamente firme a las personas que no tienen empleo. En consecuencia, una capacidad de trabajo reducida se ha considerado, por regla general, una justa causa de despido. La Directiva Marco de Igualdad de la UE cuestiona la laxitud tradicional en relación con los despidos vinculados a la capacidad de trabajo reducida cuando ésta tiene su causa en una discapacidad. Tradicionalmente, los programas de promoción de empleo destinados a la contratación de personas con discapacidad han sido relativamente generosos. Sin embargo, las nuevas medidas de

austeridad han provocado recortes en estos programas. En suma, el modelo danés de flexiguridad está siendo cuestionado, tanto en lo relativo a la flexibilidad como en lo tocante a la seguridad.

ABSTRACT: In Denmark, the labour market has traditionally been governed by the Danish flexicurity model consisting of relatively weak protection against dismissal and relatively strong support for persons who are not in employment. Consequently, reduced working capacity has, as a rule, been considered a just ground for dismissal. The EU Framework Equality Directive challenges the traditional laxity in relation to dismissals due to reduced working capacity when it is related to disability. Traditionally, employment promotional schemes targeting the employment of persons with disabilities have been relatively generous. However new austerity measures have led to cut-backs in these schemes. In sum, the Danish flexicurity model is being challenged both as regards flexibility and security.

PALABRAS CLAVE: discapacidad, política de empleo, Dinamarca, derechos humanos.

KEYWORDS: Disability, employment policy, Denmark, human rights.

1. PREFACE

The Danish labour market is based on the so–called "flexicurity" model which in Denmark consists in relatively weak protection against dismissal and relatively strong support for persons who are not in employment. It seems that this model of regulation of the labour market has lead to a non–inclusive labour market towards persons with disabilities.[1] In spite of relatively generous employment promotion schemes targeting persons with disabilities, persons with disabilities do not enjoy high rates of employment.

1.1. Definition of disabled worker beneficiary of the employment policies and related juridical issues

The definition of disability in Danish laws relating to disabled persons on the labour market vary according to the purpose of the legislation in question with the most relevant definitions being found under legislation relating to employment promotion legislation and anti-discrimination legislation.

For example the Danish Act on Active Employment Effort, which provides for wage subvention to persons with disabilities in order to promote their employment, limits the use of wage subvention to persons "who have permanent or long–lasting reductions of their working capacity".[2] The legal act does not require that the reduction in working capacity is related to an impairment.

Another legal act on support for persons with disabilities on the labour market which provides i.a. special support for persons with disabilities who have taken an education which lasts longer the 18 months, does mention disability directly.[3] The aim of this act is to promote employment of "persons who may experience difficulties in obtaining or keeping employment due to disability".[4] The legal act does not provide more detail on the meaning of "disability" in this regard.

---

[1] M. LIISBERG, "Disability and Employment – A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy", Intersentia, 2011.

[2] Danish Act on Active Employment Effort, Section 69(1), LBK nr 415 af 24/04/2013.

[3] Danish Act on Compensation for Persons with Disabilities in Employment, Section 2, LBK nr 727 af 07/07/2009.

[4] Ibid.

In Denmark, the adoption of a prohibition of discrimination on the ground of disability only occurred after Denmark was required to do so under the Employment Equality Directive.[5] On 22 December 2004, the existing Act Prohibiting Differential Treatment on the Labour Market was amended to cover also age and disability.[6] Since 2009, an Equal Treatment Board has considered individual complaints of discrimination on the ground of *inter alia* disability.[7] The interpretation of the concept of "disability" by the courts is a good illustration of how reticently the legal protection against discrimination on the ground of disability was, at least initially, interpreted in Denmark. The Danish Act on Differential Treatment on the Labour Market does not provide a definition of "disability", and the Preparatory Works give an unclear picture of the intended scope of the term. The Preparatory Works explain that the concept of disability must be understood as "physical, psychological or intellectual impairment [which] must be compensated in order for that person to function on an equal footing with other citizens in a similar situation".[8] However, the meaning of "compensation" is not provided, although it is stated that "it is not a requirement for protection against differential treatment on the grounds of disability that there is a specific need for compensation".[9]

In the first two cases decided by a High court relating to the disability provisions of this Act, the Western High Court found that two women, who had Multiple Sclerosis and Post-Traumatic Stress Syndrome respectively, were not disabled under the Act on Differential Treatment on the Labour Market.[10] Both women were employed in 'flexjob' positions, which meant that they worked reduced hours and that

---

[5] Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. The deadline for national implementation of the provisions regarding disability was 2 December 2003, which could be extended to 2 December 2006, cf. Article 18.

[6] Legal Act amending Act Prohibiting Differential Treatment on the Labour Market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), L 1417 of 22 December 2004. Latest version of Act Prohibiting Differential Treatment on the Labour Market, LBK 1310 of 16 December 2008.

[7] Legal Act on the Equal Treatment Board (*Lov om Ligebehandlingsnævnet*), Lov nr. 387 of 27/05/2008.

[8] Danish Preparatory Works, Proposal L92 of 11 November 2004, 4.1. Handicapkriteriet and Bemærkninger til de enkelte bestemmelser, 'Til no. 2'.

[9] Ibid.

[10] Danish Western High Court Judgment of 11 October 2007, published in UFR2008.306V (Multiple Sclerosis). Danish Western High Court Judgment of 11 October 2007, No. B-2722-06, unpublished (Post Traumatic Stress Syndrome).

special consideration had to be given to their reduced working capacity, while the employers received a reimbursement of approximately half of their salary. In later cases however, the Danish courts seem to have broadened their interpretation of "disability" under the Danish Act and have considered persons in supported employment to be disabled without requiring that they have an additional need for adjustments.[11] In April 2013, the Court of Justice of the European Union passed a judgment in a case referred to it by the Danish Maritime and Commercial Court decided to refer a question on the definition of "disability" under the Employment Equality Directive, as implemented by the Danish Act on Differential Treatment on the Labour Market.[12] The CJEU rejected the narrow definition of disability applied to date by the Danish courts and it underlined that the concept of disability in the sense of the Directive, "must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from 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, and the limitation is a long–term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept."[13] Following this judgment by the CJEU, the Danish courts can be expected to be in conformity with the CJEU as regards the definition of disability under the Employment Framework Directive.

In conclusion, the concept of disability is not clearly defined under Danish law and it varies according to the purpose of the legislation. The definition of disability under the Danish anti–discrimination legislation started out as linked to the medical model of disability. However, a recent EU judgment will force Danish courts to interpret the concept more in line with the social model of disability and the UN Disability Convention on the Rights of Persons with Disabilities.

1.2. Job-placement statistics

Job placement statistics are made on a regular basis in connection with the Labour Force Surveys. According to the most recent survey concerning 2012

[11] See e.g. Danish Eastern High Court Judgment of 5 May 2010, 18. Afd., no. B-2215-09 (unpublished).

[12] Judgment of the CJEU of 11 April 2013, Joint Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S and Jette Ring v. Dansk almennyttigt Boligselskab DAB.

[13] Para. 47.

approximately 17.5% of persons between the age of 16 and 64 years consider that they have a "longer–lasting disability or health problem".[14] Approximately 3.5 million persons are between the age of 16 and 64 years and this means that approximately 625.000 of them would consider that they have a longer-lasting disability or health problem. The rate of employment for persons with disabilities was 44% in 2012 compared to 78% for persons without disabilities.[15] For persons with a disability and a reduced working capacity, the employment rate was 27%.

Women are strongly over-represented among persons between the ages of 16 and 64 years who consider themselves to have a longer-lasting disability or health problem. Women constitute 56% of persons with disabilities, whereas among persons without disabilities they amount to 48%.[16] Women with disabilities are less likely to be employed than women without disabilities. Logistic regression of probability of employment for persons *with* disabilities between the ages of 16 and 64 is 0.4 for men, and for persons *without* disabilities, the probability of employment for men is 0.3.[17]

2. SECTION I: JOB-PLACEMENT POLICIES. LEGAL FRAMEWORK AND CASE LAW

2.1. The influence of European Union Law and International Law in Denmark

Denmark joined the European Community in 1973 and, following a referendum in 1992, a majority of voters rejected the Maastricht Treaty which was only ratified by Denmark following the adoption in December 1992 of a Protocol on the Position of Denmark. This protocol provides that Denmark will not be bound by legal acts in the areas of i.a. justice and home affairs. This protocol does not limit the participation in relation to employment policy. When Denmark became a member of the European Community, the aim was to retain the special Danish labour market model, whereby the regulation of the labour market is the prerogative of the social partners. However, the Danish labour market has become increasingly "Europeanised" in the sense that a

[14] M. MØLLER KJELDSEN, H. S. HOULBERG and J. HØGELUND, "Handicap og Beskæftigelse. Udviklingen mellem 2002 og 2012.", SFI 2013:01, Danish Social Research Institute, Copenhagen 2013, p. 14.
[15] Ibid., p. 10.
[16] Ibid., p. 135.
[17] Ibid., p. 141 and 142.

number of laws have been adopted to implement EU law in Denmark, including for example legal acts on prohibition against discrimination on the grounds of gender, race and disability.[18] Thus, the introduction of protection against discrimination on the grounds of disability on the labour market in Denmark is the result of the influence of EU laws and policies.

Laws on wage subvention for promotion of employment of persons with disabilities are in line with Danish disability policy as well with the Danish flexicurity model, and they are not the result of influence from the EU.

Denmark ratified the UN Convention on the Rights of Persons with Disabilities in 2009. The ratification of the CRPD has not led to a change in Danish employment law and policy relating to persons with disabilities.

2.2. Constitutional Law principles

The Danish Constitution dates back to 1953 and it does not contain a prohibition against discrimination. Section 75 provides that the State should strive to ensure that all citizens who are capable of working have the possibility of working under proper conditions. As indicated by the wording of this Section, the Constitution does not grant a right to employment.

2.3. National legislation

The Danish job-placement schemes fall into two groups: employment under special conditions which relates to the employment contract between the employer and the employee, and support schemes for persons with disabilities which are not related to the employment contract. The first type of job-placement scheme in the form of employment under special conditions includes both supported employment in the form of wage subvention in the open labour market, and protected employment outside of the open labour market. The most widely used type of employment under special working conditions is employment with wage subvention, called "flexjob", which will be described more in detail below. The other types of job placement schemes which are not related to the employment contract consist of five different schemes: personal assistance at work and in–job training, support for assistive devices, short–term wage subvention for persons with disabilities who have finished 18 months

[18] Liisberg 2011, p. 154.

of education and preferential treatment of persons with disabilities for employment with public employees.[19] These schemes are also described in more detail below.

2.4. Employment with wage subvention

In Denmark, the main employment promotion scheme for persons with disabilities, both in terms of persons concerned and costs of the scheme is the "flexjob" scheme.[20] Approximately 20% of persons with disabilities who are in employment are employed under special conditions, and 83% of these are employed in a "flexjob". Less than 4% of persons with disabilities in employment are employed in protected employment.

A reform of the "flexjob" scheme entered into force on 1 January 2013.[21] Before the reform, a person employed in a 'flexjob' would work approximately one third of a full-time position, but receive the same salary as a person employed in a full-time position. The employer of a person in the 'flexjob' scheme received a wage subvention, which amounted to two–thirds of the salary usually offered.[22] According to the new Act, persons who are employed in a new flexjob position will receive pay from the employer for the work they perform. In addition they will be entitled to support up to the level of unemployment benefit and not up to the level of ordinary full-time pay, as was previously the case.[23] Moreover, as a starting point flexjob will only be granted for a five year period, and not as previously on a permanent basis. In addition, an employee will not be permitted to convert an ordinary employment to a flexjob position with his or her current employer. The reform intends to avoid that persons who could otherwise be employed on the ordinary labour market with adjustments are unable to do so because of the removal of economic incentives and restrictions on the access to employment in flexjobs. This relatively low threshold on the support given under the flexjob scheme means that persons in flexjobs will earn significantly less, as a rule, than persons employed in ordinary positions. In addition, it is problematic from an equal treatment perspective that the authorities will have to determine the worth of

[19] Act on Compensation for Persons with Disabilities in Employment, mentioned in the Preface.

[20] Kjeldsen et al, p. 92.

[21] Amendment Act no. 1380 of 23 December 2012 (lov om ændring af lov aktiv beskæftigelsesindsats).

[22] Ibid., p. 93 and p. 95.

[23] Section 70e of the new Act on Employment Promotion, LBK 706 of 28 December 2012, (lov om aktiv beskæftigelsesindsats).

the work of the individual employee in a flexjob. It is difficult to see how such an assessment can be made on an objective and fair basis in all cases.

2.5. Support for persons with disabilities in employment

As mentioned above, the Act on Compensation for Persons with Disabilities in Employment provides for short-term wage subvention up to 12 months for persons with disabilities who have difficulties obtaining employment and who have completed 18 months of education.[24] This scheme is called the "ice breaker scheme". Unfortunately, no new statistics are available on the use of this scheme because it is used very little.[25] In a study from 2007, only 6% of working-age persons with disabilities had heard about this job-placement scheme.[26] In comparison, 80% of the persons asked said that they were well-informed about the flexjob scheme.

The Act on Compensation for persons with disabilities also provides for preferential treatment in relation to employment with public employers.[27] The Act provides firstly that public employers must call applicants with disabilities for a job interview if they fulfill the minimum requirements for the job, and that public employers must employ applicants with a disability if they are equally well qualified for a position than non-disabled applicants. The applicant must inform the potential employer that he wishes to make use of this preferential treatment. However, as is the case with the ice-breaker scheme, this right to preferential treatment is practically unknown in Denmark and consequently it is used very little.[28] Almost 85% of working-age persons with disabilities who were asked about their knowledge of this scheme had not heard of it.

2.6. Collective agreements

Practically all collective agreements contain Social Chapters according to which employees with reduced working capacity may be employed for a lower wage than persons who are not employed under the Social Chapters. According to a survey from

[24] Act on Compensation for Persons with Disabilities in Employment, Chapter 5.
[25] KJELDSEN et. al., p. 95.
[26] MIILER, HØGELUND and GEERTSEN: Handicap og Beskæftigelse, Udviklingen mellem 2002 og 2005. Social Research Institute, SFI 2006:24, p. 62.
[27] Act on Compensation for Persons with Disabilities in Employment, Chapter 6.
[28] MIILER et al., p. 60.

2012, less than 5% of persons with disabilities who are employed under special working conditions are employed under a Social Chapter.[29]

The use of employment under Social Chapters is expected to rise after the amendment of the main wage subvention scheme, flexjob, in 2013. According to the amended Act on an Active Employment Effort, persons who are employed in an ordinary job whose working capacity is reduced may only obtain wage subvention for continued employment with the same employer after employment for one year under a Social Chapter.[30]

3. SECTION II: DISABILITY DISCRIMINATION AND EMPLOYMENT. ACCESS TO WORK AND TERMINATION OF EMPLOYMENT

In Denmark, the adoption of a prohibition of discrimination on the ground of disability only occurred after Denmark was required to do so under the Employment Equality Directive.[31] On 22 December 2004, the existing Act Prohibiting Differential Treatment on the Labour Market was amended to cover also age and disability.[32] Since 2009, an Equal Treatment Board has considered individual complaints of discrimination on the ground of *inter alia* disability.[33]

In Denmark, a component that is often considered the cornerstone of the flexicurity model is that employers enjoy extensive freedom to dismiss employees.[34] According to the OECD's indicators of individual employment protection, Denmark

---

[29] SFI 2013:01, p. 95.

[30] Act on an Active Employment Effort, Section 70b.

[31] Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. The deadline for national implementation of the provisions regarding disability was 2 December 2003, which could be extended to 2 December 2006, cf. Article 18.

[32] Legal Act amending Act Prohibiting Differential Treatment on the Labour Market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), L 1417 of 22 December 2004. Latest version of Act Prohibiting Differential Treatment on the Labour Market, LBK 1310 of 16 December 2008.

[33] Legal Act on the Equal Treatment Board (*Lov om Ligebehandlingsnævnet*), Lov nr. 387 of 27/05/2008.

[34] J. C. BARBIER, F. COLOMB and P. KONGSHØJ MADSEN, 'Flexicurity – An Open Method of Coordination at the National Level', *Documents de travail du Centre d'Economie de la Sorbonne (Paris I)*, (2009), no. 09046, 6.

has the 7th most lenient protection against dismissals of permanent employees of all OECD countries, following countries such as the United States and several Commonwealth nations. [35] In contrast, countries such as Sweden, Germany and the Netherlands feature at the top of the list among those with strong individual employment protection. In Denmark, a significant number of persons are not covered by employment protection under law or collective agreements. Danish employment protection legislation is incorporated into three different laws, covering white–collar employees, sailors and public servants.[36] Many persons who are not covered by these legal acts will be covered by collective agreements but, according to a survey from 2001, around 30% of blue-collar workers in the private sector were not covered by a collective agreement either. In addition, employment protection only applies after nine months of employment. In sum, a significant number of employees on the Danish labour market do not enjoy protection against unfair dismissals other than anti-discrimination protection.

Secondly, for those employees who are covered by employment protection under law or collective agreements, the protection afforded is relatively weak. The regulation of the employment market is, to a large extent, based on the assumption that, in the long run, it is in the best interest of both employers and employees that the only limitations on the managerial prerogatives of the employer are a result of free negotiations between employers and employees on a collective and an individual basis.[37] Interference from the State in this balance of interests is seen as detrimental to a stable economy and employment market. As a consequence, contractual principles dominate the practice of limiting the employer's right to dismiss their employees.[38] In order to determine whether a dismissal is fair (in relation to dismissals on the grounds of reduced working capacity), a concrete assessment is made, assessing the burden placed on the employer as a result of continued employment of the individual in question and whether it is reasonable that the employer should suffer this inconvenience. The prevalence of contractual principles implies that the employer

---

[35]Organisation for Economic Co-operation and Devlopment, *Employment protection in OECD countries and selected non-OECD countries in 2008*, (OECD, 2008), available at: <http://www.oecd.org/employment/protection> (accessed 1 June 2012).

[36] Funktionær, sømænd, tjenestemand, Legal Act on White Collar Employees (Funktionærloven), LBK nr 81 af 03/02/2009, Legal Act on Sailors (Sømandsloven), LBK nr 742 af 18/07/2005, Legal Act on Public Servants (Tjenestemandsloven), LBK nr 488 af 06/05/2010.

[37] L. NIELSEN AND R. ROSEBerry, *Dansk Arbejdsret,*(DJØF, 2008), 479.

[38] R. NIELSEN, *Lærebog i Arbejdsret,* (DJØF, 2005), 17; J. Bruun, *Usaglig Afskedigelse,* (Thomson GadJura, 2003), 32.

may, as a rule, expect from the employee that he or she delivers the initially agreed working targets. Thus, under many collective agreements such as, for example, a collective agreement which covers the production industry, an employer is permitted to dismiss an employee after 120 days of absence due to reduced working capacity.[39] Moreover, the collective agreement does not mention any duties for the employer to place the employee in another position or provide any other adjustments for his or her reduced working capacity.

This so-called "120–day rule" illustrates an underlying presumption that an employer should not be made to bear the burden of having employees who have restricted working capacity. According to Section 5(2) of the Act on White Collar Employees, an employer and an employee may agree that the employee can be dismissed with a shorter notice of one month, when he has been absent due to sickness for 120 days within a period of 12 months. The 120 days must be calculated as calendar days and not as working days and the dismissal must take place while the employee is still absent from work.[40] The Danish Supreme Court has established that a dismissal which takes place with reference to such an agreement will normally be considered reasonable.[41] The case in question concerned the dismissal of a shop assistant who had been employed for 13 years, and had developed a problem with her back. She was dismissed after being absent from work for 4 months and the dismissal was found to be reasonable. The Supreme Court stated that dismissals with reference to the 120-day rule: 'will ordinarily be deemed reasonable so that compensation for a dismissal on unreasonable grounds will only be relevant under very special circumstances. Such very special circumstances are not in our opinion present in this case'.[42]

According to its wording, the 120–day rule applies when the 120–day absence is due to *sickness* and, until the implementation of the Employment Equality Directive, there was no doubt that also absences related to disability would warrant a dismissal with shortened notice. However, in 2011, questions on compliance of the 120–day

[39] Section 29 of the Collective Agreement in the production industry (*kollektiv overenskomst på industriens område*).

[40] Danish Maritime and Commercial Court judgment, UFR 1951.156 SH. J. Paulsen, *Afskedigelse,* (GadJura, 1997), 598.

[41] Danish Supreme Court judgment, UFR 2002.2626 H.

[42] Danish Supreme Court judgment, UFR 2002.2626 H; One judge dissented and stated that 'very special circumstances' did not have to be present in order to find that a dismissal in accordance with the 120–day rule was unreasonable. In his opinion, a simple assessment of all the available facts could well lead to the conclusion that such a dismissal was unreasonable.

rule with the EC Employment Equality Directive were referred to the CJEU by the Danish Maritime and Commercial Court.[43]

In its judgment of 11 April 2013, the CJEU found that application of a shortened notice for dismissal with reference to the 120–day rule constituted discrimination on the grounds of disability if the reason for the sick-leave was that the person in question had not been given reasonable accommodation. The CJEU left it up to the Danish Court to decide whether the 120–day as such constituted indirect discrimination on the grounds of disability.[44] In January 2014, the Danish Maritime and Commercial Court decided that the use of the 120–day rule in the two cases amounted to direct discrimination on the grounds of disability. The Maritime and Commercial Court underlined that the sick–leave had not been a result of the disability of the two employees, but had become necessary because the employers had not provided reasonable accommodation for the two employees.[45] These judgments illustrate how difficult it can be to reconcile Danish legislation based on contractual principles and anti–discrimination legislation based on principles of inclusion and equal treatment of persons with disabilities.

4. SECTION III: EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB-PLACEMENT FOR DISABLED PERSONS

4.1. Labour market crisis and active employment policies

The employment situation has not been affected as much as in many other European countries by the economic crisis following the banking-crisis in 2007 and 2008. In addition, it would seem that persons with disabilities as a group have not been hit harder than persons without disabilities. The employment rate of persons without disabilities fell from 82% in 2008 to 78% in 2012 and for persons with disabilities it fell from 51% to 44%.

However, persons with severe disabilities have experienced a significant reduction in their employment rate from 2010 to 2012. Thus, the employment rate of persons

[43] Joint Cases C–335/11 and C–337/11, HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S and Jette Ring v. Dansk almennyttigt Boligselskab DAB, judgment of 13 April 2013.

[44] Ibid., para. 93.

[45] Danish Maritime and Commercial Court judgments of 31 January 2014, F-13-06 HK for A mod DA for Pro Display A/S and F-19-06 HK for A mod DA for Dansk Almennyttigt Boligselskab, not yet published.

with significant disabilities fell from 31% to 26% from 2010 to 2012, while their employment rate had not fallen from 2008 to 2010.[46] This indicates that there may have been a delay in the effect of the economic crisis on the employment of persons with disabilities, and that it has affected not the whole group, but especially persons with severe disabilities.

During the last few years a number of spending cuts have been made to unemployment benefits with the aim of motivating persons without employment to seek employment. No specific cuts have been made to welfare schemes for persons with disabilities who are unemployed or outside of the labour market. However, as mentioned above, the most widely–used type of wage subvention for supporting the employment of persons with disabilities has been cut significantly so that persons under this scheme will no longer receive subvention above the level of unemployment benefit. Previously, they would have been entitled to subvention up to the level of wages set by collective agreements.

In sum, it would seem that no specific cuts have been made to welfare benefits intending to motivate persons with disabilities to seek employment. General cuts in benefits are however likely to affect persons with disabilities hard, as they may experience more difficulties than others in achieving employment.

4.2. Job-placement for disabled persons and issues relating to gender

As explained above, women are more likely to consider themselves disabled than men, and women with disabilities are also more likely to be unemployed than men with disabilities. Although a study by the Social Research Institute has pointed out this problem, the authorities have not taken specific steps to target job placement policies to women with disabilities.[47] The study points to a number of possible explanations for the lower employment rate of women with disabilities including that women are more likely to have lower–paid jobs with low levels of self-determination when they are employed than men, and that it may be socially more acceptable for a woman not to work than it is for a man.

[46] KJELDSEN et al., p. 16-17.

[47] LARS BRINK THOMSEN & JAN HØGELUND: *Køn, handicap og beskæftigelse i 2010*. SFI – Det Nationale Forskningscenter for Velfærd, 11:36.

4.3. Connection between welfare state and active labour market policies

In Denmark, the rate of persons receiving permanent welfare disability benefits in the form of invalidity pension and flexjob wage subvention has risen from 18% of persons with disabilities in 2003 to 45% in 2012.[48] In 2002, the employment rate of persons with disabilities was 51% and this fell to 46% in 2012.[49] Surprisingly, the rate of persons on unemployment benefit has fallen from 9% in 2003 to 6% in 2012. The rate of persons on means-tested income-replacement benefit has been constant around 10%. The significant rise in the rate of persons with disabilities on permanent disability benefits is partly due to the rising age of the Danish population, which means that the degree of the disability of the Danish population is likely to have become more severe. It is also due to the availability of early-retirement schemes and the availability of the flexjob-scheme, which use has practically exploded during this period. A study of the group of persons with disabilities who received welfare benefits in the period from 2003 to 2012 shows that approximately one third has a relatively strong connection to the labour market with few, short lapses of time on welfare benefits, and one third has a very weak connection to the labour market with practically no employment periods. The last third have a medium connection to the labour market.[50]

As mentioned above, a reform of the wage-subvention scheme has entered into force in 2012. In addition, a reform of the invalidity pension scheme was also adopted. The main changes consist in only permitting time-limited invalidity pension to persons under the age of 40 years.

In sum, there has been a significant rise in the persons with disabilities on permanent disability welfare benefits in Denmark from 2003 to 2012. With reference to the need for economic austerity and the aim of promoting employment of persons with disabilities, reforms of both the wage subvention scheme and invalidity pension have been undertaken in 2012. This reform will make it more difficult to qualify for invalidity pension for persons under 40, and will make the flexjob scheme less attractive and more difficult to obtain for persons with disabilities.

It is difficult to say whether these changes will affect the employment rate of persons with disabilities. It is possible that the rate of employment is not affected so

[48] KJELDSEN et al., p. 64.

[49] The employment rate of persons with disabilities in Denmark does not exist for 2003, the closest available year is 2002.

[50] Ibid., p. 72.

much by the availability of, for example, wage subvention and that many would be employed, but with a lower pay, if it were not available. Presumably the economic situation affects the employment rate more strongly.

5. SECTION IV: CAREER COUNSELING AND JOB-PLACEMENT FOR DISABLED STUDENTS

The Universities in Denmark do not traditionally provide strong career counseling or job-placement for their students. Instead, the unemployed graduates may receive help from the ordinary job–placement services who will in some cases have special programmes for unemployed academics. However, no specific career counseling or job placement programmes exist with the exception of the ice-breaker schemes mentioned above. Unfortunately, however, this scheme is hardly ever used.

Maria Ventegodt Liisberg
PhD, Leader of Disability Team at
Danish Institute for Human Rights
mvl@humanrights.dk

INFORME SUECO

(SWEDISH REPORT)

SWEDISH POLICY AND REGULATION ON DISABILITY AND WORK

DR. ANDREAS INGHAMMAR
Associate Professor in Business Law.
Lund University School of Economics and Management,
Lund University, Sweden

Fecha de recepción: 26-08-2014
Fecha de aceptación: 02-10-2014

SUMMARY: 1. PREFACE. 1.2. Definition of disabled worker beneficiary of the employment policies and related juridical issues. 1.2. Job placement statistics regarding disabled workers, particularly referring to women and young people. 2. SECTION I. JOB PLACEMENT POLICIES: LEGAL FRAMEWORK AND CASE LAW. 2.1. The influence of European Union and International Law in Sweden. 2.2. Constitutional Law Principles. 2.3. National legislation. 2.4. Regional or local regulations. 2.5. Collective agreements. 2.6. Leading cases. 3. SECTION II. DISABILITY DISCRIMINATION AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT. 3.1. Case Law. *3.1.1. Discrimination cases and legitimate justifications. 3.1.2. Direct and indirect discrimination.* 4. SECTION III. EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB PLACEMENT FOR DISABLED PEOPLE. 4.1. Labour market crisis and active employment policies. 4.2. Job-placement for the disabled and gender-related issues. 4.3. Economic dislocation and company crisis as a limit for the placement of disabled workers. 4.4. Connection between welfare state and active labour market policies: could the first be more of a discouragement than an aid for the latter? 5. SECTION IV. UNIVERSITY: CAREER COUNSELING AND JOB PLACEMENT FOR DISABLED STUDENTS. 6. APPENDIX.

RESUMEN: A pesar de que el mercado laboral sueco ha permanecido relativamente intacto durante la crisis económica en los últimos seis años, la

integración de personas con capacidad laboral reducida a causa de discapacidades es significativamente menor que la de otros grupos sociales. La legislación sueca sobre discapacidad y trabajo cubre varios aspectos en medidas de integración, antidiscriminación y disposiciones para conservar el empleo. Lo más relevante es el sólido sistema de protección laboral, el cual sólo permite el despido de empleados enfermos o discapacitados si ya no pueden desempeñar ninguna tarea relevante para la actividad desarrollada por el empleador. Suecia ha ratificado la Convención sobre los Derechos de las Personas con Discapacidad, y ha implementado la Directiva 2000/78/CE sobre discriminación, que incluyen la igualdad de trato y el deber del empleador de acometer ajustes razonables. Sin embargo, todavía no existe una jurisprudencia establecida que defina qué se consideran ajustes razonables. Para las personas con capacidad laboral reducida, la legislación sueca ofrece una serie de medidas positivas para la integración, que van desde financiar los ajustes necesarios en el espacio de trabajo hasta empleos subvencionados e incluso protegidos. En Suecia no existe, y nunca ha existido, un sistema de cuotas para discapacitados. Las políticas para la obtención de empleo se canalizan principalmente a través de la Agencia Sueca de Empleo, que ofrece oportunidades para desempleados con discapacidad. Los centros de orientación profesional de las universidades suecas no disponen de programas especiales para la integración de discapacitados y están menos desarrollados que en países similares.

ABSTRACT: Even though the Swedish labour market has been more or less intact during the financial crisis in the past six years, persons with reduced working capacity due to disabilities are significantly less integrated in the labour market than other groups in society. Swedish legislation on disability and work provides for a number of different aspects of integrative measures, anti-discrimination and provisions for maintaining employment. Of most significant importance is the strong employment protection scheme, which only allows employers to dismiss sick or disabled permanent workers if they can no longer perform any duties of importance to the employers business. Sweden has ratified the CRPD and implemented the EU directive 2000/78/EC on discrimination law, covering both equal treatment as well as the employer duty to undertake reasonable accommodation. There is, however, not yet an established case law on the reasonableness of adjusments. For persons with reduced working capacity, Swedish legislation offers a number of integrative positive measures, stretching from financing workplace adjustments to supported and even sheltered employments. There is not, and never has been, a disability quota scheme in Sweden. Job-placement activities are primarily effectuated through the Swedish Labour Agency, opening opportunities for unemployed persons with disabilities.

Career centers at Swedish universities do not have special programs for disability integration and are, in relation to comparative countries, less developed.

PALABRAS CLAVE: derecho laboral, leyes de discapacidad, discriminación por discapacidad, mercado laboral, legislación de la UE, Directiva 2000/78/CE, mercado laboral sueco.

KEYWORDS: labour law, disability law, discrimination on the grounds of disability, labour market, EU-legislation, Directive 2000/78/EC, Swedish labour market.

1. PREFACE

1.2. Definition of disabled worker beneficiary of the employment policies and related juridical issues

The Swedish labour market has not experienced as desperate problems as many other European countries recently have. Even though unemployment has increased over the past five years, the percentage of workers outside the labour market is still comparatively low.[1] This is of some importance to keep in mind, since workers with a less established position on the labour market, such as workers with disabilities, are likely to be more exposed to labour market fluctuations than "core workers".

The definition of disability in Swedish labour and employment law and the application of the concept of disability based on different labour market regulations are not founded on one singular definition. On the contrary, several definitions or variants of disability are applied in the different parts of labour market regulation. This is partly related to the purpose of the specific regulation, but also to the sequential development of legislation supporting disabled workers and job applicants over time. The most significant distinction which can be unveiled in this respect monitors the different concepts of, primarily

- positive, active measures of the integration of disabled at work,

and secondly,

- equality of opportunity, as it is manifested in anti-discrimination law

In Sweden, as in most other European countries, the primary concept of specially designed measures to promote integration has a long, but not necessarily successful, history through a good part of the 20th century, while anti-discrimination legislation is dated much later, currently provided for by the development in EU law.[2]

Swedish debate on the disability concept reflects the international discourse with the distinction between medical impairment and social construct of disability. Even though the Parliament has adopted the idea of disability as a social construct, the existing legislation nevertheless shows a reluctance to finally abandon the medical

[1] The unemployment rate is currently (July 2014), in the range of 8 per cent, see further the agency Statistics Sweden, www.scb.se.

[2] The first Swedish Disability Discrimination Act (1999:132) was introduced in 1999 and merged, in 2009, with other discrimination acts into a broader and more general Discrimination Act (2008:567).

perspective of disability.[3] In Swedish active measures, the disability criteria mainly relates to the decreased working capacity of the individual worker or applicant. In order to benefit from such measures, regardless of those being associated with publicly funded supported employment schemes or specially designed provisions under employment protection legislation, the job applicant or employee is required to prove reduced working capacity. The general regulation on supported employment schemes, which creates the legal base for a number of different schemes, entails the mandatory inclusion criteria is *disability which results in reduced working capacity.*[4] As the supported employment schemes are arranged in a progressive scale, the Swedish Public Employment Service (*Arbetsförmedlingen*) will, when applying the provisions for decision-making in the individual case, also examine the difficulties the disabled applicant or employee is expected to face in relation to regular employment.[5]

Swedish employment protection legislation has been under massive debate ever since the introduction of the legislation in the mid-1970s. Three aspects of this legislation are of particular interest when discussing the definition of disability and inclusion regarding legal protection in different situations. First of all, the Employment Protection Act does not cover individuals who (for reasons related to reduced working capacity) are employed in sheltered employment programmes.[6] A significant number of those in sheltered employment are, however, covered by some employment protection under collective agreements.[7] In Swedish employment protection legislation the concept of fair dismissal has been significantly scrutinised especially since the legislation was introduced in the mid-1970s. Leading case law from the Labour Court has repeatedly stated that sickness and reduced working

---

[3] Even in this regard the difference between ”old” measures and ”new” anti-discrimination legislation are significant. a Governmental Inquiry, SOU 1997:176 p. 104 ff, which predated the implementation of the first Disability Discrimination Act 1999, and in numerous other documents, are references to the 1980 WHO *International Classification of Functioning, Disability and Health* (ICIDH). For further legal academic reading from a Swedish point of view, see, Sahlin, 2004, p. 35 ff., as well as Inghammar, 2007, pp. 27-30.

[4] Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, my translation from Swedish, *förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*.

[5] 1 § Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda åtgärder för personer med funktionsnedsättning som medför nedsatt arbetsförmåga).*

[6] 1 § Employment Protection Act (1982:80), (*lagen om anställningsskydd).*

[7] The main provider of sheltered employment is the public body of Samhall AB. This company, wholly owned by the Governent, employs appr. 18 000 persons with reduced working capacity.

capacity as such would not constitute a ground for fair dismissal unless the employer can prove that the employee is unable to perform any duty of value for the employer.[8] Since this principle has been significantly honoured in courts in relation to sickness and reduced working capacity, the definition of disability has not come to play such an important part of this critical issue. The burden of proof has provided for the employers to manifest that the disabled employee's capacity *in relation to work available with the employer* is massively reduced before a dismissal can be considered fair and valid. In relation to redundancies, also under the Employment Protection Act, a special provision explicitly states that disabled employees, who have reduced working capacity, and for this reason are employed under special arrangements, shall be excluded from the selection of persons made redundant.[9] This special provision does also take reference to the reduced working capacity as inclusion criterion in relation to disability.

The disability definition in the Discrimination Act (2008:567) is based on a broader, more inclusive criterion with no direct correspondence to reduced working capacity.[10] For the understanding of the discrimination law, disability is defined as:

"Disability: permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of injury or illness existed at birth, has arisen since then or can be expected to arise."[11]

The understanding of the criterion "permanent" is not necessarily taken literally, since the outspoken ambition of the legislator has been to provide for an inclusive definition of disability, and definitions of disability in other acts refer to disablement exceeding 12 months of duration.[12] There is, however, not yet any Swedish disability discrimination case law which defines the concept of permanent.[13] Disabled persons who are rehabilitated and (re)gain the capacity will, from the time of the completion of the recovery, not be covered by the disability definition in the Discrimination Act.[14] Under Swedish law, progressive conditions, such as HIV infection, Multiple Sclerosis

[8] The relation to Employment Protection Act (1982:80) will be further discussed below in this article.

[9] 23 § Employment Protection Act (1982:80).

[10] The reduced working capacity might, however, play a significant role for the establishment of a case of discrimination, but the inclusion criteria on the definition of disability is broad.

[11] 1 Chapter 5 § p. 4 Discrimination Act (2008:567), available in English at www.government.se/sb/d/574/a/118187 2014-07-11.

[12] See prop. 1997/98:179 p. 34 as well as Inghammar 2007, pp. 282-283.

[13] See also European Union Court of Justice, Case C-13/05 *Sonia Chacon Navas v. Eurest Colectividades SA.*

[14] Prop. 1997/98:179 p. 34, also Inghammar 2007, p. 283.

and Cancer are included in the definition of disability even at stages where they have not yet resulted in such permanent impairments as otherwise stated in the Act.[15] It is explicitly said in the Government Bill that the existence, not the severances, of a disability constitutes the inclusive criterion.[16]

1.2. Job placement statistics regarding disabled workers, particularly referring to women and young people

The most recent significant Swedish compilation of labour market statistics on persons with disabilities refers to the situation in 2013.[17] According to this investigation the Swedish labour market includes approximately 987,000 persons with disabilities, of which slightly more than 650,000 consider their working capacity to be reduced.[18] In 2014 the Swedish labour force between 15 and 75 years consisted of approximately 5.17 million individuals whereof 4.76 million were employed, resulting in an unemployment rate of 8%.[19] Unemployment rate amongst people with disabilities is significantly higher: 10%.[20]

---

[15] There has been one case of Multiple Sclerosis related to disability discrimination in the Swedish Labour Court, AD 2005 nr 32. In this case the applicant in his 30s successfully argued that he had been discriminated against due to his recently discovered Multiple Sclerosis in a redundancy situation. The Court concluded that such progressive illnesses would fall under the disability definition in relation to discrimination. Interestingly, there are cases from our neighboring country Denmark pointing to MS not being a disability under Discrimination law.

[16] SOU 1997:176 p. 107, also Fransson, Stüber, *Diskrimineringslagen, En kommentar*, Stockholm 2010.

[17] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04. This publication has a 5 page summary in English.

[18] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 7.

[19] Statistics Sweden, www.scb.se. 2014-07-11.

[20] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 8. Note, however, that a hugh number of severely disabled individuals never enter the labour market but benefit from social insurance and early retirement schemes.

Active on the Swedish Labour Market, 2013. Disabled with or without reduced working capacity, non-disabled and the population in total. Male and female. (Including employed and unemployed)

	Male		Female		Total	
Disabled total	65,5	± 3,2	58,4,0	± 3,3	62,0	± 2,2
-with reduced work. cap.	58,1	± 3,9	51,7	± 3,9	54,7	± 2,8
-without reduced work. cap.	79,3	± 4,7	77,7	± 5,7	78,6	± 3,6
Non-disabled	81,1	± 0,8	77,6	± 0,9	79,4	± 0,6
Total population	78,6	± 0,8	74,4	± 0,9	76,5	± 0,6

Figure 1. Source: *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04 page 40.

The rate for disabled persons participating in the labour market, as employed or unemployed, part-time or full-time, is significantly lower than for non-disabled (61.8% in relation to 77.1%, see sheet below). The difference appears to almost exclusively relate to the reduced working capacity of disabled persons. Between the group *disabled without reduced working capacity* and non-disabled, there is almost no overall difference.[21] In all sub-groups, but for the disabled with reduced working capacity, there is a statistically significant difference between men and women. The overall rate of women participating in the labour market (both in figures 1 and 2) is significantly higher than in many other EU-members. Disabled women are less active than non-disabled women but, as for disabled in general, the differences are primarily related to reduced working capacity.

As is shown in Figure 2 (below), the relationship between the different sub-groups is similar when looking at the percentage actually employed (part-time or full-time).

[21] This finding is supported by, and corresponds to, the previous publication in the same statistical series, year 2008, 2006 and 2004 (and even in a longer perspective).

Unemployed, 2013. Disabled with or without reduced working capacity, non-disabled and the population in total. Male and female. (Including part-time and full-time)

	Male		Female		Total	
Disabled total	10,5	± 2,4	9,9	± 2,5	10,2	± 1,7
-with reduced work. cap.	11,6	± 3,1	10,0	± 3,0	10,8	± 2,2
-without reduced work. cap.	9,0	± 3,7	9,7	± 4,5	9,3	± 2,8
Non-disabled	8,4	± 0,7	7,6	± 0,7	8,0	± 0,5
Total population	8,7	± 0,7	7,9	± 0,7	8,3	± 0,4

Figure 2. Source: *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, page 43.

Disability is not equally distributed in the working age population. Most disabled persons in working age, 40.2%, are found between 50-64 years, while another 37.6% are between 30-49 years. Only 22.2% are in the age 16-29.[22] Statistics indicate that persons with disabilities which result in reduced working capacity, compared to non-disabled, face difficulties in entering the labour market already as young as that. Disabled workers in ages 30-49 seem to be significantly more active in the labour market than disabled in both younger and older (50-64) categories. Gender is reported not to pose a significant issue between the different age sub-groups.[23]

[22] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 29. Note that these statistics, in contrast to most other referred statistics in this article define the working population between 16 and 64 years of age.

[23] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 29.

2. SECTION I. JOB PLACEMENT POLICIES: LEGAL FRAMEWORK AND CASE LAW

2.1. The influence of European Union and International Law in Sweden

The influences of European Union and International Law of Swedish policies on job placements have not been of significant importance. Labour market regulation had a history in Sweden long before the country entered into the EU in 1995, and in relation to EU policies the most evident labour market regulation area which affects disabled workers or applicants is discrimination law.[24] The Swedish job placement and employment support system have, where applicable, been focused on balancing the reduced working capacity of the individual by supplementing the employer financially to re-distribute the risk of such reductions. This has, over the last centuries, been undertaken in three major schemes:

- Financial support for the accommodations and adaptation at the specific workplaces.
- Financial support, so called *Lönebidrag*, to compensate the employer in relation to reduced working capacity of the disabled employee's salary.
- Sheltered employment, primarily by the public Samhall AB or within public bodies through the Public Sheltered Employment Scheme.

Even though, it has been discussed whether these schemes are efficient, and to what extent they constitute objections to free labour market competition, as addressed in the European *Commission Regulation No 2204/2002 of the 12 December 2002 on the application of the Articles 87 and 88 of the EC Treaty to State aid for employment*. However, the schemes applied in Sweden are developed only to provide financial contribution in relation to the reduced working capacity. Even if the application in every individual case might not have fulfilled these expectations and indeed "over compensated", there has not, as far as I am aware, been any legal action undertaken against any of these schemes under state aid provisions.

[24] EU disability discrimination principles, primarily under directive 2000/78/EC are considered to be fully implemented in Swedish legislation through the Discrimination Act (2008:567).

2.2. Constitutional Law Principles

The Swedish Constitution states that the State shall *secure the right to work* and *combat discrimination* on the grounds of, among other grounds, *disability*.[25] Now, the "right to work" is in Swedish law an explicit right without a corresponding duty for anyone, and the role of the State as provider of the commodity "work" is indeed limited and the right to work impossible to exercise legally.[26] While the right to work under constitutional Swedish law is recognised but not sanctioned, the constitutional protection against discrimination has emerged into a significant discrimination law body, as mentioned above, under the important influence of EU-law. The discrimination law does not, however, focus on job placement, but on equal opportunity.

2.3. National legislation

Swedish legislation and other provisions on job placement policies for the promotion of work for persons with disabilities aim to balance the negative effects of reduced working capacity, not by force or quotas, but by introducing financial incentives for employers hiring disabled workers.

The main legal act regulating current job placement policies is the Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen [2000:630] om särskilda åtgärder för personer med funktionsnedsättning som medför nedsatt arbetsförmåga).* The Regulation covers the Swedish Public Employment Service (*Arbetsförmedlingen*) job placement program for persons whose disabilities reduce their working capacity, and who face or are likely to face difficulties to achieve or maintain a regular employment contract. Support under the Regulation is only provided for employment which respects regulations on health

[25] 1 chapter 2 § section 2 and 5 of the Swedish Constitution (*Regeringsformen*).

[26] The balance between the right to work and any corresponding duty to fascilitate the exercise this right has been discussed in terms borrow from Hohfelds famous articles, Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, *Yale Law Journal,* 1913 pp. 16-59 and Hohfeld, Fundamental legal conceptions as applied in legal reasoning, *Yale Law Journal,* 1917, pp 710-770, see also Inghammar 2007, pp. 21-26.

and safety at work, and where remuneration is in accordance –or in line with– applicable collective agreements.[27] The most important efforts are the following:

- Financial support to the employer to cover (partly) the cost of workplace adaptations and aid.
- Special efforts for the visual- and hearing impaired.
- Special support assistance for introduction and follow-up at a new workplace.
- Wage support (supported employment with private or public employers), which also includes the more specific Development employment as well as Safety employment.
- Sheltered employment.

The general idea all through the job placement program is a stepwise increase of activities, reserving the more comprehensive efforts to disabled persons most far from the regular labour market. This result in a program where sheltered employment, as being the most comprehensive effort, can only be granted if less extensive measures would not be sufficient. Subsequently, the different versions of wage support will not be applied if introductory support or support for workplace adaptations would secure the employment of the disabled worker.

Financial Support to the Employer to cover workplace adaptations and aid is granted, if needed, up to a level of 100,000 SEK (approx. 12,000€) to the employer and/or the employee each year. Only assistance discovered during the first 12 months of employment is covered. In special circumstances, or if the support comprises computer-related aid, even higher amounts can be accepted.[28]

Special efforts for the visual-and hearing impaired can amount to up to 50,000 SEK (6,000€) per year to cover adjustments of literature or workplace education needed for the performance of the employment contract, or to cover costs related to interpreter services for the deaf.[29]

---

[27] 8 § Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga)*.

[28] 11-15 §§ Regulation (2000:630) on special measures for persons with disabilities which result in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*). See, Inghammar 2007, pp. 72-74.

[29] 16-17 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

Special support assistance for introduction and follow-up at a new workplace can be provided when a disabled person is introduced at a new workplace as an employee or on probation. The assistant is appointed and employed by the Swedish Public Employment Service and is only granted for a maximum of 6 months.[30]

Wage support (lönebidrag) and the corresponding *Development* and *Safety Employments* are financial support schemes directed to employers who employ a disabled worker who would otherwise not be able to achieve or keep the employment position. The employment contract is between the private or public employer and the employee, but the wage support is calculated to compensate for the disadvantages that result from the person's reduced working capacity. The compensation is intended to be gradually decreased and is roofed at a maximum of 4 years (for *development employment* only 12 months). The support can be, and is repeatedly, extended after special examination even beyond the first 4 years. Any cost associated with the salary to the employee, such as total income, social security fees, vacation benefits and pension schemes under collective agreements are included, but only as far as they correspond to a gross income of 16,700 SEK per month (approx. 2,000€ per month).[31] There is no minimum wage legislation but 16,700 SEK per month would be at the very lowest end of unqualified work. The Wage Support system, including the figures for *Development* and *Safety Employments* has covered in the range of 45,000-60,000 employees during the past decades.[32]

Sheltered Employment, being the most comprehensive job placement program relates to employment within the publicly owned Samhall AB Group (similar to Remploy in the UK) or *public sheltered employment* (offentligt skyddat arbete, OSA) with other public bodies such as local municipalities, authorities and the like. Samhall, which is the main actor in sheltered employment, employs 21,000 people, mainly persons whose disabilities reduce their working capacity.[33] Disabled employees at

---

[30] 20-21 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

[31] 25-31 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

[32] The most recent figure from 2011 show that 46 000 are included in the ordinary wage support scheme while 18 000 are in sheltered employement and 3 000 in development employment, see *Information om arbetsmarknadsläget, Arbetsmarknadsåret 2011,* Arbetsförmedlingen, www.arbetsformedlingen.se 2014-07-11, See, for a breif discussion abourt the development of wage support, Inghammar 2007 pp, 65-68.

[33] Samhall Annual Report 2013, see www.samhall.se, 2014-07-11.

Samhall are excluded from the Employment Protection Act but are to some extent covered by collective agreements with similar content.[34] Public sheltered employment with public employers other than Samhall employs only 4,000 individuals (2011). This particular program is monitoring especially persons with social-medical disabilities, long-term and severe psychiatric illness or some specific groups of severely disabled. Contrary to employment within Samhall *public sheltered employment*, it is only available if the services provided by the organisation are clearly outside sectors open for private competition.[35] In 2011 the Swedish government initiated a public inquiry with the aim to investigate the current situation and future strategies for disabled workers' integration in the labour market. The inquiry presented the report SOU 2012:31, *Sänkta trösklar – högt i tak. Arbete, utveckling, trygghet*, in May 2012, but there have not yet been any changes in the legislation proposed on the basis of the report.

2.4. Regional or local regulations

Sweden is a centralised country and not a federation. Nevertheless, there are regions (counties) with some decentralised responsibilities. Health care is the main such responsibility. Labour market regulations are not decentralised and, compared to other countries such as Germany, the importance of the regions when it comes to labour market regulation is very limited. At both regional level and at municipalities (city councils), there have been efforts in relation to labour market integration under national law. These efforts have reflected a delegated authority to implement national legislation, but still the competence for labour market regulation is national and lies with the Parliament, being the Government and the labour market authorities responsible under the Government.

2.5. Collective agreements

In Swedish labour law, collective agreements are not focusing on job placement strategies for disabled workers. As mentioned in the presentation of sheltered employment, the public corporation of Samhall AB, which employs 20,000 disabled workers under the sheltered employment program, has a collective agreement which

[34] 1 § 2 section Employment Protection Act (1982:80).

[35] 34-35 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

provides for employee rights, particularly since disabled workers at Samhall AB are excluded from the Employment Protection Act.

Other collective agreements could address issues only partly related to disability issues, such as Health and Safety at work and therewith associated topics such as sick leave and rehabilitation of employees returning to work after sick leave.

2.6. Leading cases

The job placement programs presented in this chapter are run and financed by the Swedish Public Employment Service. The decisions by this public body (in relation to supported or sheltered employment) have not been subjected to appeal in courts of law. Consequently there are no leading cases in this field.[36]

3. SECTION II. DISABILITY DISCRIMINATION AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT

In Swedish labour law, the impact of the unfair dismissal provisions of the Employment Protection Act (1982:80) is significant, especially in relation to dismissal related to the individual employee. While redundancies are comparatively easily undertaken in Sweden, dismissals related to illness or disabilities are significantly more complex.[37] Based on a number of reported cases and the explicit counsel of the government upon the introduction of the Employment Protection Act, an employee can only be dismissed due to illness or disability if the employer can prove that the employee is no longer able to perform "any duty of importance" to the employer.[38] The employer has an obligation to facilitate the rehabilitation of the employee and will, in court, be responsible to show that necessary rehabilitating measures have been

[36] This situation has indeed been critized (see Inghammar 2007 p. 112), but there has not been any dramatic improvements in this regard, even though a change in the legislation in relation to re-examination of decisions was passed recently.

[37] For two comparisons in Swedish of different angles of employment protection law in Sweden, England and Germany, see Rönnmar, *Arbetsledningsrätt och arbetsskyldighet: en komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext* 2004 as well as Inghammar 2007. For a slightly older presentation in German, see Gotthardt, *Kündingungsschutz im Arbeitsverhältnis im Königreich Schweden und in der BRD.* Baden-Baden 1999. For an English text on Swedish Labour Law, see Eklund, Sigeman, Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008.

[38] Prop. 1973:129 p. 126, AD 1993 nr 42, Ad 1994 nr 94, AD 1999 nr 26, also, Lunning, Toijer, Anställningsskydd. En lagkommentar, 10 upplagan, Stockholm 2010, pp. 466-474.

taken. Furthermore, the dismissal will be considered unfair where it is reasonable to require the employer to provide other work with the employer for the employee. The burden of proof in both these regards lies with the employer.[39] For disabled already in employment these provisions are apparently of significant importance, and the interpretation of the specific criterion has been developed in case law since 1974 in numerous law cases and academic comments.[40] Indeed, one could say that most of the efforts on promoting the position of employees with reduced working capacity have been focused on employment protection law and not on discrimination law. Naturally, this also has implications for those who are not (yet) in employment. Their cases cannot be heard under employment protection law, to the contrary, their situation could be even worsened since employers might be reluctant to employ disabled due to the fact that the employment protection legislation would make dismissals far-fetched.

As previously discussed, disability discrimination legislation was first materialised in Sweden in 1999 and reshaped in 2009 into the new Discrimination Act (2008:567). The observance of the law is a task for the disabled individual who would primarily report and seek advice and legal counsel from his or her trade union. Supplementary to the trade union, the Discrimination Ombudsman could investigate the case and support the individual in legal action against the employer. Thirdly, the individual might take legal action on his or her own, if neither the trade union nor the Ombudsman are willing to participate. However, bearing in mind that the Swedish labour market is characterised by a decreasing but still high trade unions density (71 per cent in 2010), trade unions are likely to handle most of the discrimination cases.[41] Due to the strong position of trade unions and the elaborated negotiation system between the industrial partners even at local level, most employment disputes never end up in court. The Swedish Labour Court reports approximately 150 cases per annum, of which 50 per cent are related to employment protection and a handful – between 5 and 10 cases– deal with discrimination.[42]

---

[39] 7 § Employment Protection Act (1982:80). For a version in English, see Eklund, Sigeman, Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008, p 488.

[40] See also Westregård, En analys av samspelet mellan arbetsrätt och rehabiliteringsregler vid uppsägning och omplacering, *Juridisk Tidskrift*, 2006-07 nr 4 pp 876-888.

[41] Kjellgren, The Decline in Swedish Union Density since 2007, *Nordic Journal of Working Life Studies,* Vol. 1. Nr. 1. Aug. 2011, pp. 67-93.

[42] The Labour Court hears, as first and final tribunal, almost all cases where the employee is represented by a trade union. In other employment cases, the Labour Court is appellate court to the District Courts. The cases are reported in Swedish only and available at www.arbetsdomstolen.se.

In 1 Chapter 4 § the Discrimination Act defines:

> "1. *Direct discrimination*: that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.
>
> 2. *Indirect discrimination*: that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.
>
> 3. *Harassment*: conduct that violates a person's dignity and that is associated with one of the grounds of discrimination sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.
>
> 4. *Sexual harassment*: conduct of a sexual nature that violates someone's dignity.
>
> 5. *Instructions to discriminate*: orders or instructions to discriminate against someone in a manner referred to in points 1–4 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person."[43]

3.1. Case Law

There has not been all that many disability discrimination cases reported in the Swedish Labour Court so far, and a number of aspects of the Law, primarily indirect discrimination and reasonable accommodation, still need significant clarifications in case law.

In AD 2003 nr 47 the Labour Court heard the first Swedish case on direct disability discrimination. The plaintiff sued the employer for direct disability

[43] A translation into English is available at www.government.se/sb/d/574/a/118187 2014-07-11.

discrimination since he, for reasons related to his diabetes, was not employed as a technical operator at a petroleum industry. Due to the specific health and safety issues at the industry and furthermore based on a general provision (or rather recommendation) on diabetes related issues related to irregular working hours from the Swedish Work Environment Authority (*Arbetsmiljöverket*), the employer was reluctant to hire the job applicant. The working conditions entailed both irregular working hours, including nights, and work performed by the employee alone. The corporate physician who examined the applicant recommended an employment with a probation period in order to find out whether or not the person's diabetes in combination to his working conditions would constitute a threat to his health situation. Probation employment was, however, not allowed under the collective agreement, and therefore the management decided not to employ the job applicant with diabetes. The Labour Court concluded that diabetes –as a long-term impairment– fell under the concept of disability, and that the reason not to employ the person was related to that disability. A *prima facie*-case of disability discrimination was established. The Labour Court went on and found that the employer should have consulted the applicant's private physician who, in court, testified that the diabetes was well under control and would not constitute a problem for the employment situation. The Labour Court ruled in favour of the plaintiff.[44]

The second Swedish case of disability discrimination, AD 2003 nr 76, concerned an employee (guard) at a State prison who had been deprived of some of his supervising work tasks. The employee argued, among other things, that the employer had repositioned him because of his disability, a back and shoulder impairment he suffered due to a car accident. Based on the evidence in the case, the Labour Court found that there was no relation between the action taken by the employer and the disability and hence ruled in favour of the employer.

In AD 2005 nr 32, the third and more frequently quoted case, an employee in his 30s charged the employer with unfair dismissal, unfair redundancy and disability discrimination, since he had been dismissed shortly after informing the Management that he had been diagnosed with Multiple Sclerosis (MS). The Labour Court found that the reason for the dismissal was related to redundancy and that the employer in principle had observed the provisions of the Employment Protection Act as such. However, the Labour Court proceeded to conclude that Multiple Sclerosis was a long term condition and therefore constituted a disability even though the condition had

[44] Under Swedish discrimination law a job applicant who has been discriminated against can only receive damages for injury of feelings. In this case the Labour Court ruled decided on 30,000 SEK (approx. 3,300€).

not yet resulted in any reduced working capacity. The Court went on and found that the employer, under the "*shared burden of proof*" concept in discrimination law, could not prove that there was no correlation between the disability and the dismissal. Since the overall picture of the situation, the Court concluded, pointed in the direction of a correlation between the disability and the dismissal and the employer could not refute that properly, the Court ruled in favour of the employee and determined the damage for injury to feelings to 100,000 SEK (approx. 12,000€) and additional damages for loss of income.[45]

The Labour Court ruled in the fourth disability discrimination case, AD 2006 nr 47, that a Lutheran priest, who had applied with the Church of Sweden for a position as evangelist in Brazil, had been discriminated against in a recruitment situation. The priest suffered from a rare form of allergic reaction to certain fruit and some root vegetables. The court considered the condition to fall under the definition of disability. The employer had refused to hire the priest with respect to the risk of exposure to such food, and the negative effect (though not life threatening) on his health condition he could end up with during the work in Brazil. The Labour Court found that the employer had directly discriminated the priest by not employing him due to his allergy. The damages for injury to feelings were set at 50,000 SEK (6,000€).

In AD 2010 nr 13 the Labour Court decided on a case where a visually impaired person applied for employment with the Swedish Social Insurance Agency, a very large nationwide public body which administers social security and rehabilitation. The Agency argued that appropriate accommodations to meet the needs of the disabled applicant would represent 20,000 working hours, mainly with re-writing computer programs. The Labour Court ruled this to be outside the scope of "reasonableness" even with respect to the financial and organisational strength of the employer's organisation.

A special situation concerning recruitment of a trainee for practical experience was examined in the Labour Court case AD 2011 nr 11. The plaintiff, an unemployed person who was subject to job placement activities for young unemployed by the Swedish Public Employment Service had been refused training for practical experience with a care centre for persons with severe mental disorder for reasons related to his vision impairment. The plaintiff was totally blind on one eye and only had 6% vision on the other. In the case, the Labour Court examined whether the care centre, by not offering the plaintiff the training, by not asking him relevant questions at a meeting

[45] This case has been repeatedly discussed in the doctrine, see Rönnmar, Diskriminering vid arbetsbristuppsägningar, *Juridisk Tidskrift*, 2006-07, Nr 3, pp. 630-645, Lunning, Toijer 2010, p. 87, Inghammar 2007, pp 286-289.

held prior to the possible training, had acted in a directly discriminatory way against him. The Labour Court found that the plaintiff would not have been be able to fulfil the pivotal part of the duties at the care centre, and that he therefore was not in an equal situation to a person without such disabilities applying for the same position.

The latest reported disability discrimination case from the Swedish Labour Court is AD 2012 nr 51. In this case a disabled employee, who had a permanent impairment in one arm, was dismissed from a position as assistant with a major super market corporation which employed 7,000 people nationwide. While the plaintiff argued that the dismissal was unjustified and due to her personal situation, or related to her disability and directly discriminatory, the Labour Court found in the ruling that the dismissal was for redundancy reasons and fair under the Employment Protection Act (1982:80). Contrary to the case of AD 2005 nr 32, the Court concluded that there was no finding of discrimination.

3.1.1. Discrimination cases and legitimate justifications

The number of reported cases from the Labour Court on disability discrimination is very low and, as mentioned above, there are still significant aspects of the law that need interpretation in further cases.

One of the most important issues to address relates to the concept of reasonable accommodation.[46] Since there has not yet been any clarifying Swedish case law about the interpretation of "reasonable" or even "accommodation", other sources or law and interpretations from other fields of law might be applicable, at least for preliminary guidance.[47] When proposing the new legislation to the Swedish Parliament the Government made some statements about reasonable accommodation.[48] The Swedish Government explicitly examines the provisions of Directive 2000/78/EC. It is a prerequisite for the application of the duty to perform reasonable accommodation that such accommodation would bring the disabled person to an "equal situation" with someone able-bodied.[49] The duty shall apply continuously throughout the employment period and will be related to a number of aspects, such as the employer's

[46] 2 chapter 1 § p. 4 Discrimination Act (2008:567), see also Section 5, Directive 2000/78/EC.
[47] In the Labour Court case AD 2010 nr 13 the Court found that it was not reasonable under the discrimination legislation to demand from the Swedish Social Insurance Agency, as employer, to undertake accommodative measures amounting to approximated at 20,000 working hours in order to facilitate the recruitment of one single, visually impaired job-applicant.
[48] Prop. 2007/08:95, pp. 142 ff.
[49] Prop. 2007/08:95, p. 151.

financial situation as well as the form and duration of the employment relation.[50] The financial landmarks for scrutinizing the "reasonableness" are, however, not yet obvious.[51]

3.1.2. Direct and indirect discrimination

The Swedish disability discrimination legislation has catered to the concept of both direct and indirect discrimination since the first legislation was introduced in 1999, with the explicit ambition to copy the concept in sex discrimination legislation. While direct discrimination, however difficult to prove in a case of law, is more commonly understood as discrimination, the concept of indirect discrimination, especially in relation to disability (and indeed age), is more complex.[52] A number of criteria (or even procedures), which appear as neutral, will *de facto* have specific implications in relation to competence and capability, aspects that could potentially be related to disability. In relation to most other grounds of discrimination the balance between relevant and irrelevant criteria will be much more difficult to manoeuvre when applied to disability. The Swedish case law, so far, has not scrutinised any significant aspect of indirect disability discrimination even though in working life, in recruitment, as well as in selection for advancement, pay raise or other managerial decisions, is very likely to put "neutral" criterion harsh for persons with certain disabilities.[53]

---

[50] Prop. 2007/08:95, p. 152, and also prop. 1997/98:179 pp. 51-55.

[51] There is no case law to clarify this particular topic and other sources of law, primarily the Goverment proposal to parliament does not make any such statement. One could under these circumstances suggest an analogous interpretation where the financial support for workplace adjustments offered under other legislation could serve as some sort of indicator, see Inghammar 2007, pp. 294-295 and 354-355. See also, Waddington, Hendricks, The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination, *The International Journal of Comparative Labour Law and Industrial Relations,* 2002, pp. 403-427.

[52] Much have been said about indirect discrimination already, for instance by Christensen, Structural Aspects of Anti-Discriminatory Legislation, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination,* The Hague 2001. Direct and indirect discrimination is defined in 1 chapter 4 § Discrimination Act (2008:567) .

[53] Prop. 2007/08:95 pp. 100-103, prop. 1997/98:179 p. 44, Inghammar 2007 pp. 288-290.

4. SECTION III. EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB PLACEMENT FOR DISABLED PEOPLE

This article has previously described the most vital Swedish job placement programs for persons with disabilities, as well as some labour market statistics related to disability in workforce. The current chapter will draw some conclusions on issues related to these programs and policies.

4.1. Labour market crisis and active employment policies

Swedish labour market has suffered a significant blow due to the financial crisis, and the unemployment rate is untraditionally high. However, the country does not experience the same dramatic blow as other countries, mainly southern European countries. The national finances are in impressively good order with a decreasing and much controlled national debt. The backbone of industry such as steel, wood, mining and production of heavy vehicles (trucks and buses), is still very profitable even though the fixed stars of the last two decades, mobil/telecom and pharmaceutical industry have been in decline for some years. For those in employment, taxes have been reduced and salaries increased in most sectors, even during the crisis, while people on the outskirts of the labour market, especially young people and immigrants, have faced decreased changes of employment.

A special feature of the Swedish labour market for the last 10-15 years, which I believe has implications for the integration of disabled workers, is the "raise and fall" of long term sick leave under the sickness benefit legislation. The number of employees on sick leave increased dramatically from 1997 to 2003, in fact the figures almost doubled in those few years, with a total number of 8.2% of men and 12.2% of women receiving long term sickness benefit in 2004.[54] In 2006, 2007 and 2008 the new liberal-conservative majority in the Swedish Parliament issued a number of provisions –primarily changes to sickness benefit– with the ambition to counteract this development. The changes resulted in a situation where it is much more difficult to get long term sickness benefit. Indeed a significant portion of groups who could

[54] The result was not equally distributed in the country. In some smaller cities in the north of Sweden almost 25 per cent of the women was on long term sickness benefit but only 4,4 per cent in privileged areas of Stockholm. See Edling, *Alla behövs. Blott arbetsmarknadspolitik skapar inga nya jobb.* The publication of the report was initially cancelled by the Swedish Labour Organisation (where the author Jan Edling was Labour Market Reserecher), but is available at www.timbro.se/pdf/**Alla** behovs 2.pdf 2014-07-11.

previously count on such benefits are now supposed to apply for employment. This development has taken the political –and to some extent the legal– focus away from a more constant but less intense discourse on disability job placement strategies. Not only have the groups previously on long term sick leave been in the interest of media and politics, but when returning to the labour market and actively seeking employment, they are likely to displace marginalised groups like disabled workers.

4.2. Job-placement for the disabled and gender-related issues

The main focus of the Swedish job placement programs for disabled workers are arranged as financial incentives for employer when hiring a disabled person with reduced working capacity. The programs, like the Wage Support Scheme, are supposed to compensate the employer in relation only to the reduced working capacity, and the question of effects of displacement of able-bodied workers is considered in the legislative process. However, there has repeatedly been massive criticism against the job placement programs for being inefficient.[55] Another criticism brought forward against the sheltered employment program within Samhall AB relates to the fact that women are underrepresented in the group of sheltered workers that transfers to open labour market employment. This is of particular interest since women's possibilities to undertake such transfers are supposed to be specially monitored by Samhall AB.[56]

Sweden has never had any quota-legislation for the integration of disabled workers. The country remained neutral and did not fight in the 1st or 2nd world wars and was subsequently spared the number of war injured workers that forged the disability quota schemes in countries like Germany and Britain. The only comparable legislative "burden" to employers in this regard is a rarely used legislation from the 1970s on the promotion of disabled workers.[57] The more explicit and far-reaching provisions of the act whereby employers can be forced not to employ unless employing

[55] For further references to this criticism see Inghammar 2007, p. 109 and the reports from the Swedish National Audit Bureau (Riksrevisionen), RiR 2007:24 *Utanförskap på arbetsmarknaden. Funktionshindrade med nedsatt arbetsförmåga*, Stockholm 2007, and, RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna.* Stockholm 2008.

[56] RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna.* Stockholm 2008, p. 39.

[57] Employment Promoting Measures Act (1974:13), *lagen om vissa anställningsfrämjande åtgärder.*

a disabled worker have never been exercised, even though they had already been implemented in the mid-70s.[58]

The importance of privately owned employment agencies in job placement strategies in general is increasing.[59] With regard to the specific job placement programs for disabled workers which are referred to above in this article, the absolutely dominating actor is the Swedish Public Employment Service. Even if the decisions on financing and placing of sheltered or supported employment remain with the Public Employment Service, private employment agencies, can be involved with efforts and services related to job finding for disabled workers on contractual basis.

4.3. Economic dislocation and company crisis as a limit for the placement of disabled workers

As in most other western countries the portion of employees in the industrial sector has decreased over the past while the service sector has increased. A significant number of low skilled industrial jobs have been dislocated to primarily other European or Asian countries. Due to high standards, a comparatively rigorous welfare system and high income and social security taxes, "labour" is expensive in Sweden.[60] According to statistics in Sweden, persons with disabilities are, to a slightly larger extent than able-bodied, employed by public bodies, primarily local authorities (city councils). However, the majority in both groups are privately employed.[61] There has been no specific Swedish political debate on the impact of dislocation of workplaces in relation to disabled workers, but rather in relation to "core workers". The absence of such a debate would not affect the opinion that dislocation could have specific implications for disabled workers. Since the early 1990s when Sweden went through a very dramatic economic crisis, much like the one seen in southern Europe in 2012, a number of employments with low qualification has disappeared, both in the private and public sector. The downscaling of such jobs is likely to have provided further

[58] Inghammar 2007 p. 74-77, and SOU 1992:52 p. 300.

[59] Lundin, IFAU Rapport 2011:13, *Marknaden för arbetsmarknadspolitik: om privata komplement till Arbetsförmedlingen.* Uppsala 2011.

[60] Income taxes even on low income starts at 30 per cent and employers pay mandatory social security contributions of at least 32 per cent (additional if collective agreements are applicable) of the gross salary.

[61] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 48-49.

difficulties for persons with disabilities since the level of education, particularly for people with reduced working capacity, is significantly lower than for able-bodied.[62]

4.4. Connection between welfare state and active labour market policies: could the first be more of a discouragement than an aid for the latter?

The question in the heading of this section monitors some very intriguing relations, that of welfare provisions and active labour market strategies –but, I would add, beneath this– with the role of the individual in relation to the state. The fields of legislation described more in detail in this presentation, discrimination law and job placement schemes, together with the briefly described changes to the welfare system (primarily long term sickness benefit), are all results of a political (and economic) alertness to combat "idleness" by different means.[63] The State does, to a less extent than previously (at least in Sweden), offer an "opt-out" possibility from the labour market, but as a preliminary or temporary solution wherein the individuals are expected to "adapt, retrain, rehabilitate and re-educate themselves".[64] Even if the general ambition behind the welfare system has been in line with these statements for decades, the factual implementation has not.

From a Swedish perspective, I would conclude that there is a significant connection between the social security systems developed in the Welfare State and the active labour market policies. This connection is, however, reciprocal in the way that solutions in one of the systems will affect the outcome of the other, but not necessarily in line with expectations. As has been discussed previously, the changes to the sickness benefit legislation in Sweden altered the landscape of demographics in job placement policy. A significant number of people who had previously been subject to "opt-out" strategies were suddenly supposed to be re-entering the active labour market, with a possible effect of balancing out other groups –such as the disabled– with legitimate expectations in relation to work and employment.

---

[62] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 29.

[63] Stendahl describes this in Stendahl, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State.* Gothenburg 2008, pp. 178-180.

[64] Stendahl, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State.* Gothenburg 2008, p. 179.

I would also like to make a comment on the apparently different normative functions of active job placement schemes for disabled job-applicants and disability discrimination. While the job placement schemes are derived from an *equality of outcome*-perspective, the disability discrimination legislation is linked to the *equality of opportunity*-perspective.[65] These two different perspectives constitute significantly different normative points of departure, have very alternate implications and are, in the field of disability, not aiming at the same outcome. In my personal opinion, one of the most fundamental differences are related to how we construct "actors" and "recipients". Where most job placement policies, at least in Sweden, construct disabled workers as "recipients", disability discrimination more significantly refers to disabled as "actors" with a mandate, and first call, to exercise their right individually. Since the paradigm of discrimination law has overwhelmingly prevailed in European labour law in the past decades –and understand me correctly, I do not argue against discrimination law– individuals not able, willing or otherwise capable of successfully exercise their anti-discrimination rights have been increasingly neglected.[66]

5. SECTION IV. UNIVERSITY: CAREER COUNSELING AND JOB PLACEMENT FOR DISABLED STUDENTS

Swedish Universities, which are publicly run but for a few exceptions, have significant obligations in relation to disabled students and promote accessibility to campus, courses and accommodations in relation to literature (for vision impaired) as well as exams. Apart from a general duty to all groups of students, the Discrimination Act (2008:567) covers also higher education. The percentage of disabled in higher education has increased over the years, but is still lower than for able-bodied.[67]

---

[65] There has been a legal Nordic/Swedish discourse on the *Normative Patterns of Labour and Social Law* over the past decade where aspects like these have been discussed by different scholars. See for instance, Christensen, Structural Aspects of Anti-Discriminatory Legislation, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination,* The Hague 2001, Stendahl, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State.* Gothenburg 2008, p. 176, Numhauser-Henning, *Legal Perspective on Equal Treatment and Non-Discrimination,* The Hague 2001, and in relation to disability issues, Inghammar 2007.

[66] Inghammar, From a given – into a task, in, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State,* Gothenburg 2008, pp157-164.

[67] *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med

Sweden has no specific programs for job placement for disabled and in fact, Swedish Universities are only to a minor extent oriented towards job-coaching of students even in general. Most Universities, however, have job-coach offices, but these are not particularly engaged, on a regular basis, in job placement for disabled students.[68]

6. APPENDIX

6.1. Main sources of law

European Union

- European Commission Regulation No 2204/2002 of the 12 December 2002 on the application of the Articles 87 and 88 of the EC Treaty to State aid for employment.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Government Bills (Propositioner)

- Proposition 1973:129 Lag om anställningsskydd m.m.
- Proposition 1997/98:179 Lag om förbud mot diskriminering i arbetslivet av personer med funktionshinder.
- Proposition 2007/08:95 Ett starkare skydd mot diskriminering.

Government Inquiries (Offentlig utredningar)

- SOU 1992:52 Ett samhälle för alla.
- SOU 1997:176 Förbud mot diskriminering i arbetslivet av personer med funktionshinder.
- SOU 2012:31 Sänkta trösklar – högt i tak. Arbete, utveckling, trygghet.

---

funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 28-29.

[68] My Alma Mater, Lund University, has this very autumn initiated a collaboration with the local branch of the Swedish Public Employment Agency, but no specific measures have yet been taken.

6.2. Cases

European Union Court of Justice

- C-13/05 *Sonia Chacon Navas v. Eurest Colectividades SA.*

Swedish Labour Court (Arbetsdomstolen)

- AD 1993 nr 42
- AD 1994 nr 94
- AD 1999 nr 26
- AD 2003 nr 47
- AD 2003 nr 76
- AD 2005 nr 32
- AD 2010 nr 13
- AD 2012 nr 51

6.3. Bibliography

CHRISTENSEN, Structural Aspects of Anti-Discriminatory Legislation, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination,* The Hague 2001.

EDLING, *Alla behövs. Blott arbetsmarknadspolitik skapar inga nya jobb.* www.timbro.se/pdf/**Alla**_behovs_2.pdf 2014-07-11.

EKLUND, SIGEMAN, CARLSON, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008.

FRANSSON, STÜBER, *Diskrimineringslagen, En kommentar*, Stockholm 2010.

GOTTHARDT, *Kündingungsschutz im Arbeitsverhältnis im Königreich Schweden und in der BRD.* Baden-Baden, 1999.

HOHFELD, Some fundamental legal conceptions as applied in judicial reasoning, *Yale Law Journal,* 1913, pp. 16-59.

HOHFELD, Fundamental legal conceptions as applied in legal reasoning, *Yale Law Journal,* 1917, pp 710-770.

INGHAMMAR, *Funktionshindrad med rätt till arbete? En komparativ studie av arbetsrättsliga regleringar kring arbete och funktionshinder i Sverige, England och Tyskland.* Lund 2007.

INGHAMMAR, From a given – into a task, in, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*, Gothenburg 2008.

KJELLGREN, The Decline in Swedish Union Density since 2007, *Nordic Journal of Working Life Studies*, Vol. 1. Nr. 1. Aug. 2011, pp. 67-93.

Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1 (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04.

LUNDIN, IFAU Rapport 2011:13, *Marknaden för arbetsmarknadspolitik: om privata komplement till Arbetsförmedlingen*. Uppsala 2011.

LUNNING, TOIJER, *Anställningsskydd. En lagkommentar*, 10 upplagan, Stockholm 2010.

NUMHAUSER-HENNING, On equal Treatment, Positive Action and the Significance of a Person's Sex, in, Numhauser-Henning (ed), *Legal Perspective on Equal Treatment and Non-Discrimination*, The Hague 2001.

RiR 2007:24 *Utanförskap på arbetsmarknaden. Funktionshindrade med nedsatt arbetsförmåga*¸ Stockholm 2007.

RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna*. Stockholm 2008.

RÖNNMAR, *Arbetsledningsrätt och arbetsskyldighet: en komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext*, Lund 2004. (Rönnmar 2004).

RÖNNMAR, Diskriminering vid arbetsbristuppsägningar, *Juridisk Tidskrift*, 2006-07, Nr 3, pp. 630-645. (Rönnmar 2006).

SAHLIN, *Diskrimineringsskydd för personer med funktionshinder inom utbildningsområdet: en offentligrättslig studie*, Stockholm 2004.

STENDAHL, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*. Gothenburg 2008, pp. 173-192.

WADDINGTON, HENDRICKS, The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination, *The International Journal of Comparative Labour Law and Industrial Relations,* 2002, pp. 403-427

WESTREGÅRD, En analys av samspelet mellan arbetsrätt och rehabiliteringsregler vid uppsägning och omplacering, *Juridisk Tidskrift*¸2006-07 nr 4 pp. 876-888. Stockholm 2006.

6.4. Internet

u u u,_p`crqbmkqrmjcl,qc

Information om arbetsmarknadsläget, Arbetsmarknadsåret 2011, Arbetsförmedlingen,

www.arbetsformedlingen.se

www.samhall.se

www.scb.se

Dr. Andreas Inghammar
Associate Professor in Business Law.
Lund University School of Economics and Management,
Lund University, Sweden
andreas.inghammar@har.lu.se

INFORME COMPARATIVO

(COMPARATIVE REPORT)

THE RIGHT TO WORK OF DISABLED PERSONS: A COMPARATIVE STUDY ON LEGAL FRAMEWORK AND POLICIES IN SOME EUROPEAN UNION MEMBER STATES

CARLA SPINELLI
Assistant Professor of Labour Law
University of Bari Aldo Moro, Italy

Fecha de recepción: 23-01-2015
Fecha de aceptación: 29-01-2015

RESUMEN:

En este artículo se considera el derecho al trabajo de las personas con discapacidad desde una perspectiva comparada. Las tendencias actuales en las legislaciones nacionales en materia de trabajo y empleo para las personas con discapacidad demuestran que, a pesar de que aún no se ha implementado por completo, el modelo social de la discapacidad es cada vez más adoptado por muchos Estados miembros de la UE. Para cumplir con las normas internacionales y europeas, todos los países encuestados han desarrollado una legislación contra la discriminación por motivos de discapacidad. El núcleo de protección de la discapacidad se basa en la obligación

impuesta a los empleadores de proporcionar "ajustes razonables". Las sentencias del TJCE están jugando un papel muy importante en este contexto. A pesar del desarrollo de las legislaciones nacionales, las medidas previstas tienen una baja eficacia. La tasa de participación de las personas con discapacidad en el mercado laboral tiende a ser considerablemente menor que la de otros trabajadores. De hecho, la mayoría de los Estados miembros de la UE aún gastan mucho más en transferencias de efectivo para apoyo a los ingresos que en servicios para promocionar la integración en el mercado de trabajo. El aumento del nivel de educación de las personas con discapacidad requiere el compromiso de las universidades no sólo para garantizar las condiciones adecuadas para su plena participación en el proceso de aprendizaje, sino también para ayudar a las personas con discapacidad en el proceso de transición de los estudios al mercado laboral. Para las personas con discapacidad no es suficiente tener derecho a trabajar, hay que darles los medios para que puedan ejercer ese derecho. El camino hacia la dignidad del trabajo decente en un mercado laboral inclusivo sigue siendo estrecho y lleno de dificultades.

ABSTRACT: This article considers the right to work of people with disabilities from a comparative perspective. Current trends in national legislations on work and employment for disabled people show that, even though it has not yet been completely implemented, the social model of disability is increasingly adopted by many EU Member States. To fulfil international and European standards all the countries surveyed have developed anti-discrimination legislation on the grounds of disability. The core protection of disability is based on the obligation imposed on the employers to provide a “reasonable accommodation”. The ECJ judgements are playing a very important role in this context. Despite the development of national legislations the measures foreseen have low effectiveness. The participation rate of persons with disabilities in the open labour market tends to be considerably lower than that of other workers. Indeed, most of the EU Member States still spend many times more on cash transfers for income support than on the services promoting labour market integration. The increasing level of education of people with disabilities requires Universities’ commitment not only to ensure appropriate conditions for their full participation in the process of learning, but also to help disabled graduates in the process of transition from studies to the labour market. It is not enough for people with disabilities to have the right to work, they must be given the means to enable them to exercise that right. The pathway towards the dignity of decent work in an inclusive labour market is still narrow and uphill.

PALABRAS CLAVE: discapacidad, derechos humanos, marco legal, discriminación por discapacidad, políticas de inclusión del mercado de trabajo, papel de las universidades en la inserción laboral, estudio comparativo.

KEYWORDS: Disability, Human Rights, Legal framework, Disability discrimination, Labour market inclusion policies, Universities' role in job placement, Comparative study.

1. EMPLOYMENT OF PERSONS WITH DISABILITY: A HUMAN RIGHTS PERSPECTIVE

Over the last century, there has been a major evolution in the way individuals with disabilities are perceived and supported.

For centuries, most people with disabilities have been excluded from mainstream society, based on the notions that disability was something to be feared or pitied, or more recently, that disability was a problem of the individual – something that could be "corrected" to a certain extent through medical and rehabilitative treatment, frequently in specialist and segregated centres.

The policy focus associated with these ways of understanding disability was on charity in the first case, and on the provision of services catering to the medical and associated rehabilitation requirements of the disabled, as well as on welfare and social security provisions, in the second case. These approaches, which are generally referred to respectively as the charity model and the medical model of disability, very often led to the social exclusion of disabled persons.

In recent years, there has been a growing emphasis on the social and physical environmental factors constraining the participation of disabled persons in the world of work and in society more generally. This trend has led to an increasing recognition of the rights of persons with disabilities and their status as citizens.

Consequently there is a transformation in the understanding of disability. Rather than being seen as a personal problem or tragedy, there is now a recognition that many of the barriers to participation arise from the way in which society is built and organized, together with the way in which people think about disability and the assumptions they make.

The *medical model* emphasizes the individual's impairment, disability and limitations, while the *social model*, pioneered by Oliver[1], seeks to put persons with disabilities at the centre of the services and support they need and it emphasizes capacity – what the person can do as opposed to what they cannot do.

The shift from one model to the other has taken considerable time to filter systematically through to laws and policies. It is a shift from the perception of disability as a social welfare issue, wherein people with disabilities were marginalized within society, to a human rights approach, so that individuals with disabilities have

[1] M. OLIVER, "The Politics of Disablement", Macmillan, London, 1990.

been afforded more and more opportunity to fulfil their roles in society as productive citizens.

The social model of disability is clearly adopted by the United Nations Convention on the Rights of Persons with Disabilities of 2006 (hereinafter indicated by UN CRPD)[2]. The Convention does not establish new rights, but restates, reinforces and updates rights contained in other international instruments[3]. It confirms that all such rights apply to persons with disabilities, who include, according to the Convention, "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" (art. 1).

The basic idea of human rights law, centred on the concept of human dignity, is that all people have equal and inalienable rights as human beings. All human rights are universal, indivisible, interdependent and interrelated. It is the duty of States, regardless of their political, economic, social and cultural systems, to respect, to protect and to fulfil human rights[4].

According to the holistic approach to human rights, there is no hierarchy among civil, political and social rights, the latter being recognised as human rights by legally binding provisions of many international treaties and conventions. Labour rights, notably the right to the full enjoyment of the right to work, as social rights share the same foundations of all human rights[5].

---

[2] See V. PIETROGIOVANNI in this issue.

[3] For a detailed description of the principal international legal instruments concerning the right to work of persons with disabilities, see A. O'REILLY, "The Right to Decent Work of Persons with Disabilities", Geneva, International Labour Office, 2007.

[4] On the difficult question regarding the status and the standing of human rights before their legalization occur, see A. SEN, "Elements of a Theory of Human Rights", *Philosophy and Public Affairs,* vol. 32, No. 4, 2004, p. 315, http://www.mit.edu/~shaslang/mprg/asenETHR.pdf .

[5] See, *inter alia*, J. BELLACE, "Who Defines the Meaning of Human Rights at Work?", in E. ALES, I. SENATORI (eds), *The Transnational Dimension of Labour Relations*, Giappichelli, Torino, 2013, p. 111; J. FUDGE, "The New Discourse of Labor Rights: from Social to Fundamental Rights?", *Comparative Labour Law and Policy Journal,* 2007-2008, 29, p. 35*;* V. MANTOVALOU, "Are Labour Rights Human Rights?", *European Labour Law Journal*, No. 3, 2012, p. 151.

The qualification of social rights as human rights remain controversial, see references to the debate in L. RODGERS, "Vulnerable Workers, Precarious Work and Justifications for

As far as work and employment are concerned, States Parties to the UN CRPD recognize the right of persons with disabilities to work on an equal basis with others; this includes 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". The States Parties also undertake to take appropriate steps, including those specifically listed in the Convention, to safeguard and promote the realization of the right to work (art. 27).

This provision is one of the cornerstones of the Convention, whose approach towards the right to work of people with disabilities is concerned with dignity and equality and recognizes the principle of State responsibility[6].

2. DEFINING DISABILITY IN NATIONAL LEGISLATION

With regard to the change of approach to disability according to the human rights perspective, the ratification of the UN CRPD was of great importance for the EU Member States. The European Union itself has become a party to the Convention, with the result that compliance with the provisions of the latter are also binding on the work of EU institutions[7].

Following the ratification of the UN Convention by the European Union, the European Court of Justice (ECJ) held that the concept of "disability" in compliance with Directive 2000/78/EC had to be understood as referring to a limitation which results in particular 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 (*HK Denmark*, 11 April 2013, Joined cases C-335/11 and C-337/11, paragraphs 37 to 39).

Labour Law: a comparative study", *E-Journal of International and Comparative Labour Studies*, vol. 1, No 3-4, 2012, p. 87, Adapt University Press, file:///C:/Documents%20and%20Settings/pc%20carla/Documenti/Downloads/38-135-1-PB%20(1).pdf .

[6] For an interesting analysis of art. 27 UN CRPD in the light of critical disability studies and Nussbaum's capabilities theory, see E. ALBIN, "Universalising the Right to Work of Persons with Disability: an Equality and Dignity Based Approach", in V. MANTOVALOU (ed.), *The Right to Work*, Hart Publishing, 2014, p. 61.

[7] European Commission, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, SWD(2014) 182 final, Brussels, http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf .

The transition from the conception of disability as a natural condition of physical or psychological impairment to a relational concept, resulting from the interaction between persons with impairments and attitudinal and environmental barriers, was used by the Court, following this decision and unlike in the past, as the key to interpreting the rules contained in the Employment Equality Directive.

A similar hermeneutic approach is required for measures of national legislation, which, as they often date back to before the Convention, employ wording that reflects the medical model. A key common element, which is particularly clear from the analysis of national laws, is the considerable difficulty in building a uniform notion of disability.

The protection of persons with disabilities is foreseen by the rules of the *European Constitutions*, which are placed at the foundation of the legislative framework on disability in most countries.

In continental Europe, according to the **French** (sec. No. 11 of the Preamble) and the **Italian** Constitution (art. 38), in the case of inability to work – due to age, mental or physical impairment, economic conditions - every person has the right to obtain from the State appropriate means for his or her existence. These provisions therefore require a duty of solidarity on the part of the State towards people with disabilities, as people excluded from the production system because of their impairments, to balance the negative effects of reduced working capacity.

More recent constitutional norms, as in **Poland** (art. 69) and in **Spain** (art. 49), provide for the social and professional integration of disabled persons as a fundamental principle of public policy. Therefore, the aim of the public authority is to guarantee the conditions enabling disabled persons to earn a livelihood and participate in social life.

All the Constitutions of the countries examined in this research provide anti-discrimination protection, but only in some of them, such as the **German** (art. 3(3)2) and the **Swedish** Constitutions (chapter 1, § 2, section 2 and 5), is that protection expressly referred to disability.

Taking into consideration the *ordinary legislation*, it can be observed that in most of the countries surveyed different definitions or variants of disability can be found with reference to the aims and the scope of the legal provisions which they are provided for, such as those on vocational training, job placement or income support.

The medical model of disability is still predominant in the **British** regulations (Equality Act of 2010), also in **Sweden**, notwithstanding the adoption of the idea of

disability as a social construct, the existing legislation demonstrates a reluctance to finally abandon the medical perspective of disability. The concept of disability is not clearly defined under **Danish** law and varies according to the purpose of the specific regulations. The Danish courts adopted a narrow interpretation of disability, at least initially linked to the medical model, especially relating to legal protection against discrimination. However, the Danish courts can be expected to change their position following the above mentioned *HK Denmark* judgment by the ECJ.

In **Germany** (Code of Social Law, Book IX), in Italy (Law No. 104/1992) and in **Poland** (Act of 27 August 1997) the legislators adopted a comprehensive approach considering both the medical and social aspect of disability. The notion of disability is based on two criteria: a limitation resulting from physical, mental or psychological impairments and the lack of integration and participation in society. The **French** definition is very close, although not identical, to that given by the ECJ in the *HK Denmark* case (Act No. 2005-102 of 11 February 2005 and Article L.114 of the Family and Social Action Code), taking into account the social, material, human and technical environment.

The **Spanish** legislation (Royal Legislative Decree 1/2013), which contains the literal definition closer to the social model of disability, in any case requires a permanent or at least long-lasting impairment and a minimum percentage of reduced functional capacity.

In most of the countries, recognition of disability occurs through specific administrative proceedings brought by the applicant. These proceedings generally foresee the involvement of a medical committee. The medical state and the ability to work remain decisive factors in the competent administrative body's assessment.

To ensure full consistency with the social model of disability, therefore, an evolutionary interpretation of the literal text of the regulations is essential in all the countries surveyed, so as to allow, on the one hand, to overcome the original welfare-ratio, if still present and, on the other, to expand and consolidate the anti-discrimination protection, according to the *substantive equality model*. This equality model not only recognizes that certain groups are disadvantaged compared to others, but it also includes some positive obligations for the States, such as creating general structures that are inclusive[8].

[8] S. FREDMAN, "Human Rights Transformed – Positive Rights and Positive Duties", Oxford University Press, 2008.

3. CURRENT TRENDS IN DISABILITY LEGISLATION ON WORK AND EMPLOYMENT

The analysis of national legislations reveals some common lines along which the discipline of the protection of people with disabilities has been developed in Europe, including the origin of the first legislative actions, which occurred frequently near the end of the First and Second World Wars[9].

Comparative study allows a substantial uniformity to be detected in the tools adopted in different jurisdictions for the protection of the right to work of disabled people, with a predominance of the model of compulsory recruitment (*quota system*) **in western, eastern and southern Europe**.

For persons with disabilities for whom, for reasons of choice and/or suitability, open employment may not be appropriate, alternative forms of employment of a sheltered or supported nature are usually provided. There are numerous variations of these options across countries, given that even the concept of sheltered employment does not have the same meaning for all of them[10].

3.1. Quota system

Quota schemes are probably the best known and most familiar affirmative action measures aimed at promoting the integration of people with disabilities in the labour market.

A*ffirmative action measures* seek to actively promote the principle of equal opportunity for members of disadvantaged and under-represented groups by granting these members some form of preferential treatment and are aimed at overcoming structural disadvantages experienced by those groups.

Under quota schemes, employers of a specific minimum number of workers are obliged to ensure that a certain percentage (*quota*) of their workforce, typically in the range of 2%-7%, is made up of people with disabilities.

Such schemes first emerged in Europe in the aftermath of the First World War, and initially war veterans who were disabled as a result of military action were the only beneficiaries. These schemes usually exempted small employers. In the post Second

[9] *Infra*, par. 3.1.

[10] See the national reports in this issue.

World War period, quota schemes were extended to cover civilians with disabilities, and were adopted in many countries throughout the world. The exemption for small employers was, however, often maintained. More recently, some quota schemes have been expanded expressly to include people with mental health problems.

While all quota systems call for employers to employ a set minimum percentage of disabled persons, not all of them are supported by a levy-grant system, according to which all employers covered by the system who do not meet their obligation are required to pay a compensatory payment. The money raised through such a quota scheme usually goes into a fund to support the employment of people with disabilities. These funds are usually administered by the public authorities, although exceptionally the social partners are involved, as in the case of **France**.

The levy is often regarded, particularly during difficult economic periods, as an additional tax to be paid by the employers and as a more attractive option than hiring.

The quota system is often accompanied by rules concerning modes of exemption or alternative measures, such as in **Italy and Spain**, which allow companies to avoid the obligation to hire people with disabilities. The basic problem of the quota system is the implementation of a delicate balance between freedom of economic initiative and the right to work.

Despite the fact that quota systems can be adapted to fit national economic and political requirements, since they allow law and policy makers to influence the size and nature of both the targeted group of beneficiaries (persons with disabilities) and the group upon whom obligations are imposed (employers), the available data indicates that they are only partially effective as an instrument for furthering open competitive employment for individuals with disabilities. Even when the use of mandatory quotas is accompanied by adequate sanctions, they are only partially filled[11].

Transforming Disability into Ability; Policies to promote work and income security for disabled workers, a 2004 study conducted by the Organisation for Economic Co-operation and Development (OECD) in 20 countries found that more than one-third of the countries in the study used mandatory quota systems. The study concluded that, whether the approach is rights-based (anti-discrimination laws), obligations-based (quota) or incentives-based (voluntary action), it is predominantly current employees with a disabling condition who receive protection. A further conclusion was that employees who become disabled and are thus eligible for inclusion in the quota

[11] European Commission (2000), *Benchmarking employment policies for people with disabilities,* Brussels, http://ec.europa.eu/employment_social/soc-prot/disable/bench_en.pdf

are more likely to be kept in a job, while quota schemes give little incentive to employ a disabled job applicant[12]. [p. 105].

Moreover, the choice to exclude small employers from the quota scheme has a much greater impact in countries where small firms are predominant and provide a high percentage of jobs; the impact of the quota in these countries will be significantly reduced if such employers are excluded from its scope.

Nevertheless, a targeted positive action measure in the form of a quota remains an appropriate tool to promote employment for those people with the most severe disabilities, who might be expected to be less able to profit from the existence of non-discrimination disability legislation, and that even in non-discriminatory environments may not be able to compete for and win jobs on their individual merits.

3.2. Alternative forms of employment:

3.2.1. Sheltered work

In calling for measures to promote employment opportunities for persons with disabilities, ILO Recommendation No. 168/1983 states that such measures should include "appropriate government support for the establishment of various types of sheltered employment for disabled persons for whom access to open employment is not practicable".

In general, sheltered employment was intended for persons who were unable or unlikely to obtain or retain a job in the open labour market because of the severity of their disability or limited working capacity. The majority of those employed under this system tend to have an intellectual disability.

According to a broad definition, sheltered work should not only have the purpose of making it possible for people with disabilities to carry out worthwhile work and employment options, but also to prepare them, as far as possible, for work in normal employment.

The majority of **Polish** people with a disability work in sheltered jobs. In **Sweden,** the main provider of sheltered employment is the public body of Samhall AB, a company wholly owned by the Government.

---

[12] http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/transforming-disability-into-ability_9789264158245-en

3.2.2. Supported work

In recent years, other supported employment measures have come more into favour than sheltered work, which is mainly criticised for failing to provide proper working conditions and employment contracts.

In conformity with the UN CRPD aim of creating an inclusive labour market, sheltered employment is not mentioned in Article 27(b) of the Convention on means to guarantee the right to work. While sheltered employment is not prohibited, it is envisaged to play a small role in promoting employment of persons with disabilities, preferably pursued through other measures which may include affirmative action programmes and incentives.

There is no clear-cut line between supported and sheltered employment, since sheltered employment may be performed on the open labour market and may entail some work output for the benefit of the employer. However, the higher the degree of specialized working conditions (segregation, reduced pay, reduced working hours), the more the employment should be characterized as sheltered employment.

Supported employment can be defined as paid work in integrated work settings, with ongoing support services, for persons with severe disabilities. Supported employment aims at encouraging employment on the open labour market and includes programmes that support employment through wage and cost subvention. Moreover, the support should be given with the aim of promoting employment with the least assistance needed, and working conditions should be as similar as possible to those that apply to persons employed on the ordinary labour market.

The UN CRPD 2006 recognizes that for many disabled persons in developing countries, *self-employment or entrepreneurship* may be the first option, and in some cases, the only option (Art. 27, par. 1, f). Self-employment is appropriate for many of these people because it can provide more flexibility than paid employment in terms of workload, work schedule and work location, and permits better management of disability and lifestyle.

States Parties to the UN CRPD are called on to promote such opportunities. In many of them the legislators introduced regulations supporting the self-employment of disabled persons from public funds[13].

[13] European Commission, OECD, *Policy Brief on Entrepreneurship for People with Disabilities. Entrepreneurial Activities in Europe*, Luxembourg: Publications Office of the European Union, 2014 http://ec.europa.eu/social/BlobServlet?docId=11086&langId=en is an interesting study that

In **Spain** people with disabilities who undertake self-employment are subsidized by the state and are eligible for reduced contributions[14]. In **Poland**, disabled persons registered as unemployed or searching for work at a powiat labour office may receive one-off support from the State Fund for the Rehabilitation of Disabled Persons by undertaking non-agricultural economic activity, agricultural activity or making a contribution to a social cooperative[15].

3.2.3. Social enterprises

Finally, social enterprises should be mentioned as specific strategies to create additional employment opportunities for persons with disabilities. The EU sees the Social Economy as an important part of the European economic model.

In **Italy**, Law No. 381 of 1991 introduced a new model of employment for persons with disabilities based on social cooperation. Law No. 68 of 1999 (Art. 11 ff.) subsequently provided new paths to widen employment opportunities for people with a disability through greater involvement of social enterprises. These social enterprises sign conventions with employers – obliged or not under the quota system - and public employment services with the aim to facilitate the gradual integration in the workplace of people with disabilities.

In **Spain**, it worth mentioning the interesting experience of ONCE (The Spanish Organization of Blind Persons), which established a Foundation (Fundación ONCE) in 1988, involving representatives of different groups of persons with disabilities, whose primary goal is the promotion of full employment integration of disabled people.

4. DISABILITY ANTI-DISCRIMINATION LEGISLATION

A key element of the human rights based approach to disability is the adoption of anti-discrimination laws and policies. In recent years, the most important shift in the area of employment for people with disabilities has been this move to anti-

indicates various areas of action for governments to improve self-employment and entrepreneurship for persons with disabilities.

[14] See J. GORELLI HERNÁNDEZ in this issue.

[15] See M. SZABŁOWSKA-JUCKIEWICZ in this issue.

discrimination legislation. In the UK, for example, the quota system was abolished in 1996 when the Disability Discrimination Act of 1995 came into force. In most of the EU countries examined the anti-discrimination protection has received a significant boost from the adoption of international and European standards.

An interesting survey[16], requested by the European Commission, Directorate-General Justice and co-ordinated by Directorate-General for Communication, published in 2012, proves that disability is one of the three most widely perceived grounds of discrimination. The survey also shows that, for all grounds, discrimination is seen as more prevalent in employment than in other areas of life. As a consequence, measures to foster diversity in the workplace are strongly supported. Finally, the research results highlight that the economic crisis is contributing to more discrimination in the labour market and is impacting negatively on policies promoting equality and respecting diversity.

According to the non-discrimination approach, people with disabilities are inherently equal human beings and thus entitled to equal treatment and equal opportunities, particularly with respect to employment. The criticisms of the quota system are mainly based on the argument that people with disabilities can be equally productive workers as non-disabled individuals, provided the workplace is adapted to ensure that they have the proper accommodations, and that more can be achieved through incentives to employers, such as financing the necessary accommodations, than through sanctions.

The promotion of equal employment opportunities for people with disabilities not only entails the prohibition of discrimination on grounds of disability, but it also requires States to take affirmative action to ensure that people with disabilities have access to employment opportunities in the labour market. This proactive approach includes requirements that the workplace environment be adapted to make it accessible to all people with disabilities who are able to work, with appropriate technical aids or supports, if necessary.

The core of the protection of disability from the perspective of human rights is based on the obligation imposed on the employers to provide a *reasonable accommodation*.

This legal concept can be found in the Employment Equality Directive, No. 2000/78/EC (Art. 5) and in the UN CRPD (Art. 2 and Art. 27, sec. 1, i).

---

[16] *Discrimination in the EU 2012*, Special Eurobarometer 393/Wave EB77.4 – TNS Opinion & Social, November 2012, http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf .

Furthermore this concept is now adopted by many countries' disability laws. The **Italian** legislation was recently amended in this regard (Article 3 *bis* of Legislative Decree No. 216 of 2003) following the ECJ ruling, according to which the national regulations could not be considered to respect fully the Employment Equality Directive because of the absence of any provisions of specific obligations for employers[17].

In accordance with the second paragraph of Article 2 of the UN Convention, "reasonable accommodation" is "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

The preamble to the Employment Equality Directive states that appropriate measures should be provided to adapt the workplace to the disability, "for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources" (Recital 20).

With reference to these international and supranational rules, reasonable accommodation can be defined as modification or adaptation of a job, employment practice, or work environment, that makes it possible for a qualified person with a disability to apply for a job, perform an essential function of the job, or access a benefit of employment.

The provision of a reasonable accommodation is an individualized measure required to meet the needs of a particular worker that should be distinguished from an affirmative action measure, such as quotas, aimed at the favourable treatment of specific groups.

It may include, but is not limited to making existing facilities used by employees readily accessible to and usable by persons with a disability; job restructuring, modifying work schedules, or reassignment to a vacant position; acquiring or modifying equipment or assistive devices, adjusting or modifying tests, training materials or policies; providing sign language interpreters or readers for individuals who are blind or have poor vision.

[17] ECJ, 4 July 2013, C-312/11, *European Commission v. Italian Republic*. See P. DIGENNARO in this issue.

Reasonable accommodation does not need to be temporary in nature, in fact it could be provided for an individual for the duration of his or her employment. Moreover, it could need adjustments and implementation over time.

Indeed, rather than a focus only on impairments or health conditions, an open and supportive workplace that accommodates a wide range of needs – including not just those of disabled people - would help individuals perform better. Most disabled people do not want to be singled out and treated differently, they want to be part of the mainstream and given a fair chance. The open and supportive workplace requires an understanding by managers and co-workers of their responsibility to subscribe to those values and behave accordingly[18].

The national regulations should provide a definition for what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

In **France**, the High Authority against Discrimination and for Equality (Halde) developed a genuine guidance for employers in the private sector on how to implement the notion of reasonable accommodation[19]. In **Britain**, the 2010 legislation makes new and detailed provisions for reasonable adjustments to be made in the case of disabled persons in employment (Equality Act 2010 Schedule 8 paras. 4 & 5). Moreover, the Code of Practice 2011, sec. 6.32 to 6.35, treats "Reasonable adjustments in practice" and gives some excellent practical advice on this issue[20].

This obligation to accommodate is not unlimited, but it is subject to the requirement that the accommodation does not result in a *disproportionate burden*[21]. Therefore, an employer could be exempted from providing a reasonable accommodation.

To determine whether the measures to adapt the workplace to the disability give rise to a disproportionate burden the preamble of the Employment Equality Directive states that "account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance" (Recital 21).

---

[18] These are some of the conclusions reached by Equality and Human Rights Commission, *Working Better. The perfect partnership-workplace solution for disabled people and business*, May 2012, www.equalityhumanrights.com/perfectpartnership.

[19] See S. LAULOM in this issue.

[20] See J. CARBY-HALL in this issue.

[21] Art. 2, UN CRPD 2006; Article 5, Directive 2000/78/EC.

In other words, a disproportionate burden could be considered an action involving significant difficulty or expense when viewed in the light of factors such as the size of the company, its financial resources and the nature and structure of the operation.

In its judgment of 11 April 2013, *HK Denmark*, the ECJ stated that Article 5 of Directive 2000/78/EC must be interpreted as meaning that a reduction in working hours may constitute one of the adjustments an employer might make to enable someone to return to work, provided that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to the Directive is not exhaustive. The EU Court also stated that it is for the national courts to assess whether a reduction in working hours would represent a disproportionate burden on the employer in the particular circumstances.

However, the defence or justification for not accommodating a disabled person needs to be drafted carefully, otherwise unscrupulous employers would have recourse to this in order to avoid any obligation. In practice, the question as to what constitutes a disproportionate burden very much depends on the context of the case concerned, and is not merely dependent on the financial costs of an accommodation or on financial compensation schemes.

The failure to provide a reasonable accommodation to workers and job applicants, who face obstacles in the labour market, is not merely a bad employment practice, but is increasingly perceived as an unacceptable form of employment discrimination.

The Employment Equality Directive does not explicitly define a *denial of an accommodation as a form of discrimination*, while the UN CRPD states a failure to make a reasonable accommodation as a form of discrimination[22].

For the **British** legislation (Equality Act 2010, Sch. 8, s. 21 (1) (2) (3)) should the employer not comply with the duty to make reasonable adjustments he would be liable for unlawful discrimination. In **France**, for an employer to refuse to take appropriate measures is deemed to be a form of discrimination.

[22] Article 2 of the UN CRPD defines "discrimination on the basis of disability" very broadly to mean: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*".

In *HK Denmark*, the judges of Luxembourg ruled that a national legislation, like Danish law in this case, that allows an employer to reduce an employee's notice period after a prolonged period of absence, where that absence was caused by "the employer's failure to take the appropriate measures", constitutes discrimination on the grounds of disability.

In this case the ECJ has defined the scope of reasonable accommodation under the Employment Equality Directive by reference to the UN CRPD, recognising that the UN Convention defines it more broadly. Moreover, with this ruling the EU Court has defined a typical case of indirect discrimination. This interpretation may impact on national tribunals when they apply the relevant provision of the Directive[23]. What is certain is that the principle of reasonable accommodation has broken the dogma of the intangibility of the employer's business organization.

Persons with disabilities face many obstacles in their struggle for equality. Very often they are victims of *multiple discrimination*, which means that there is more than one reason for the discrimination, such as in the case of disability in combination with age, race, etc. For example, although both men and women with disabilities are subject to discrimination, women with disabilities are doubly disadvantaged by discrimination based on gender and their disabled status.

The UN CRPD 2006 recognizes the particular situation of women with disabilities. States Parties to the Convention undertake to recognise that "women and girls with disabilities are subject to multiple discrimination, and in this regard [the countries] shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms" (Art. 6).

The new concept of combined discrimination of two relevant protected characteristics has been introduced in **Britain** by the Equality Act of 2010 (s. 14(1))[24].

In *Odar v Baxter Deutschland GmbH*[25], the ECJ ruled on a case of multiple discrimination on grounds of age and disability. Dr. Odar, a severely disabled Baxter's marketing director, was made redundant on operational grounds and was entitled under the social plan to the reduced amount of compensation provided in the case of workers older than 54 years of age and based on the assumption of earliest possible beginning of pension for severely disabled persons under the German retirement pension scheme. Dr. Odar contended that the calculation formula of the

[23] See the January 2014 decision of the Danish Maritime and Commercial Court cited by M. VENTEGODT LIISBERG in this issue.

[24] See J. CARBY-HALL in this issue.

[25] ECJ, 6 December 2012, C-152/11.

compensation adopted by the social plan was directly discriminatory against him with regard to age and gave rise to indirect discrimination on grounds of disability. The evaluation technique of discrimination adopted by the Court in this case was to divide the trial into two parts: first assessing the existence and the possible justification of age discrimination and, then, checking for disability discrimination and possible causes of justification, with reference to the workers of the same age. In the present case, the ECJ ruled out age discrimination, because the national provision was considered justified by the aim of protecting younger workers and facilitating their reintegration into employment. On the contrary, the Court stated that there was discrimination based on disability, given that paying a severely disabled worker compensation on termination on operational grounds which is lower than the amount paid to a non-disabled worker has an excessive adverse effect on the legitimate interests of severely disabled workers. They generally face greater difficulties in finding new employment and those risks tend to become exacerbated as they approach retirement age.

More difficult to address is *intersectional discrimination*, that can be explained as a unique mixture of grounds in a given context. Intersectional discrimination is certainly a reality, especially among people with disabilities, but from a legal point of view it is very difficult to conceptualise and combat[26]. Good examples to illustrate "intersectionality" are cases such as those of an elderly patient with severe impairments requiring expensive health care; a gay mentally disabled man employed in an orthodox catholic school or a mentally disabled single woman who seeks assistance to become a mother.

According to some interpreters a case of intersectional discrimination was recently judged by the European Court of Justice (18th March 2014, C-363/12), without being recognised as such under the EU law[27].

A female worker (Ms. Z), a post-primary school teacher in Ireland, unable to bear a child, because of a rare physical condition (lack of uterus), had a baby through a surrogacy arrangement. The baby was a genetic child of Ms. Z and her husband. They

[26] See J. BROCKMANN, M. BANAFSCHE in this issue.

[27] A. HENDRIKS, "Intersectionality and discrimination", paper presented at the conference on "Equal Rights and Accessible Environments: the UN CRPD and EU Disability Law and Policy, Maastricht University", 3-4, April, 2014, http://www.maastrichtuniversity.nl/web/Faculties/FL/programme_EqualRightsAndAccessibleEnvironmentsTheUNCRPDAndEUDisabilityLawAndPolicy_conference_law.htm .

have taken care of the baby since birth. The Government Department stated that Ms. Z. could not qualify either for maternity leave, because she had not been pregnant and given birth, or for adoptive leave, given that she and her husband were considered the baby's parents, also according to the child's birth certificate.

The ECJ ruled that: a) there was no sex discrimination (Directive 2006/54/EC), because the commissioning male father stood in the same position as Ms Z., not being entitled to paid leave equivalent to maternity leave either; b) there was no disability discrimination (Directive 2000/78/EC), because Ms. Z could not be considered a disabled person according to the definition of disability adopted in *HK Denmark* (see above, par. 2), in fact, despite her impairment, she could carry out work and participate in professional life on an equal basis with other workers; c) it was not necessary to examine the validity of the Directive No. 2000/78/EC in the light of UN CRPD 2006, because the provisions of that Convention are not, as regards their content, unconditional and sufficiently precise and therefore they do not have direct effect in European Union law, "*but, that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention*".

This ECJ judgment appears very far from a contextualised approach to discrimination, which has been developing in recent human rights claims. Indeed, the EU anti-discrimination law still adopts a singular grounds based approach that, coupled with the prescribed comparator-based model upon which the concepts of discrimination in the Directives depend (both direct and indirect discrimination require a comparator or comparator group to be identified), makes addressing intersectional discrimination somewhat more problematic and proving it very difficult[28].

Discrimination can occur in recruitment of workers - for employment opportunities that are outside the quota system – and during the employment relationship, but even more, perhaps, at the termination of the employment contract. In this regard, according to the **Italian** law, for example, in the event of redundancies, disabled workers can be dismissed only without prejudice to observance of the percentage of employment as required by the quota system. For the individual dismissal, however, such as in **France**, there is no discrimination if the disabled worker cannot be employed otherwise. This obligation to attempt to relocate the employee,

[28] K. MONAGHAN, "Multiple and intersectional discrimination in EU law", *European Antidiscrimination Law Review*, Issue No. 13/2011, p. 20, http://www.migpolgroup.com/public/docs/200.European_Anti-discrimination_Law_Review_13_19.01.2012_EN.pdf .

which means that the employer must review all possible job opportunities in all the companies and offices of its group, is strictly controlled by judges. The **German** legislation explicitly mentions severe disability among the social criteria the employer has to consider in selecting a person who has to be dismissed for economic reasons (§ 1 (3) 1 KSchG).

5. SOCIAL POLICY MEASURES TO PROMOTE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES

The participation rate of persons with disabilities in the open labour force tends to be considerably lower than that of other workers, while the unemployment rate tends to be higher. Unemployment rates vary between types of disability, being highest among those with mental illness.

According to the latest data provided by the Labour Force Survey *ad hoc* module on employment of disabled people in 2011[29], while in the majority of the Member States the employment rate for people without disabilities aged between 20 and 64 was higher than 70%, the employment rate of people with disabilities was lower than 50%.

National situations vary considerably. Countries with similar employment rates for people without disabilities present large differences in the employment rates for people with disabilities[30]. This suggests that national interventions and policies can make a difference.

Reasons for this high rate of inactivity vary between countries. Benefit traps and risks of losing benefits on starting work are major disincentives. Another possible reason may be the reluctance of employers to recruit disabled workers for fear of having to make expensive workplace adjustments or because of the difficulty of "letting someone go" once appointed.

The effectiveness of legislation and policy that aims to promote equal employment opportunities for persons with disabilities depends on the measures introduced to implement these in practice.

[29] http://ec.europa.eu/eurostat/statistics-explained/index.php/Disability_statistics_-_labour_market_access .

[30] See the national reports in this issue.

According to Article 27 of the UN CRPD on Work and Employment, it is the role of States Parties to: "Promote the employment of persons with disabilities in the private sector through appropriate policies and measures which may include affirmative action programmes, incentives and other measures"[31].

At present, passive measures (income transfers) consume a considerably greater proportion of public resources than active labour market measures. The 2010 OECD study on sickness and disability policies confirm this tendency[32]. This report shows how the recent recession resulting from the global economic crises has raised the possibility that many of the long-term unemployed may end up on sickness and disability benefits. In OECD countries there is an increasing number of workers leaving the labour market permanently due to health problems or disability and too few people with impairments reducing their work capacity who manage to apply for or remain in employment. Even if there are changing policies in this field[33], much needs to be done to reverse this trend.

Most Member States still spend many times more on cash transfers than on services promoting labour market integration. These should include a range of technical advisory and support services and measures for employers and for disabled job seekers and workers, such as financial incentives as well as specific employment support measures.

Public authorities can provide financial subsidies to employers to compensate them for extra costs or shortfalls in productivity associated with an employee with a disability.

The financial incentives provided for by national legislations are mainly of three types: bonus grants for workplace modifications or special equipment (e.g. costs associated with making a reasonable accommodation); tax credits or reduction in social security charges in respect of each new disabled worker; wage subsidies.

The most practiced solution is the second, but the first, which is used for instance in **France** and in **Sweden**, allows the company to achieve a greater degree of responsibility for adapting its organization to the residual working abilities of the disabled person.

---

[31]Article 27(1)(d) and (h), UN CRPD 2006.

[32] OECD (2010), *Sickness, Disability and Work: Breaking the Barriers: A Synthesis of Findings across OECD Countries*, OECD Publishing, http://www.oecd-ilibrary.org/social-issues-migration-health/sickness-disability-and-work-breaking-the-barriers_9789264088856-en .

[33] See, for instance, the recent change in Swedish sickness benefit legislation reported by A. INGHAMMAR in this issue.

One example of employment promotion schemes providing for wage subsides for persons with disabilities is the **Danish** 'flexjob'. According to a recent reform of this scheme, persons who are employed in a new flexjob position will receive pay from the employer for the working hours that they perform. In addition they will be entitled to support up to the level of unemployment benefit (and no longer up to the level of ordinary full-time pay as was the case before the reform)[34].

A singular and interesting experience in **Britain** is the "*Two Ticks' Symbol*" campaign, which has the merit of instilling good business practice in employers. The symbol is conferred by Job Centre Plus to employers for their commitment in employing disabled people. This policy aims to convince employers that having disabled employees would provide a good image for the firm. The British policies since the 1990s have focused on the best business practices, with less emphasis on financial support or statutory constraints. The aim is to encourage employers to employ disabled people voluntarily, on the basis that there is an unquestionable value for the business to employ them[35].

A combination of financial incentives and employment related support services is useful for disability legislation to be effective, provided that these incentives and services are organised and regulated in a coordinated and coherent way.

Empirical research tends to suggest that anti-discrimination legislation has no employment effect and there is mixed evidence on the merits of quota systems. On the contrary, active labour market programmes, if adequately designed, can greatly contribute to social inclusion and improved and sustainable employment opportunities.

Public employment services (PES) can play an important role in implementing these policies, providing for programmes, such as for example vocational rehabilitation, that are tailored to the specific needs of people with disabilities[36].

The target group of disability policies is not easy to identify. Disabled people are a highly differentiated group, varying not only in terms of impairment characteristics

---

[34] See M. VENTEGODT LIISBERG in this issue.

[35] See K. GROMEK-BROC in this issue.

[36] European Commission (2013), Analytical Paper: *PES approaches for sustainable activation of people with disabilities*, Brussels, Author: Ágota Scharle, Budapest Institute, in collaboration with ICF GHK, file:///C:/Documents%20and%20Settings/pc%20carla/Documenti/Downloads/20130911%20P2P%20Analytical%20Paper_EN.pdf .

(type, severity, stability, duration and time of onset), but also in terms of other personal and household characteristics (i.e. gender, ethnicity, age, education, family structure) and socioeconomic circumstances that influence labour market participation rates (e.g. educational attainment).

The growing awareness that *women* are more likely than men to be confronted with disadvantage, exclusion and discrimination holds true for individuals with disabilities as well. Women with disabilities are more likely than their male counterparts to be poor or destitute, illiterate or without vocational skills, and most of them are unemployed. Therefore, the gender dimension of disability should be taken much more into account at national level both in the legal framework and in the employment policies[37].

The same consideration should be devoted to *young people* with health problem and disabilities, who are especially vulnerable in the labour market. They are currently being missed by relevant disability policies, such as those concerned with employment, discrimination and active inclusion. There is a need to shift the focus towards them and to develop new policy tools to reach this target group. Measures to create labour demand for this group are needed[38].

The EU Council Recommendation of 22 April 2013 on establishing a "youth guarantee" (2013/C 120/01)[39] - whereby young people aged 15-24 who are not in employment, education or training (NEET) are assured a quality offer of employment, further education or training within four months of becoming unemployed or leaving formal education[40] - contains outreach strategies to ensure that young people with disabilities are included in the scheme and are registered with employment services.

---

[37] European Disability Forum (2011), *2nd Manifesto on the Rights of Women and Girls with Disabilities in the European Union. A toolkit for activists and policy makers*, ch. 12, http://www.edf-feph.org

[38] Eurofound (2012), *Active inclusion of young people with disabilities or health problems*, Luxembourg: Publications Office of the European Union, http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2012/26/en/1/EF1226EN.pdf

[39] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2013:120:FULL&from=EN

[40] On this programme see EU Commission (2014), *Employment policy beyond the crisis. Social Europe guide vol. 8*, ch. 3, Luxembourg: Publications Office of the European Union, http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7721 .

6. THE ROLE OF UNIVERSITIES IN THE PROCESS OF TRANSITION OF DISABLED GRADUATES FROM STUDIES TO LABOUR MARKET

Education and lifelong learning are a crucial domain for young people, especially for those with disabilities. Focusing on transition from school-based to employment-based systems is an important and productive way of addressing their problems.

Within this framework the Universities can help to provide their disabled students with training and work-orientation activities, in order to facilitate their employment.

In recent times, more attention has been directed towards these students with disabilities, given that the percentage of the disabled gaining higher education has increased over the years. All Universities should ensure appropriate conditions for the full participation in the process of learning by students with disabilities. In addition to accessibility, these students should benefit from human and material assistance.

In **France** and in **Italy**, for example, a specific reception and support service should be created in each university to assist and support disabled students during their university career.

Organisational facilities are to be provided not only for disabled students, but also for candidates with disabilities in the case of admission tests, entrance requirements and procedures.

The Universities in **Denmark** and **Sweden** do not traditionally provide a great deal of career counselling or job-placement services for their students even in general. Most Swedish Universities, however, have job-coaching offices, but these are not particularly engaged, on a regular basis, in job placement for disabled students. In Denmark, unemployed graduates may receive help from the ordinary job-placement services who will in some cases have special programmes for them.

In **British**, **Polish** and **Spanish** Universities a significant role in promoting fluent transition from studies to labour market is played by the student career offices, which very often assure specific interventions for disabled graduates.

Under Article 6 of Legislative Decree No. 276/2003 the public and private universities in **Italy** are authorized subjects of intermediation in the labour market.

The Universities, therefore, act with their *job placement* services as integrated entities in the network of employment services. However, only a few of them offer specific assistance to graduates with disabilities.

In **Germany**, the Universities engaged in job placement cooperate with the public placement services of local governments and/or student organizations. In **France**, the disability service can also work jointly with the university traineeship service and with non-profit-making organisations to help disabled students find internships and jobs.

The strategies adopted by Universities substantially converge on the establishment of career guidance services, providing graduates with *information* about the labour market and opportunities for improving occupational qualifications; gathering, classifying and making available job offers, training and internships; keeping a *database* of students and graduates interested in finding a job; *assisting* them in active job seeking. They develop *vocational assessment and career counselling* services to assist in understanding the specific skills, traits and abilities a graduate with a disability has that can be matched to specific jobs[41].

These measures have proved much more effective when complemented by actions - like training and workshops on disability - to raise awareness and sensitivity among the actors of the labour market involved (business owners, managers and co-workers).

Better results in terms of accessing the labour market have been gained through conventions signed between Universities and companies, law firms or other employers interested in offering graduate students with disabilities internships, training and job opportunities. British and Spanish[42] Universities have proved to be particularly active in this field. This practice should be increased and made more widespread so as to enhance the proactive role that Universities can play towards their graduates with disabilities entering the labour market.

[41] See the national reports in this issue.

[42] See J. GORELLI in this issue.

7. CONCLUDING REMARKS

A *legal framework* for action to eliminate discrimination on the basis of disability and to break down barriers so as to positively promote the inclusion of disabled persons in all aspects of society is now provided by international and national provisions, but it is not enough to reach these goals.

It is still necessary to make a *cultural change* in the way disability issues are considered and to progress further along the pathway towards the dignity of decent work in an inclusive labour market.

In this perspective, it is essential to underline first of all the importance of *information campaigns* about the rights and duties of people with disabilities, employers and other key stakeholders under the law, and the policy provisions that have been introduced at national and international level.

Moreover, the involvement of *organizations representing people with disabilities* is of crucial relevance. By consulting them policy makers will be able to profit from the expertise that exists in these communities and this will help to ensure the effectiveness of any law and policy that is eventually adopted.

The UN CRPD requires that persons with disabilities and their representative organizations are involved in policy-making and the implementation of the Convention. Thus, according to Article 4, "States Parties shall closely consult with and actively involve persons with disabilities through their representative organizations". In addition, the UN Convention stipulates that States Parties must promote participation of persons with disabilities in non-governmental organizations in general, and representative organizations of persons with disabilities specifically, under Article 29, on participation in political and public life as well as Article 33, on national implementation and monitoring.

In recent years, several countries have gone beyond merely consulting with disabled people's organizations regarding the drafting of legislation, to directly involve them in the business of representing the concerns of people with disabilities through participatory processes. "Such active involvement is necessary to redress and counteract the under-representation and lack of power of the group in question"[43].

[43] M. VENTEGODT LIISBERG, "Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective", in L. WADDINGTON, G. QUINN, E. FLYNN (eds.), *European Yearbook of Disability Law*, vol. 4, Intersentia, 2014.

Notwithstanding the fact that a similar role could be played by *trade unions* in the workplace, their action is not really so significant. Collective bargaining could be an appropriate mechanism to promote equal opportunities, as the social partners are close to social reality and this proximity should facilitate reaching these aims. However, collective bargaining usually either does not regulate the recruitment of disabled person at all or it does it in a very marginal way. Collective agreements more often address topics that are only partly related to disability issues, such as health and safety at work, sick leave and rehabilitation of employees returning to work after sick leave, work-life balance measures for the disabled or their caregivers. The social partners are much more interested in dealing with these issues than in bargaining for measures to promote the access of the disabled to the labour market. Even in France, where the 2005 Act established an obligation to negotiate measures relating to the employability and job retention of workers with disabilities (Article L.2242-3 of the Labour Code), notwithstanding the incentive effect of the law on the signing of collective agreements, it is not easy to find information about the qualitative content of these agreements[44].

Organizations representing people with disabilities can also make valuable contributions by investigating the strengths and weaknesses of equal employment opportunity policies and law. The task of *monitoring* compliance can be partly carried out by these bodies. They lack, however, the authority – and often the resources – to investigate complaints and measure compliance by individual employers, as a result of which the task of monitoring cannot be solely left to these bodies.

Indeed, the effectiveness of an equal employment law and regulations to implement these laws also depends on the availability and accessibility of *judicial and/or administrative procedures* to individuals. Individuals, and those who represent their interests, must be enabled to enforce the principle of non-discrimination or to claim appropriate compensation through individual cases or group actions taken before the courts.

In most countries, Human Rights Commissions, Equal Opportunity Commissions and Disabilities Commissions have been established to promote and protect human rights, equal treatment law and the rights of people with disabilities.

People with disabilities have the right to work, but they must be given the means to enable them to exercise that right.

Education is one of the key determinant factors in the struggle against inequalities, social exclusion and poverty. There is a need to promote inclusion in education for persons with disabilities in order to mitigate the clear disadvantage they

[44] See S. LAULOM in this issue.

suffer in this field, which in turn hinders their subsequent inclusion in the labour market. Education systems, at all level, should develop flexible curricula in order to ensure the possibility of individual educational paths for all students with disabilities. Such educational paths should include non-academic and vocational activities.

For persons with a disability, *professional training* – under qualified instructors, and leading if possible to some form of recognized certification – is an essential passport to gaining employment. This is why a national policy on *vocational rehabilitation* and employment of disabled persons, as called for in ILO Convention No. 159 of 1983, is so essential.

Priority in vocational training policy and provisions, particularly in times of high unemployment, needs to be given to the most vulnerable if they are not to become further disadvantaged in the labour market. This is the aim of the above mentioned EU Youth Guarantee, for instance, that requires Member States to tailor services to the needs of beneficiaries, taking into consideration "their diverse backgrounds (due in particular to poverty, *disability*, ...)". It would be interesting to develop a further analysis on the implementation of this scheme expected at national, regional and local level.

Many women and men with disabilities are still unable to find decent jobs, however, even when they have completed training, and frustration and a decline in aspirations can set in. Discouraged by discriminatory barriers and mistaken assumptions about their capacity to work, many withdraw from an active search for jobs, and rely either on disability benefits where these exist, or accept low value-added work in the informal economy, with support provided by their families and community.

To overcome these situations and modify these behaviours, equal employment opportunities policies for people with disabilities should concentrate not only on access to work but also promote career patterns. The practice of *disability management* in the workplace, undertaken in a coordinated effort by workers' representatives and management, constitutes a fundamental tool for this purpose.

As this research has shown, all legal instruments and policies adopted at national level – the quota system which prevails in continental Europe, anti-discrimination legislation highly developed in Britain and active labour market measures mainly provided for in northern Europe – have their pros and cons. To achieve greater effectiveness all these tools must be used together, because only with a synergic approach can the different forms of disability be properly addressed.

As explained in the OECD (2010), *Sickness, Disability and Work: Breaking the Barriers*, "helping people to work is potentially a win-win policy: it helps people to avoid exclusion and to have higher incomes while raising the prospect of more effective labour supply and higher economic output in the long term". In other words, countries around the world are recognizing that people with disability represent a potential, that they can offer a valuable contribution to the national economy and, at the same time, that their employment reduces the cost of disability benefit. Therefore, the issue of social and economic participation of people with disabilities will become an increasingly important policy issue in years to come.

Carla Spinelli
Assistant Professor of Labour Law
University of Bari Aldo Moro, Italy
carla.spinelli@uniba.it