

**XXIII Meeting of European Labour Court Judges**  
**8-9 October 2015**  
**Stockholm, Sweden**

**NATIONAL REPORTS**  
**QUESTIONNAIRE 1**

**Workers with disability, including the question of the influence of UN and ILO  
conventions on national legal orders**

**General reporter: Judge Gyulavári Tamás, National Labour Court of Hungary**

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## **Belgium**

**Report by Justice Koen Mestdagh, Member of the Labour Chamber, Court of cassation,  
Belgium**

### **1. GENERAL LEGAL FRAMEWORK**

#### *The effect of international instruments*

##### **1.1 Has your country ratified the UN CRPD (date and form of ratification)?**

Belgium has signed the UN CRPD and the Optional Protocol to this convention on 30 March 2007 and has ratified both entirely on 2 July 2009, entering into force internally as from 1 August 2009.

##### **1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?**

Yes

(b) When and how was it implemented (formal issues)?

The Directive was originally transposed by Federal Act of 25 February 2003. As a result of an infringement proceeding due to non-conformity, launched by the Commission, a new Federal Act was adopted on 10 May 2007, hereafter the Discrimination Act, but there still is an infringement proceeding due to non-conformity with the Directive pending.

(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?

The obligation of reasonable accommodation, the equation with discrimination of failure to provide reasonable accommodation, the partial reversal of the burden of proof and the sanctions described infra are all significant changes resulting from the implementation of the Directive.

1.3 What other relevant international treaties, ILO Conventions shall be applied to your country?

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*National legal framework*

1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!

Cfr. question 1.2 (c)

1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?

The aforementioned Discrimination Act. The regions have also adopted regional legislation containing similar provisions, e.g. the Flemish Decree of 10 July 2008 holding a framework for the Flemish policy on equality of opportunities and equal treatment.

1.6 What role is there for collective agreements regarding the protection of workers with disability?

Since the Directive and the Discrimination Act both have an imperative character, there isn't really room for collective agreements to play a role.

Nevertheless have the social partners concluded two national collective agreements within the National Labour Council: the CLA nr. 95 of 10 October 2008 concerning the equal treatment in all phases of the labour relation and the CLA nr. 99 of 20 February 2009 concerning the remuneration level of disabled workers.

The CLA nr. 95 determines that the principle of equal treatment has to be observed during the entire labour relation, including employment, the conditions for access to work, the labour conditions and the modes of termination.

The CLA nr. 99 determines that disabled workers are guaranteed a remuneration that is at least equal to the minimum wages valid on inter-professional or sectoral level or on the level of the undertaking.

Thus both CLA's are merely statements and offer no added value to the provisions of the Directive and the Discrimination Act.

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

### 2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

The notions "*disability*" and "*disabled person*" are not defined in Belgian national labour law.

### 2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find an uniform legal disability definition regarding the employment protection ?

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### 2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]) had any influence on the labour law definition of disability?

Since there is no labour law definition, the Belgian judges are obliged to read the notion "disability" in accordance with the jurisprudence of the CJEU.

### 2.4 How is disability required to be proven/certified in employment litigation?

It can be proven by all means, but normally the claimant will produce a medical certificate and if it is contested, the judge will appoint a medical expert to examine the claimant, make a report and give his opinion to the judge.

## 3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### 3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?

No

3.2 Is there any special protection of persons with disability against termination of employment?

No

3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?

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#### 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

*Anti-discrimination law framework in employment matters*

4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?

No

4.2 Which aspects of employment are covered by these special provisions?

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*Reasonable accommodation*

4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?

The refusal to provide reasonable accommodation for disabled persons is considered as discrimination (article 14 Discrimination Act). Reasonable accommodation is defined by article 4, 12°, Discrimination Act accordingly to article 5 of the Directive.

(b) What is the sanction of breaching this obligation?

cf. next question

(c) Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?

The answer to both questions is yes.

4.4 Has any provision and/or practice on reasonable accommodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases *Ring* and *Z.*)?

The aforementioned provisions of the Discrimination Act were introduced as a result of implementing the Directive. They haven't been amended as a result of the UN CRPD or the jurisprudence of the CJEU.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

#### 5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (actio popularis)? Are they eligible to this with or without the consent of the concerned persons?

Yes, but if the victim of the alleged discrimination is an identified natural person or law person, the claim is only admissible if they can prove that they have obtained the consent of the victim.

#### 5.2 (a) What remedies and forums are available in cases of alleged discrimination against persons with disabilities?

Belgium has created an inter-federal Centre for Equality of Opportunities and Combat against Discrimination and Racism, hereafter CEOCDR, that has the competence to investigate complaints concerning inter alia discrimination against persons with disabilities. The CEOCDR has also the right to initiate a legal procedure on behalf of victims of discrimination or can intervene in a procedure initiated by such victim.

According to article 15 Discrimination Act all provisions contrary to this Act or clauses whereby contracting parties renounce the rights guaranteed by it are null and void. Discrimination can sometimes be repaired on basis of this provision. E.g. if a contract would held lower wages for disabled persons, this clause would be null and void and the disabled persons concerned will be entitled to get paid the normal wages.

According to article 18 Discrimination Act the victim of discrimination can claim damages on basis of contractual or extra contractual liability. He has the choice between claiming a lump sum or the real damages in which case he has to prove the amount of his damages. The lump sum for material and moral damages in case of discrimination in employment matters is in principle 6 months of wages. It is 3 months of wages if the employer can prove that he would have treated the victim the same way on non-discriminatory grounds. If the material damage is repaired in application of the sanction determined by article 15 (nullity), the victim can only claim moral damages. The lump sum for the moral damages is 650 euro. It is 1300 euro if the employer can't prove that the same measures would have been taken on non-discriminatory grounds or in special circumstances such as the extreme gravity of the moral damages.

According to article 19 Discrimination Act the judge can on demand of the victim, the CEOCDR or the public prosecutor, condemn the discriminator to pay a daily fine for delay in compliance if the discrimination has not ended.

According to article 20 Discrimination Act the president of the Labour Tribunal can on demand of the victim, the CEOCDR or the public prosecutor, establish the existence of discriminatory behaviour and order the cessation. This procedure is as in summary proceedings.

**(b) Which are the most effective and/or most common sanctions?**

The most common sanction will undoubtedly be the payment of a lump sum for material and moral damages.

**5.3 Is there any role for mediation in such cases?**

Yes, the CEOCDR will at first always try to mediate.

*Burden of proof*

**5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?**

According to article 28 Discrimination Act it is for the respondent to prove that there has been no breach of equal treatment if the plaintiff can present facts from which it may be presumed that there has been discrimination (§ 1). Some examples of facts from which it may be presumed that there has been direct (§ 2) or indirect (§ 3) discrimination are given.

**(b) How are the burden of proof provisions applied in court procedures?**

As regulated (cf. question 5.4 (a)). If not, the Court of Cassation will annul the judgment when it is appealed.

**5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?**

Yes, the procedural provisions of the Discrimination Act are the result of the implementation of the Directive.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

### 6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?

The Court of Cassation can only control the legality of the judgments of the lower courts. The Belgian Constitution doesn't allow us to play an activist role. The Court of Cassation isn't a pseudo legislator.

### 6.2 What is the tendency observed in your country's case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?

There is no visible trend. At the Court of Cassation we have one case pending, the first to my knowledge, and I couldn't find any references to case law on this matter in the juridical literature.

### 6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?

The sole case I know of is about access to a job.

### 6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision!

No

### 6.5 Please, describe the most important court decisions (test cases) in this field!

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## Finland

Report by Jorma Saloheimo, President of the Labour Court

### 1. GENERAL LEGAL FRAMEWORK

#### *The effect of international instruments*

#### 1.1 Has your country ratified the UN CRPD (date and form of ratification)?

Finland has signed the UN Convention on the Rights of Persons with Disabilities on 30.3.2007. The ratification process of the Convention has, however, been delayed but is underway. So the Convention was approved in the plenary session of Parliament on 3 March 2015.

Parliament required that the conditions of Article 14 of the Convention must be met in the

national legislation before Finland can ratify the Convention. In practice this means that provisions concerning restrictions to the individual autonomy of persons with disabilities must be duly laid down by law before Finland can commit to the Convention internationally by depositing its instruments of ratification with the UN Secretary-General. The Convention and its Optional Protocol shall enter into force on the thirtieth day following the date of the deposit of the instrument of ratification.

(a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?

As a Member State of the EU, Finland has this obligation.

(b) When and how was it implemented (formal issues)?

The Directive was transposed into Finnish law with a new statutory instrument, the Non-Discrimination Act (21/2004). The Act has recently been replaced with a new Act bearing the same name (1325/2014).

(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?

Already previously discrimination on the ground of disability was forbidden under the general non-discrimination rules of the Finnish Constitution (731/1999) and the Employment Contracts Act (55/2000). The Non-Discrimination Act introduced more detailed rules concerning for instance indirect discrimination, improving the access to employment and training of persons with disabilities, burden of proof, and remedies.

### 1.3 What other relevant international treaties, ILO Conventions shall be applied to you country?

The main international instruments to be mentioned here are the European Convention on Human Rights and the European Social Charter.

#### *National legal framework*

### 1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!

Absolutely the most important international instrument has been the Directive with its concrete and detailed regulations.

### 1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?

The most relevant regulations are included in the Non-Discrimination Act and concern the



equal treatment of disabled people not only in working life, but in the main in all private and public activities.

Another type of rules consists of those regulating the right of an employee to sickness leave and sickness allowance or pay. These are included mainly in the Employment Contracts Act.

In addition, there is a set of regulations, which seek to promote the employment, other work activity or rehabilitation of disabled persons. Such rules are included for instance in the Social Welfare Act (710/1982) and the Act on Special Care of Mentally Handicapped Persons (1116/1992). Municipalities and mental health care organizations are in charge of arranging these activities.

#### 1.6 What role is there for collective agreements regarding the protection of workers with disability?

The role of collective agreements is very important in the Finnish system of regulating the terms and conditions of work. However, provisions concerning special treatment of disabled workers are scarce in this field. Only the right to sickness leave and pay for the time of absence due to disability is commonly regulated in collective agreements.

Most collective agreements do not make a difference between workers fully able to work and disabled workers. In some cases, the application of the agreement as a whole or its provisions on pay are confined to workers fully able to work only.

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

#### 2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

There is no general definition of persons with disabilities in Finnish labour law.

#### 2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find an uniform legal disability definition regarding the employment protection ?

There is no legislative effort to find an uniform legal definition of disability. Specific definitions of, for instance, mental disability can be found in social law statutes (see above in 1.5).

There is a connection between disability and the employee's right to absence of work. In this regard, special attention may be drawn to the regulation of part-time absence due to sickness or other disability. Provisions on an employee's entitlement to a part-time sickness allowance are contained in the Sickness Insurance Act (364/1964). Under the Employment Contracts Act, the employee is entitled to part-time leave from work for the

time of the payment of the allowance. The purpose of a part-time absence due to disability is to support the employees in extending their working careers and their return to work on their own initiative. Such a part-time employment contract will be concluded based on a report on the employee's state of health.

2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]) had any influence on the labour law definition of disability?

No amendments in the Finnish legislation have been made in consequence of the case law mentioned above. The national courts are expected to take into account the rulings of the CJEU in a normal manner when they apply national rules. A factor which might mitigate the significance of the rulings is that under the Non-Discrimination Act, "state of health" is mentioned alongside with "disability" as a forbidden ground for discrimination.

2.4 How is disability required to be proven/certified in employment litigation?

As a main rule, it is for the employee to prove his or her disability when presenting any claim on this condition. For example, in cases concerning sickness leave pay, the employee must produce a medical certificate to prove his or her disability

### 3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?

There are no formal restrictions or obstacles in this regard. The person in question must, however, be competent to make a valid contract.

It is another matter that the work performed by these persons is not necessarily considered to fall within the criteria of an employment contract. This is the case especially when the work activity is organized by the municipality as a form of a social service and the work is done in sheltered work centres and work activity units. On the other hand, the person may work as employees in the open labour market as well as in work activities organized by mental health organizations for their members.

3.2 Is there any special protection of persons with disability against termination of employment?

Yes. Valid reasons for a termination of employment are defined in Section 2, Chapter 8 of the Employment Contracts Act. The general condition is that the termination is based on a proper and weighty reason. In the provision it is specifically provided that such a reason cannot be illness, disability or accident affecting the employee, unless the employee's

working capacity is substantially reduced thereby for such a long term as to render it unreasonable to require that the employer continue the contractual relationship.

There is substantial case law on the application of these conditions of termination.

### 3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?

As for the organization of working time, see the text above (2.2) on part-time sickness leave and allowance. The promotion of employment and arrangements of work activities for disabled persons have also been mentioned above (1.5 and 3.1).

## 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Anti-discrimination law framework in employment matters*

#### 4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?

Yes. They are included in the Non-Discrimination Act.

#### 4.2 Which aspects of employment are covered by these special provisions?

The Act covers all aspects of employment, such as recruitment conditions, employment and working conditions, personnel training and promotion, and termination of employment.

### *Reasonable accommodation*

#### 4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?

Yes. According to Section 15 of the Non-Discrimination Act, in order to foster equality, authorities, employers and persons arranging training shall where necessary take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance in their career. In assessing what constitutes reasonable, particular attention shall be devoted to the costs of the steps, the financial position of the person commissioning work or arranging training, and the possibility of support from public funds or elsewhere to cover the costs involved. The employer must upon request of a disabled person produce without delay a written account of the grounds of his action, if the person in question considers that denial of reasonable accommodation has involved discrimination in the context of recruitment or during employment.

(b) What is the sanction of breaching this obligation? Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?

One of the reforms introduced in the 2014 Non-Discrimination Act is that the denial of reasonable accommodation is classified as discrimination as such (Section 8, paragraph 2). Consequently, all provisions concerning discrimination are applicable in these cases as well.

4.4 Has any provision and/or practice on reasonable accommodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases *Ring* and *Z.*)?

The UN CRPD and the Directive have influenced the formulation of Section 15 of the Act, see above. The requirements of these instruments have been further explained in the Government Bill (no.19/2014) in which the Act was proposed.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (*actio popularis*)? Are they eligible to this with or without the consent of the concerned persons?

In general, *actio popularis* is not available in the Finnish legal order. One of the few exceptions is provided for in Sections 20 and 21 of the Non-Discrimination Act. According to these provisions, associations promoting equality can bring a discrimination case to a new special body, the National Discrimination and Equality Tribunal. The Tribunal may prohibit continued or repeated discrimination or victimisation and impose a conditional fine to enforce compliance with its injunctions and order payment of such a fine. This procedure is, however, not available in employment cases. Compliance with the terms of the Act in employment relationships is supervised by the occupational safety and health authorities, which can use similar kind of enforcement methods according to the relevant provisions of the law governing labour inspection.

5.2 (a) What remedies and forums are available in cases of alleged discrimination against persons with disabilities?

The main remedy available to a person who considers to have been discriminated against is the monetary compensation, provided for in Sections 23 and 24 of the Non-Discrimination Act. The compensation must be proportional to the nature and gravity of the offence. The upper limit of the compensation, 15.000 €, provided for in the old 2004 Act, has now been abolished. Payment of compensation does not preclude an injured party claiming damages under the Tort Liability Act (412/1974) or other legislation.

A claim for compensation must be presented in the regular district court.

Work discrimination is also a punishable act under Section 3, Chapter 47 of the Criminal

Code. According to the provision, an employer, or a representative thereof, who when advertising for a vacancy or selecting an employee, or during employment without an important and justifiable reason puts a applicant for a job or an employee in an inferior position because of, among other things, disability or state of health, shall be sentenced for work discrimination to a fine or to imprisonment for at most six months. This sanction is meant for severe cases of discrimination and presupposes intent of the offender.

As for the supervision duties of the Labour Inspection, see above in 5.1.

#### (b) Which are the most effective and/or most common sanctions?

This is hard to say, because there is no reported case law concerning discrimination on the ground of disability. I assume that the occupational safety and health authorities may have issued instructions on reasonable accomodation, when they visit work places for inspection.

### 5.3 Is there any role for mediation in such cases?

As in all civil law cases, mediation is available in regular courts in cases concerning compensation.

#### *Burden of proof*

### 5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?

The burden of proof is regulated in Section 28 of the Non-Discrimination Act along the lines of Art. 8(1) of the Directive. Thus, during the hearing of a discrimination case, the person who considers himself to have been a victim of discrimination must establish before a court of law or other competent authority information from which it may be presumed that the prohibition of discrimination has been infringed. Then it is for the defendant to demonstrate that the prohibition has not been infringed. This provision does not apply to criminal cases.

According to the established interpretation of the provision, the claimant must establish the existence of the discrimination ground and the disadvantage incurred, but not the causal link between the two. Then it is the defendant's duty to demonstrate the absence of any causality.

#### (b) How are the burden of proof provisions applied in court procedures?

There is no doubt that the burden of proof is applied as explained above.

### 5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?

Especially the Directive has strongly influenced the procedural provisions of the national Act.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

There are a few published discrimination judgments of the Supreme Court, but none of the concern disability. In principle, the Supreme Court has an important role in the guidance of the adjudication of the lower courts. But neither do the lower courts seem to have dealt with such discrimination cases. So it is not possible to observe any tendency here.

The only groups of disability related cases, handled both in the regular courts and the Labour Court, are those which concern termination of employment on the ground of sickness or other disability, and the right to sickness leave with pay. As the case law of the CJEU shows (see 2.3), the borderline between sickness and disability has become relative. This may in the future lead to combined actions, which are based on both unfair dismissal and discrimination on the ground of disability.

### Germany

Report by Dr. Regine Winter, Federal Labour Court of Germany

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments*

*1.1 Has your country ratified the UN CRPD (date and form of ratification)?*

*1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?*

*(b) When and how was it implemented (formal issues)?*

*(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?*

*1.3 What other relevant international treaties, ILO Conventions shall be applied to you country?*

**1.1** The Federal Republic of Germany signed the Convention and the Optional Protocol on 30 March 2007. The Approving Act (Zustimmungsgesetz), passed by the German Bundestag (German Parliament) with the consent of the Bundesrat (German Federal Council), entered into force on 1 January 2009. Germany ratified both the Convention and the Optional Protocol on 24 February 2009. The UN CRPD is in force in Germany since 26 March 2009.

In addition some structural information to which I will return later:

The "state point of contact" (Focal Point) pursuant to article 33 of the UN CRPD has been established at the Federal Ministry of Labour and Social Affairs (BMAS) and is responsible for matters relating to the implementation of the UN CRPD (<http://www.behindertenbeauftragte.de/EN/Englisch.html?nn=2950120>). Some of the Länder<sup>1</sup> have appointed focal points on their level, others work with a from their point of view comparable structure.

The "state coordination agency" is located at the Office of the Federal Government Commissioner for Matters relating to Disabled Persons and is meant to facilitate the implementation of the measures developed at the Focal Point in various areas and at different levels and shall actively integrate persons with disabilities and the civil society at large into the implementation process.

In 2008 the German Institute for Human Rights (DIMR) has been designated to establish the "independent agency" (Monitoring Mechanism), whose tasks is, inter alia, to come up with recommendations and proposals regarding the implementation of the UN CRPD as well as the counselling of the Federal Government, the German Parliament or other institutions on matters covered by the Convention.

**1.2 (a)** Germany is bound by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

**(b)** The federal General Anti-Discrimination Act/General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz/AGG) of 14th August 2006 serves to transpose into German law: Directive 2000/78/EC, Directive 2000/43/EC, Directive 2002/73/EC and Directive 2004/113/EC.

**(c)** Irrespective of the transposition of Directive 2000/78/EC, German law contained already before several relevant legal provisions relating to disabled persons.

As far as the field of work is concerned, before the transposition of Directive 2000/78/EC not any disability but only a "*severe disability*" has been recognized and covered by German law. Under the 'Sozialgesetzbuch IX' (SGB IX, "Rehabilitation und Teilhabe behinderter Menschen") - German Social Code, Part IX (Rehabilitation and Participation of Disabled Persons) - a "*severe disability*" means a degree of disability (Grad der Behinderung/"GdB") of at least 50 percent according to the German "GdB" scale. There is a possibility for recognition for persons with a degree of 30 or 40 percent.

Persons with *severe* disability have specific rights. Employers are obliged to examining whether vacant positions can be filled with severely disabled persons. Employers with at least 20 workplaces have to employ severely disabled persons in at least 5 percent of their workplaces (or have to pay a compensatory fee). Special obligations apply to public services/public authorities, for instance to invite all severely disabled applicants who are

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<sup>1</sup> Land/Länder: Federal states, due to the federal structure of Germany.

qualified for the job for a job interview (failure is in case of legal dispute often regarded as indicator for discrimination).

If employed, *severely* disabled persons have a claim on their employer to a job which corresponds to their abilities, a working area equipped with assistive technologies and a place of work with disability-friendly furnishings.

The transposition of Directive 2000/78/EC brought the breakthrough that all disabled persons are covered by its general framework for equal treatment in employment and occupation. In addition, the specific rights described above for (only) severely disabled persons are maintained.

The UN CRPD was ratified in 2009 on the premise that it would not give rise to any need for legislative action; these perceptions have not changed significantly at government levels. Only sporadic legal assessments have been carried out (in some of the Länder, not on the federal level), a need for legislative action has not been checked systematically. In this regard the implementation of the UN CRPD is left more or less to the persons affected by bringing legal action. This is the usual approach of German anti-discrimination law, not only in the field of workers with disabilities.

The UN Committee on the Rights of Persons with Disabilities (UN CRPD Committee) recommends that the Federal Republic of Germany guarantees that: All relevant existing domestic laws are examined by an independent body of experts and harmonized with the Convention accordingly; All future laws and policies are aligned to the Convention; Existing and future legislation incorporate measures to ensure that the rights of persons with disabilities under the Convention are invocable before the courts, with concrete effective remedies (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

### **1.3 Other relevant international treaties, ILO Conventions which apply to Germany**

UN:

*International Convention on the Elimination of All Forms of Racial Discrimination*

*International Covenant on Civil and Political Rights*

*Optional Protocol to the International Covenant on Civil and Political Rights*

*Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*

*International Covenant on Economic, Social and Cultural Rights*

*Convention on the Elimination of All Forms of Discrimination against Women*

*Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*



*Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*  
*Convention on the Rights of the Child*  
*Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*  
*Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*  
*Optional Protocol to the Convention on the Rights of the Child on a communications procedure*  
*International Convention for the Protection of all Persons from Enforced Disappearance*  
(<http://indicators.ohchr.org/>)

ILO:

Ratifications for Germany: 85 Conventions and 1 Protocol  
([http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102643](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102643); July 2015):

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*C029-Forced Labour Convention, 1930*

13 Jun 1956 In Force

*C087-Freedom of Association and Protection of the Right to Organise Convention, 1948*

20 Mar 1957 In Force

*C098-Right to Organise and Collective Bargaining Convention, 1949*

08 Jun 1956 In Force

*C100-Equal Remuneration Convention, 195*

08 Jun 1956 In Force

*C105-Abolition of Forced Labour Convention, 1957*

22 Jun 1959 In Force

*C111-Discrimination (Employment and Occupation) Convention, 1958*

15 Jun 1961 In Force

*C138-Minimum Age Convention, 1973, Minimum age specified: 15 years*

08 Apr 1976 In Force

*C182-Worst Forms of Child Labour Convention, 1999*

18 Apr 2002 In Force

- Governance Conventions (Priority): 4 of 4

([http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102643](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102643); July 2015)

## **National legal framework**

*1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!*

*1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?*

*1.6 What role is there for collective agreements regarding the protection of workers with disability?*

**1.4** In comparison to other international legal instruments, the UN CRPD received in Germany a particular supporting public promotion (including training). This attitude of promotion has been quite contrary to the situation when Germany had to transpose EU-anti-discrimination directives (inter alia Directive 2000/78/EC). At that time in Germany no supporting atmosphere could be observed towards the EU-legal instruments combatting discrimination, partly the the opposite has been the case. An explanation of the reasons for the differences is not obvious, even if the development of knowledge in the course of time is taken into account.

As mentioned (see point 1.2.c), the Federal Republic of Germany had already legal provisions relating to disabled people in the field of labour before the above mentioned international legal instruments; but the UN CRPD and also the AGG as transposition of, inter alia, Directive 2000/78/EC (see point 1.2.b) have increasing impact on the national legal system in relation to workers with disability (see also point 1.2.c: breakthrough that all disabled persons are covered, not only "severely disabled"). Especially pursuant to the UN CRPD, discussion and program development took place, policies and various measures have been adopted, such as a nationwide public campaign by the Federal Ministry of Labour and Social Affairs, leading industry associations, the trade union federation DGB, the Federal Employment Agency, associations of persons with disabilities, the Federal Government Commissioner for Matters relating to Disabled Persons and others to promote and facilitate access to company training and employment for disabled people ("inclusion"). In the labour courts the AGG (see point 1.2.b) as transposition of, inter alia, Directive 2000/78/EC, is subject matter in a significant number of cases; the UN CRPD is increasingly present.

**1.5** Of particular importance are the AGG (see point 1.2.b) and the SGB IX (see point 1.2.c), furthermore article 3 (3) sentence 2 of the German Basic Law (Grundgesetz/GG): "No person shall be disfavoured because of disability") and the Act on Equal Opportunities of Disabled People (Behindertengleichstellungsgesetz, BGG). The latter regulates Equal Treatment of disabled persons in the area of public law (to the extent that the federal public law is concerned): inter alia, accessibility of the built environment and barrier-free access to structural and other facilities, means of transport, technical basic commodities, information processing. According to section 15 of the BGG it is the task of the Federal

Government Commissioner for Matters relating to Disabled Persons (see point 1.1) to see to it that the responsibility of the Federal Government to ensure equal living conditions for people with or without disabilities, is complied with in all areas of social life. A reform of the BGG as future "Federal Participation Act" is a topic of discussion.

The UN CRPD Committee is concerned that both existing and new legal provisions at the federal and Land levels are not always in line with the Convention (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

- 1.6** Collective agreements have to be in accordance with the principle of non-discrimination. Enhancement by collective bargaining agreement is possible. For instance, *severely* disabled workers (see point 1.2.c) are entitled to an additional five days leave by national legislation; another additional leave by applicable collective bargaining agreement is possible and not unusual.

## **2. THE DEFINITION OF DISABILITY IN NATIONAL LAW**

*2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?*

*2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find an uniform legal disability definition regarding the employment protection ?*

*2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases Chacón-Navas [C-13/05], Ring and Skouboe Werge [C-335/11 and C-337/11], Kaltoft [C-354/13] and Z. [C-363/12]) had any influence on the labour law definition of disability?*

*2.4 How is disability required to be proven/certified in employment litigation?*

**2.1** Germany defined the legal concept of "disability" in 2001, long before the CRPD was adopted:

A person is considered disabled if his or her bodily function, mental capacity or emotional health deviates with a high degree of probability by at least six months from the condition typical for a person of that age and is therefore impaired in his or her participation in social life (section 2 [1] sentence 1 SGB IX [SGB IX: see point 1.2.c]; section 3 BGG [BGG: see point 1.5] and according to the grounds of the Law to section 1 AGG [AGG: see point 1.2.b]).

According to the grounds of the SGB IX the legislator's intention has been to be in accordance with the development of the International Classification of Functioning, Disability and Health (ICF) drawn up by the World Health Organisation, characterised by participation.

## 2.2 There are no different definitions in various employment laws on the federal level.

Some of the Länder have adapted or approximated the definition of disability in various ways to the wording of article 1 CRPD during the course of revising their acts on equal opportunities for persons with disabilities.

## 2.3 The above mentioned (see point 2.1) national definition on the federal level has been adopted in 2001 with section 2 [1] sentence 1 SGB IX and thus before the date of the UN CRPD and the dates of the judgments *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]).

Referring to article 8 (1) of Directive 2000/78/EC ("Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive"), the Federal Labour Court of Germany (Bundesarbeitsgericht - BAG) recently held that the definition on the national level is different from the definitions of the UN CRPD and the CJEU/ECJ case law. Where these definitions are different, the respective more favourable to the protection of the principle of equal treatment must be applied (BAG 19.12.2013 – 6 AZR 190/12 – BAGE 147, 60). Differences mentioned in the judgement in particular:

- participation
  - "in professional life" [*Ring and Skouboe Werge*, paragraph 38],
  - "in society" [UN CRPD, national law];
- impairment
  - "long-term" [UN CRPD, *Ring and Skouboe Werge*, paragraph 39],
  - deviation "with a high degree of probability by at least six months" [national law],
  - may hinder" [UN CRPD, *Ring and Skouboe Werge*, paragraph 38],
  - "is impaired" [national law];
- "age-typical constraints" considered as included or excluded
  - included in UN CRPD, *Ring and Skouboe Werge*,
  - excluded in national law.

The German Institute for Human Rights (DIMR, see point 1.1) finds that Germany does not, or does not satisfactorily, reflect the open and dynamic understanding of disability that underlies the CRPD, either in its specified definition of disability or in the existing provisions as a whole. The existing provisions are open to interpretation, but in practice the possibilities are neither uniformly nor satisfactorily exploited. There can and should be a much sharper focus on the human rights approach and understanding of disability as laid

down by the CRPD, both in social policy and in associated initiatives (laws, policies, strategies). (Parallel Report, March 2015, see below under "reference")

The UN CRPD Committee is concerned that the situation in Germany is not always in line with the UN CRPD and recommends that Germany ensures that "Both the federal Government and the Länder revise the legal definition of disability in laws and policies with a view to harmonizing it with the general principles and provisions in the Convention, particularly in matters relating to non-discrimination and full transition to a human rights-based model" (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

So far there has been no push for a legislative amendment.

- 2.4** Proof of disability: Unproblematic for persons with an officially (by the "Versorgungsamt"/"pension office"/"maintenance office") certified severe disability. In all other cases participation impairments will be considered on a case by case basis (BAG 22.10.2009 – 8 AZR 642/08 – paragraph 21).

### **3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

*3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?*

*3.2 Is there any special protection of persons with disability against termination of employment?*

*3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?*

- 3.1** With a reform of the German disability law in 2001 the paradigm shifted away from the principle of welfare towards (more) autonomy and participation, including permanent participation – at least as permanent as possible – in working life. This also applies to persons with mental disability. Many person with disability undergo vocational training or undertake work "adapted to their condition" in "workshops"/"sheltered workshops" (segregation, outside of the general labour market).

The German Institute for Human Rights (DIMR, see point 1.1): "The growth in the number of persons employed in workshops has continued unabated. In 2013 this affected around 300,000 people. Furthermore, the workshop system is exclusive: access is granted only to those persons who are capable of producing a minimum amount of economically productive work output. The law stipulates that workshops should prepare people for the primary labour market; however, transition to the primary labour market is only successful for one percentage of those employed in workshops. ... Since the CRPD came into force, and in light of the demand for an inclusive labour market, there has been a heated debate

in Germany as to whether, and under what conditions, sheltered workshops for persons with disabilities operating parallel to the primary labour market and as part of a labour and employment structure are permissible with respect to human rights.” (Parallel Report, March 2015, see below under “reference”)

This situation is not in accordance with the UN CRPD, where an inclusive labour market is demanded. DIMR: “the workshop system ... does not offer the same opportunity to earn one’s livelihood as the general labour market. The differences are evident in the fact that attending a workshop is not considered to be employment, and for this reason is not covered by the general minimum wage introduced ... in 2015.” (Parallel Report, March 2015, see below under “reference”)

The UN CRPD Committee is concerned about segregation in the labour market, financial disincentives for persons with disabilities preventing their entry or transition to the open labour market and the fact that segregated, sheltered workshops fail to prepare workers for or promote transition to the open labour market. The UN CRPD Committee recommends that Germany provides regulations that effectively create an inclusive labour market in accordance with the Convention by creating employment opportunities in accessible workplaces, in line with general comment No. 2 of the Committee, in particular for women with disabilities, phasing out sheltered workshops through immediately enforceable exit strategies and timelines and incentives for public and private employment in the mainstream labour market, ensuring that persons with disabilities do not face any reduction in social protection and pension insurance currently tied to sheltered workshops and collecting data on the accessibility of workplaces in the open labour market. (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under “reference”)

In the last few years, perhaps in the light of the UN CRPD, the view has gained some ground that with professional support, counselling and monitoring more success in the general labour market is possible.<sup>2</sup>

Both, work in “sheltered workshops” and work in the general labour market assume the conclusion of a contract, in case of legal incapacity (which may or may not be the case regarding persons with mental disabilities) concluded by a person’s legal representative. The UN CRPD Committee is concerned that the legal instrument of guardianship (“*rechtliche Betreuung*”), as outlined in and governed by the German Civil Code is incompatible with the Convention.<sup>3</sup> The UN CRPD Committee recommends that Germany eliminates all forms of substituted decision-making and replaces it with a system of supported decision-making, in line with the Committee’s general comment No. 1 (2014) on

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<sup>2</sup> For instance „nationwide public campaign” (see point 1.4 above).

<sup>3</sup> Germany abolished statutory custodianship (“*Vormundschaft*”) for adults in 1992 (which formally deprived the person of legal capacity), replacing it with the instrument of guardianship (“*rechtliche Betreuung*”), as outlined in and governed by the German Civil Code (BGB).

equal recognition before the law, that Germany develops professional quality standards for supported decision-making mechanisms and, in close cooperation with persons with disabilities, provides training on article 12 of the UN CRPD in line with the Committee's general comment No. 1 at the federal, regional and local levels for all actors, including civil servants, judges, social workers, health and social services professionals and the wider community. (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference")

**3.2** Section 85 SGB IX (SGB IX: see point 1.2.c) offers special protection against termination, but only for *severely* disabled persons. After six months of employment, the approval of the competent authorities (Integration Office/Integrationsamt) is necessary, otherwise the dismissal is ineffective. Attempts are made by the Integration Office to maintain workplaces for severely disabled persons by support.

**3.3** *Severely* disabled workers (see point 1.2.c) are entitled to an additional five days leave by national legislation (see point 1.6). On request severely disabled workers will be released from extra work (section 124 SGB IX). Employers have to provide reasonable accommodation (see points 1.2.c, 4.3/4.4).

Additional financial benefits from the Integration Office (Integrationsamt), for instance assistive technologies or job assistance. Entitlement to different kinds of assistive technologies to compensate for a restricted capacity to move, see or hear.

## **4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

### ***Anti-discrimination law framework in employment matters***

*4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?*

*4.2 Which aspects of employment are covered by these special provisions?*

**4.1** Provisions on the prohibition of discrimination against persons with disabilities in the field of employment in the Federal Republic of Germany:

- Persons with disabilities are protected against discrimination at the federal level by article 3 of the German Basic Law (GG, see point 1.5), by the federal General Anti-Discrimination Act (AGG, see point 1.2.b and below "extract"), transposing European standards including Directive 2000/78/EC into German law, and the Act on Equal Opportunities for Persons with Disabilities (BGG, see point 1.5). These are supplemented at the Länder level by equal opportunities acts.
- Extract from the AGG:

*Section 1 AGG - Purpose:*



*"The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation."*

*Section 7 - Prohibition of Discrimination:*

*"(1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under section 1; this shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds referred to under section 1."*

**4.2** All aspects of employment are covered by the AGG (section 2 AGG, see below under "reference" link to the text translated in English).

Women with disabilities (article 6 UN CRPD):

The UN CRPD Committee is concerned about insufficient action in Germany to prevent and combat multiple discrimination of women and girls with disabilities, particularly migrants and refugees, and the inadequate collection of relevant data. The Committee recommends that Germany implements programmes for women and girls with disabilities, particularly migrant and refugee women and girls, including affirmative action to eliminate discrimination in all areas of life; recommended is also systematically collect data and statistics on the situation of women and girls with disabilities with indicators to assess intersectional discrimination, and include analytical information in this regard in its next periodic report (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

### ***Reasonable accomodation***

*4.3 (a) Has the reasonable accomodation of the special needs of persons with disabilities been regulated in the field of employment?*

*(b) What is the sanction of breaching this obligation?*

*(b) Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?*

*4.4 Has any provision and/or practice on reasonable accomodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases Ring and Z.)?*

### **4.3 and 4.4:**

Current legislation does not contain a definition of reasonable accommodation and that the denial of such accommodation is considered as a form of discrimination. In this regard, article 5 of Directive 2000/78/EC and the relevant provisions of the UN BRK are not transposed in the Federal Republic of Germany. There is no legislative implementation of the requirement for all employers to make reasonable adjustments, where needed in a



particular case, *for all* persons with disabilities. Until now this failure has not been subject of a dispute at the European Court of Justice. This may seem surprisingly in view of the fact that the European Commission successfully sued Italy for a similar omission (see ECJ Case C-312/11 Commission v Italy [2013] EU:C:2013:446).

A specific sanction with regard to the failure to fulfil the obligation of reasonable accommodation is not provided in labour law and anti-discrimination law (see also point 5.2.b).

The UN CRPD Committee is concerned that the understanding of how reasonable accommodation can be implemented is still largely underdeveloped with respect to administration, jurisdiction and social services provision in Germany. There is no fixed schedule for implementing legal requirements at either the federal or Land levels. The UN CRPD Committee recommends that Germany develops protection against discrimination for persons with disabilities, including intersectional discrimination, as a comprehensive, cross-cutting right in domestic legislation, including at the Land level, and collect relevant data on case law; that Germany takes steps to ensure that reasonable accommodation provisions are enshrined in law as an immediately enforceable right in all areas of law and policy, with an explicit definition in the law in line with article 2 of the Convention; that the denial of reasonable accommodation is recognized and punishable as a form of discrimination and recommends to undertake systematic training on reasonable accommodation at the federal, Land and local levels across all sectors and with the private sector (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

The judiciary has to bridge the gap in the protection of the rights derived by individuals from European Union rules.<sup>4</sup> The Federal Labour Court of Germany (Bundesarbeitsgericht - BAG) has consistently recognised that in the absence of specific national transposing legislation other legal provisions (section 241 [2] German Civil Code/BG<sup>5</sup>, section 8 [1] AGG<sup>6</sup>) are to be understood to include the obligation for employers to provide reasonable accommodation for people with disabilities (*in particular BAG 19.12.2013 - 6 AZR 190/12 - paragraph 53; BAG 22.5.2014 - 8 AZR 662/13 - paragraph 42; BAG 26.6.2014 - 8 AZR 547/13 - paragraph 53; see point 6.4*). In case of a "severe disability" employers are pursuant to section 81 (4) sentence 1 no. 4 SGB IX (SGB IX: see point 1.2.c) obliged to a - if

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<sup>4</sup> In any event, an interpretation, by national courts, of the provisions of domestic law in accordance with those of a directive cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, in particular, ECJ Case C-281/11 Commission v Poland [2013] ECLI:EU:C:2013:855, paragraph 105 and case-law cited).

<sup>5</sup> Section 241 (2) German Civil Code/BGB, "Duties arising from an obligation": „An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party."

<sup>6</sup> Section 8 (1) AGG: „A difference of treatment on any of the grounds referred to under Section 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

possible - disability-friendly reshaping of the organisation of work<sup>7</sup> (*in particular BAG 14.3.2006 - 9 AZR 411/05 - paragraph 26*). This provision also has to be interpreted in a way which is consistent with EU law, especially with article 5 of Directive 2000/78 and the scope of "reasonable accommodation" as set forth in the UN CRPD.

The failure to cope with the scope of "reasonable accommodation" as set forth in the UN CRPD has to be taken into consideration by the courts when legally assessing the facts of a case. The general sanctions for anti-discrimination law violations (in particular section 15 AGG; see point 5.2.b) have to be taken into account.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

*5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (actio popularis)? Are they eligible to this with or without the consent of the concerned persons?*

*5.2 (a) What remedies and forums are available in cases of alleged discrimination against persons with disabilities?*

*(b) Which are the most effective and/or most common sanctions?*

*5.3 Is there any role for mediation in such cases?*

**5.1** In the Federal Republic of Germany a corresponding "individual" standing is in general required to bring proceedings. There are only a few exceptions, notably a "real" actio popularis in the German Land of Bavaria where a member of the public may challenge a Bavarian law under the Bavarian Constitution. Furthermore, actio popularis in the special form of "action by associations"/"representative action" is possible, to different extents, in the specific fields of environmental law, nature conservation legislation, animal welfare legislation, consumer protection legislation and unfair competition legislation and has become partially more relevant.

In the field of anti-discrimination law instruments to protect persons with disability a certain "action by associations"/"representative action" is possible, but only in a very reduced form. According to section 13 BGG (BGG: see 1.5) associations of/for persons with disabilities who are recognised (by the the Federal Ministry of Labour and Social Affairs) may bring certain types of action before administrative and social courts (not labour courts) concerning, inter alia, the obligation of the Federal Government to ensure accessibility.

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<sup>7</sup> If employed, severely disabled persons have a claim on their employer to a job which corresponds to their abilities, a working area equipped with assistive technologies and a place of work with disability-friendly furnishings (see point 1.2).

Also of importance in the field of anti-discrimination law instruments to protect persons with disability is the possibility of anti-discrimination organisations to be authorised under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings, section 24 (2) AGG (AGG: see point 1.2.b).

Pursuant to Art. 11 Labour Court Law (Arbeitsgerichtsgesetz/ArbGG), legal protection provided by the trade unions for their members in labour law disputes is legally recognised (also in the social courts).

Class-action is not recognized in German law.

The National CRPD Monitoring Body, the German Institute for Human Rights (DIMR, see point 1.1) acts as *amicus curiae*. Within the framework of its protective function, its activities extend to individual cases in the form of *amicus curiae* statements submitted to the courts. DIMR only produces such statements when cases of fundamental importance relating to compliance with or the implementation of the UN Convention on the Rights of Persons with Disabilities appear before the court (<http://www.institut-fuer-menschenrechte.de/en/monitoring-body/amicus-curiae-statements/>).

## 5.2 (a) Remedies and forums:

- "run-up measures":
  - A *national action plan (article 4 (5) UN CRPD)* to implement the Convention has been adopted on the federal-level on 15 June 2011; uneven development of disability action plans at the Land level. The UN CRPD Committee is concerned that with regard to these plans the situation in Germany is not always in line with the UN CRPD and recommends that the State party Germany ensures that "federal and all local governments establish overarching human rights-based action plans with a clear concept of disability, setting adequate measures to promote, protect and fulfil rights, and with targets and indicators to monitor the implementation of the Convention" (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").
  - *Employee representations* such as, in particular, the works committees, staff councils and committees of employees with severe disabilities (see below) play an important role in the working world. Anti-discrimination issues belong to their statutory tasks.
    - The SGB IX (see points 1.2.c, 3.2, 3.3) includes provisions about the special representative body "Schwerbehindertenvertretung" (*committee of employees with severe disabilities*).
    - The statutory provisions governing the employee representation such as, in particular, the *works committees* (Betriebsverfassungsgesetz/Works Constitution Act) and *staff councils* (Personalvertretungsgesetze Bund,

Länder/ civil service Employee Representation Acts at federal and Land level) contain anti-discrimination-provisions.<sup>8</sup>

- The *Federal Anti-Discrimination Agency* provides support to persons who have experienced discrimination on grounds of racism or their ethnic origin, gender, religion or belief, *on grounds of disability*, their age or their sexual orientation.<sup>9</sup>

The Federal Anti-Discrimination Agency tries to develop sustainable approaches in co-operation with stakeholders, local authorities on federal and regional level, non-governmental organizations and other partners in anti-discrimination work. Persons affected will be able to get quick and competent support if they need help in cases of discrimination. In this context, the core business of the Federal Anti-Discrimination Agencies work is counselling, for instance quick and unbureaucratic first counselling via telephone helpline.

(July 2015: [http://www.antidiskriminierungsstelle.de/EN/Home/home\\_node.html](http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html))

In particular, the Federal Anti-Discrimination Agency can specifically

- provide information on legal claims
- outline possibilities of taking legal action within the scope of legal provisions for the protection against discrimination
- provide referrals to counselling by other agencies and
- seek an amicable settlement between those involved.

In cases where the Commissioners of the German Bundestag or the German Federal Government are responsible, the Federal Anti-Discrimination Agency will immediately pass on the requests from the affected individuals, after having obtained their consent, to those Commissioners.

(July 2015: [http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/tasks\\_node.html](http://www.antidiskriminierungsstelle.de/EN/AboutUs/Tasks/tasks_node.html))

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<sup>8</sup> For instance: *Section 75 Works Constitution Act:*

*"Principles for the treatment of persons employed in the establishment*

*(1) The employer and the Works Council shall ensure that all persons working in the establishment are treated in accordance with the principles of law and equity, in particular that no one is subject to discrimination on grounds of race, ethnic origin, descent or other origin, nationality, religion or belief, disability, age, political or trade union activities or convictions or on the grounds of gender or sexual identity.*

*(2) The employer and the works council shall safeguard and promote the untrammelled development of the personality of the employees of the establishment. They shall promote the independence and personal initiative of the employees and working groups."*

<sup>9</sup> Statement of the Agency: "The reduction of prejudice, the change of attitudes and views is a time-consuming process and it requires more than just an Act. Bringing the General Equal Treatment Act to life and implementing its provisions in everyday routine is our concern of utmost priority".

- Due to the federal structure of Germany an important part of the implementation, including counseling, lies with the German *Länder*.
- Not infrequently, *counsels of trade unions* or *lawyers* try to seek an amicable settlement or their clients.
- In the case of a legal dispute, the first instance *labour courts* schedule as a compulsory first court hearing the *conciliation hearing* (“Güteverhandlung”), only some weeks after the case has been brought to court. At this stage usually the defence is not yet submitted, only the application is the starting point for a first attempt to conciliation in the Court. Although in principle the “Chamber” (panel) as a whole (composed of both professional and lay judges<sup>10</sup>) is sitting, the conciliation hearing is before the professional judge of the Chamber only.

The access to justice for people with disabilities is guaranteed by German law. Corresponding provisions are, for example, contained in the Courts Constitution Act (GVG). The German Sign Language has been recognised as a language in its own right. In all proceedings before German courts and in administrative procedures with federal authorities, persons with hearing and speech impairments have the right to choose to communicate either through German Sign Language, sound-accompanying signs or through other technical communication aids. Any costs arising in this regard are to be borne by the authorities or courts. Blind and visually disabled persons participating in administrative procedures have the right that documents enabling them to exercise their rights be made accessible to them. The form of such documents depends on the possibilities of perception of the persons involved. Documents can, for example, be made accessible by being read out, with the help of sound recording devices, in Braille or capital letters, electronic form or by other means. The persons concerned are not to be charged with additional costs associated with the provision of these documents. The same applies to court proceedings (see European Commission, Fifth disability high level group report on the implementation of the UN convention on the rights of persons with disabilities, May 2012, see below under “reference”).

However, the UN CRPD Committee recommends that Germany introduces targeted measures to improve the physical and communicative accessibility of courts, judicial authorities and other bodies involved in administering the law, introduces legislative reforms so that the national (inter alia) labour procedures include the requirement to ensure procedural accommodations for persons with disabilities, taking into particular account persons with intellectual or psychosocial disabilities and deaf-blind persons and

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<sup>10</sup> Each labour court is composed of both professional and lay judges. The Labour Courts of First Instance and the Regional Labour Courts each comprise of Chambers (“Kammern”) with one professional judge and two lay members representing the employers’ and employees’ sides respectively. The lay judges have the same rights and powers as the professional judge, the leading role in the proceedings is for the professional judge. At the Federal Labour Court (court of last instance in the labour court system one of the five highest courts of justice in Germany), panels are called Senates. They are made up of three judges (one chair and two other judges) and two lay members.

ensures awareness-raising and effective training of personnel in the justice on the application of human rights standards to promote and protect the rights of persons with disabilities (Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015, see below under "reference").

(By the way: In this regard there also seems to be a general and structural problem in German legal education. Low priority is given in legal education to international law, in some universities also to European Union law. It might be helpful to start with "effective training" already at this stage.)

- In addition, *mediation* is provided both inside (with a judge from outside the Chamber, specially educated in mediation) and outside the courts.

**5.2 (b) Sanctions:** Under current German anti-discrimination legislation the sanction for violations of the non-discrimination clauses contained in the AGG (some named as "employer obligations", among others: advertisement of vacancies without discrimination; the duty to take measures necessary to ensure protection against discrimination on any of the grounds named in the Directive, including preventive measures) are compensation and damages (section 15 AGG, see below).

*Section 15 AGG:*

*"(1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.*

*(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment."*

These sanctions are only issued by individual legal proceedings brought against the employer (no official sanctions).

In case of discrimination on any grounds regarding access to employment, German law does not require a sanction by way of an obligation imposed upon the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against (in accordance with the EU-Directives, see ECJ Case 14/83 von Colson and Kamann [1984] ECR 1891, paragraph 19).

Sanctions in case of dismissal in violation of non-discrimination law:

There is general protection against dismissal by the German Dismissal Protection Act (Kündigungsschutzgesetz/KSchG), applicable in all establishments with more than five employees after a six-month waiting period. This law restricts the employer's possibility to terminate an employment relationship unilaterally to socially justified terminations. In case

of unlawful dismissal, including dismissal in violation of anti-discrimination law, the termination is legally invalid/ineffective (being "reinstated" is the remedy for an invalid termination).

However, a termination in violation of anti-discrimination law is legally invalid/ineffective also without entitlement under the Dismissal Protection Act (in Small Business/before expiry of the waiting period) (BAG 19.12.2013 – 6 AZR 190/12 – BAGE 147, 60).

The ineffectiveness of a dismissal is without prejudice to a compensation/to damages under section 15 AGG (see section 15 (2) AGG, see above). On principle, a claim for unlawfulness of dismissal does not hinder a claim for compensation (BAG 12.12.2013 - 8 AZR 838/12 -; BAG 23.7.2015 - 6 AZR 457/14).

### 5.3 See answer 5.1.a.

#### **Burden of proof**

*5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?*

*(b) How are the burden of proof provisions applied in court procedures?*

*5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?*

**5.4 (a)** The rules relating to the reversal of the burden of proof that are envisaged in the Directive have been transposed into German law with section 22 AGG - Burden of Proof:

*"Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination."*

**5.4 (b)** National labour courts have established a good understanding of this legal standards and they are constantly making efforts to cope with it.

**5.5** The EU-anti-discrimination directives (and their predecessors) and the jurisprudence of the ECJ are the origin of section 22 AGG (Burden of Proof). Also section 15 AGG (sanctions: compensation and damages) is rooting in EU-anti-discrimination directives (and their predecessors) and in ECJ-jurisprudence.

As regards the question of sanctions, in former times German law did not give adequate sanctions (only reimbursement of costs like travel expenses, see ECJ Case 14/83 von Colson and Kamann [1984] ECR 1891, paragraphs 3-5). Section 15 AGG has been shaped by the German legislator more or less in order to meet the requirements set out by the ECJ



jurisprudence in the mentioned Case 14/83 and in Case C-180/95 Draehmpaehl [1997] ECR I-2195.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

*6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?*

*6.2 What is the tendency observed in your country's case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?*

*6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?*

*6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision!*

*6.5 Please, describe the most important court decisions (test cases) in this field!*

**6.1** In general: The Federal Constitutional Court made clear that German domestic law must, if possible, be interpreted in harmony with public international law, regardless of the date when it comes into force (see Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04 – paragraph 48, see below under "reference"). This includes the UN CRPD.

As far as the scope of Directive 2000/78 is concerned, the Federal Labour Court follows the ECJ (*see, in particular, BAG 19.12.2013 – 6 AZR 190/12 – BAGE 147, 60, paragraph 53*): the provisions of the UN CRPD are, from the time of its entry into force, an integral part of the European Union legal order. Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention (see ECJ Cases C-335/11 and C-337/11 HK Danmark [Ring and Skouboe Werge], paragraphs 28-33).

As in other areas of labour law the role/task of the Federal Labour Court is primarily to ensure uniform application of law, clarify fundamental points of law and develop the law. This includes development and guidance of case law in the area concerned here.

**6.2.** A rough estimate (have found no other available data/precise numbers) supported by a search of a legal database suggests that the number of cases related to disability discrimination increased after the AGG entered into force in 2006 (see point 1.2.b) as transposition of, inter alia, Directive 2000/78/EC.

Perhaps an increase of the number of cases may be partly attributed to the fact that a liability and compensation regime for disability discrimination as set out in section 15 (2) AGG (see point 5.2.b),

- which applies not only to cases of non-recruitment, if the employee would have been recruited if the selection had been made without unequal treatment (a high burden of proof on the applicant),



- but also to cases of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment (with the restriction of the amount of compensation "shall not exceed three monthly salaries"), did not exist before (a predecessor provision did concern gender only).

**6.3** So far, the major part of complaints had been related to topics of discrimination based on disability in the field of recruitment and dismissal.

**6.4 and 6.5** - Some of the recent cases - Federal Labour Court (BAG):

- *BAG 19.12.2013 - 6 AZR 190/12 - HIV infection - disability - dismissal - obligation to provide reasonable accommodation – application for dismissal protection and compensation*

The defendant produces anti-cancer drugs for intravenous use under EC Directives laying down the principles and guidelines of good laboratory practice. The employee is a chemical-technical assistant and works in a cleanroom. After having learned that the employee is living with a symptomless HIV infection, the employer gave notice of unilaterally termination of the employment.

The Federal Labour Court (BAG) ruled that an HIV infection qualifies as disability under section 1 AGG (see points 1.2.b, 4.1), article 5 of Directive 2000/78/EC, read in conjunction with the relevant provisions of the UN BRK<sup>11</sup> because of the hindrance to the exercise of a professional activity. Termination of an employment relationship because of HIV infection of an employee is therefore invalid if not justified. The employer is obliged to assess whether reasonable accommodation enables the employees' work in the cleanroom, inter alia in compliance with the above mentioned guidelines. In addition to being "reinstated" (see point 5.2.b above) the employee may be entitled to compensation/damages.

For more information on the case see the summary by *Dr. Henriette Norda LL.M.*

(<http://blogs.dlapiper.com/employmentgermany/2013/12/23/termination-of-employment-of-hiv-infected-employee-may-trigger-anti-discrimination-legislation/>)

- *BAG 22.5.2014 – 8 AZR 662/13 – multiple sclerosis (MS) - disability - recruitment - obligation to provide reasonable accommodation - application for compensation*

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<sup>11</sup> The UN CRPD does not explicitly refer to HIV or AIDS in the definition of disability. However, States are required to recognize that where persons living with HIV (asymptomatic or symptomatic) have impairments which, in interaction with the environment, results in stigma, discrimination or other barriers to their participation, they can fall under the protection of the Convention ([http://www.who.int/disabilities/jc1632\\_policy\\_brief\\_disability\\_en.pdf](http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf)).

The defendant operates public swimmingpools. The employee is a certified bath attendant. Shortly before conclusion of a fixed-term employment contract the employer refused to accept recruitment after having learned that the applicant is living with multiple sclerosis (in her case recognized as severe disability with "GdB 50", see point 1.2.c). The claimant recently completed her vocational training and claimed to be fit for the occupation.

An employer may only claim an employee/applicant cannot do the job because of his/her disability when having first verified whether "reasonable accommodation" enables the employees' work.

- BAG 26.6.2014 – 8 AZR 547/13 -

*limited mobility (walking) - disability - recruitment - obligation to provide reasonable accommodation - application for compensation*

Asking an applicant visibly disabled (or an applicant who has indicated to be disabled) during the job application process about the extend of the disability may (only) be justified in the context of the assessment of reasonable accommodation to enable the employees' work.

- BAG 20.11.2014 – 2 AZR 664/13 -

*tinnitus/psychovegetative disturbances - disability - dismissal - obligation to provide reasonable accommodation*

An unilateral termination of an employment relationship because of the employees' disability is valid if the employee permanently cannot do the job, always supposing that providing reasonable accommodation has been assessed without a positive result.

## Reference

- The federal General Anti-Discrimination Act/General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz/AGG) of 14th August 2006 translated in English:
  - [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg\\_in\\_englischer\\_Sprache.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/AGG/agg_in_englischer_Sprache.html)
  - [http://www.agg-ratgeber.de/files/pdf/AGG\\_en.pdf](http://www.agg-ratgeber.de/files/pdf/AGG_en.pdf)
- European Commission (EC), Fifth disability high level group report on the implementation of the UN convention on the rights of persons with disabilities, May 2012
  - [http://ec.europa.eu/justice/discrimination/files/dhlg\\_5th\\_report\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/dhlg_5th_report_en.pdf)
- Initial reports of States parties - Germany - Consideration of reports submitted by States parties under Article 35 of the Convention, September 2011

- [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fDEU%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fDEU%2f1&Lang=en)
- German Institute for Human Rights (National Monitoring Body), Parallel Report to the UN Committee on the Rights of Persons with Disabilities in the context of the examination of the Initial Report of Germany under Article 35 of the UN Convention on the Rights of Persons with Disabilities, March 2015
- [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNHS%2fDEU%2f19761&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNHS%2fDEU%2f19761&Lang=en)
- UN, Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, CRPD/C/DEU/CO/1, 194th meeting, 13 April 2015
- <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/096/31/PDF/G1509631.pdf?OpenElement>
- Federal Constitutional Court (Bundesverfassungsgericht/BverfG), Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04 –, (see point 6.1) translated in English:
- [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014\\_2bvr148104en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html)

## Ireland

### Report by Kevin Duffy, Chairman of the Labour Court, Ireland

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments*

##### 1.1 Has your country ratified the UN CRPD (date and form of ratification)?

*While Ireland signed the Convention in March 2007 it has not yet ratified it. This arises from the inability of the State to implement the Convention in full until primary legislation is enacted dealing with the legal capacity of persons with intellectual disabilities. This will be necessary in order for the State to comply with Article 12 of the Convention (equal recognition before the law)*

*However the terms of the Convention are applied in employment related cases particularly since the decision CJEU in joined cases C-335/11 and C-337/11, HK Denmark –acting on behalf of Ring v Dansk Almennyttigh Boligselskab and HK Denmark, acting on behalf of Werge v Danks Arbejdsgiverforening, acting on behalf of Pro Display A/s [2013] IRLR 57. Here the CJEU held that where the Union concludes international agreements they are binding on its institutions, and consequently they prevail over acts of the European Union.*

*Hence, the Labour Court considers itself bound to interpret and apply Directive 2000/78/EC, and by extension Irish law, in harmony with the Convention.*

1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?

Yes.

(b) When and how was it implemented (formal issues)?

*The Employment Equality Act 2004 was enacted to formally transpose the Directive in Irish law. However, before the adoption of the Directive, Ireland had domestic legislation in place, the Employment Equality Act 1998, prohibiting discrimination on grounds of disability*

(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?

*The main change introduced in 2004 (as compared to the 1998 Act) was to strengthen the obligation on employers to provide disabled workers with reasonable accommodation so as to enable them to participate fully in employment and training.*

1.3 What other relevant international treaties, ILO Conventions shall be applied to your country?

*There are none*

*National legal framework*

1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!

*As state, the adoption of the CRPD by the EU has resulted in the application of the terms of the Convention in cases brought on behalf of people with disabilities. In particular it has led to decision of the Labour Court to extend the obligation to provide reasonable accommodation to such matters as adjusting working hours and redesigning jobs where this is necessary in order to allow workers with disabilities to fully participate in the workforce, provided the adjustments are reasonable and proportionate.*

1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?

*The Employment Equality Act 2004*

1.6 What role is there for collective agreements regarding the protection of workers with disability?

*There is no formal role for collective agreements other than a general prohibition of provisions in collective agreements that could lead to discrimination.*

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

### 2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

*The definition of disability in the Employment Equality Act is very broad. It defines disability as: -*

*disability” means—*

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,*
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,*
- (c) the malfunction, malformation or disfigurement of a part of a person's body,*
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*
- (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,*

*and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person;*

### 2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find a uniform legal disability definition regarding the employment protection?

*No. This is the only definition in employment law*

### 2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]) had any influence on the labour law definition of disability?

*The provision in the Irish definition that includes a condition that causes chronic illness or disease and the provision regarding disability that previously existed allows the Irish Labour Court to ascribe a wide ambit to the concept of disability. The position taken by the Court in that regard was strengthened by the decision of the CJEU in *Ring and Werge* (referred to above)*

## 2.4 How is disability required to be proven/certified in employment litigation?

*There is no prescribed method of proving disability. Normally medical evidence is required to establish the existence of a condition of the type referred to at section 2 of the 2004 Act.*

## 3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### 3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?

*Irish anti-discrimination law prohibits discrimination in relation to access to employment on grounds, inter alia, of disability. This protection is qualified by a requirement that the disabled person is fully capable of performing the duties of the position. However, the law provides that a person is deemed to be fully capable of performing all the duties of a position if they would be so capable if provided with reasonable accommodation.*

*The statute law has not changed in consequence of the UN CRPD but the approach of the Labour Court in the interpretation of the law has taken the provisions of the Convention into account in defining the rights of disabled workers and the duties of employers. Hence, it has been held that the duty to provide reasonable accommodation can include such adjustments as reducing working hours, redesigning the allocation of duties, allowing a worker to work from home and allowing extended sick leave. The defining criterion is whether the adjustments required are reasonable and proportionate in all the prevailing circumstances.*

### 3.2 Is there any special protection of persons with disability against termination of employment?

*Yes. Dismissal on grounds of disability is prohibited. An employer can mount a defence where it can be shown that the worker with a disability is no longer able to perform the duties of their position. However, this must be seen in the context of the duty to provide the person with reasonable accommodation. As stated above, the law deems a person with a disability to be fully capable if he or she would be fully capable if provided with reasonable adjustments.*

### 3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?

*The duty to provide reasonable accommodation extends to special measures to organise the working time of a worker with a disability so as to accommodate the person's disability. There is no provision for extra paid leave although the provision of unpaid leave has been held to come within the requirement to provide reasonable accommodation. Allowance,*

*such as mobility allowances are available in cases of special hardship and are provided through the social welfare system.*

#### **4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

*Anti-discrimination law framework in employment matters*

**4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?**

*In general, discrimination on any one of nine protected grounds is prohibited. The prohibition on discrimination on grounds of disability is different only in that it can be defended on the basis that the worker is unable to perform the duties of the position. That, as previously stated, is tempered by a requirement to provide reasonable accommodation. The duty to provide reasonable accommodation carries with it an obligation to treat a person with a disability more favourable than a person without a disability in the sense that facilities must be provided to such a person which cannot be claimed by others.*

**4.2 Which aspects of employment are covered by these special provisions?**

*All aspects of employment are covered.*

*Reasonable accommodation*

**4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?**

*Yes. The question posed here has been dealt with elsewhere in this response. .*

**(b) What is the sanction of breaching this obligation?**

*There is a wide range of sanctions available. These include requiring the employer to take a specific course of action, requiring the reinstatement of the worker and the award of compensation.*

**(b) Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?**

*The duty to provide reasonable accommodation, where needed, is a stand-alone duty. The breach of that duty attracts the same sanctions as are available in the case of discrimination.*

**4.4 Has any provision and/or practice on reasonable accommodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases *Ring* and *Z.*)?**

*As previously stated, the statute law has not change. But the Labour Court has applied the jurisprudence of the CJEU in dealing with cases on this subject.*

*On that point see answers to other questions in which the Court's response to the judgment in HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab; HK Danmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, was applied.*

## **5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

### *Forums and sanctions*

**5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (actio popularis)? Are they eligible to this with or without the consent of the concerned persons?**

*The Irish Human Rights and Equality Commission is a statutory body established to promote equal treatment and to prevent discrimination. The Commission is authorised to bring proceeding either in its own name or on behalf of an individual who has suffered discrimination. Trade unions do not have locus standi to initiate proceedings, per se. They do, however, support and represent workers in discrimination claims.*

**5.2 (a) What remedies and forums are available in cases of alleged discrimination against persons with disabilities?**

*The legal process is that claims are heard at first instance by an adjudication officer of the Workplace Relations Commission. Decision of the adjudication officer can be appealed to the Labour Court. The appeal is in the form of a full rehearing of the case.*

*The question of remedies has already been addressed.*

**(b) Which are the most effective and/or most common sanctions?**

*The most common sanction is an award of compensation.*

**5.3 Is there any role for mediation in such cases?**

*Yes. There is a mediation service provided by the Workplace Relations Commission. Mediation is not compulsory.*

### *Burden of proof*

**5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?**

*The provision of Directive 2000/78/EC on the allocation of the burden of proof is replicated in the Employment Equality Acts.*



(b) How are the burden of proof provisions applied in court procedures?

*The claimant must first prove the primary facts upon which he or she relies in advancing his or her claim of discrimination. That could involve proving that the person has a disability within the statutory meaning of that term and that he or she was treated less favourable than a person without a disability. The Court must then consider if the facts proved are of sufficient significance to raise an inference of discrimination. If stage (1) and (2) are satisfied the onus of proving the absence of discrimination passes to the employer.*

5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?

*No. The Convention did not change either the procedural provision or the range of sanctions available.*

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?

*In the Irish legal system the Supreme Court is the final Court of appeal against the decisions of inferior courts. Disputes concerning statutory employment rights rarely come before the Supreme Court. There are no decisions of the Supreme Court relating to discrimination on grounds of disability*

6.2 What is the tendency observed in your country's case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?

*The proportion of cases involving discrimination based on disability, relative to the overall number of cases under the Employment Equality Acts, has remained steady in recent years at around 30%. Consequently such cases have neither increased nor decreased.*

6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?

*The main topics tend to relate to dismissal, failure to provide reasonable accommodation and promotion.*

6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision!

6.5 Please, describe the most important court decisions (test cases) in this field!

*I will deal with these questions together. There are two cases that are of particular note although the second case is undoubtedly the most important.*

*The first case is that of Humphreys v Westwood Fitness Club [2004] E.L.R 296 which was an early decision of the Labour Court involving a failure to provide reasonable accommodation.*

*Here the claimant worked for the respondent as a childcare assistant in a crèche facility operated by them. She developed anorexia which later developed into bulimia. The claimant went on sick leave to undergo treatment. After her return to work, and just as it appeared that her condition had stabilised, a number of incidents occurred which caused the respondent concern in respect of the manner in which she was performing her duties. The claimant received two verbal warnings in respect of these matters. A number of months later the claimant became depressed and requested more time off work as she wished to be readmitted to hospital. At this stage, the respondent, without obtaining medical or psychiatric advice in respect of the claimant's disorder or any form of risk assessment in relation to her condition, formed the view that the claimant was a danger to herself and the children in her care and resolved to dismiss her. The respondent asked the claimant to attend a meeting where she was informed of the decision to dismiss her, and was subsequently sent a letter of dismissal.*

*The court decided: -*

*(1) That as the claimant's dismissal arose primarily from the respondent's belief that her disorder would impair her ability to carry out the duties for which she was employed, her dismissal was prima facie discriminatory under [s.8 of the Employment Equality Act 1998](#).*

*(2) There is a complete defence under [s.16 of the Employment Equality Act 1998](#) to a claim of discrimination on grounds of disability under s.8, if it can be shown that the respondent formed a bona fide belief that the claimant was not fully capable of performing the duties for which she was employed.*

*(3) In order to form such belief, the respondent would normally be required to make adequate enquiries to establish fully the factual position in relation to the claimant's capacity. The nature of the enquiries would depend on the circumstances but would at a minimum involve looking at medical evidence to determine the level of impairment arising from the disability and its duration. If it is apparent that the employee is not fully capable, the respondent is required under s.16(3) to consider what if any special treatment or facilities may be available by which the employee can become fully capable and account must be taken of the cost of such facilities or treatment.*

*(4) Such enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.*

*This case is regarded as having set the standard expected from an employer in coming to a conclusion that an employee is unable to perform the duties of his or her position. It also established that the requirement to provide special treatment or facilities (reasonable*

*accommodation) can include allowing the worker time off and that the needs of the worker can only be assessed in consultation with him or her and his or her medical advisors.*

*The second case is that of A Worker v a School [2014] ELR 307.*

*The employer in this case was a school for children with disabilities. The complainant was employed by the respondent as a special needs assistant (SNA). She also undertook part-time secretarial duties. Following an accident the complainant was left paralysed from the waist down and requires the use of a wheelchair. The respondent refused to allow the complainant return to work after having been advised by an occupational health expert that she lacked the capacity to fully undertake the duties of an SNA. The respondent did not discuss any other options with the complainant, nor did it consider employing her on a part-time basis, or allowing her continue with her secretarial role which she was perfectly capable of performing.*

*The Labour Court held as follows:*

*(1) Section 16 of the Employment Equality Acts does not require an employer to employ a person in a position the essential functions of which they cannot perform due to their disability. This is subject to the duty of reasonable accommodation.*

*(2) The duty imposed by s.16 of the Employment Equality Acts must remain within the boundaries of what is reasonable and proportionate, including the financial implications involved.*

*(3) There is no reason to exclude in principle extending the duty of reasonable accommodation to include the redesign of a position so as to include those duties that a disabled person can perform if that is a reasonable and proportionate means by which the disabled person can be facilitated in exercising their right to work.*

*(4) Section 16(1)(b) of the Employment Equality Acts provides that an employer is not obliged to employ or maintain in employment in a position the duties of which they cannot perform. If a job is modified so as to reflect a disabled person's abilities, they are then able to fully discharge the duties to that position as modified.*

*(5) If there is a difference between the provisions of s.16 of the Employment Equality Acts and the provisions of the Framework Directive, the provisions of the Directive must take precedence.*

*(6) The duty to provide reasonable accommodation includes a concomitant obligation to make an informed and considered decision on what is or is not possible, reasonable and proportionate. A failure to adequately consider all available options on how a disabled person can be accommodated can amount to failure to discharge the duty to provide reasonable accommodation. If all available options are not adequately considered then the*

*employer cannot form a bona fide belief that they are impossible, unreasonable or disproportionate.*

*(7) The respondent's refusal to allow the complainant return to work was based on the mistaken belief that its duty was confined to providing the complainant with such accommodation as might enable her to undertake the full range of tasks expected from an SNA. In that respect the respondent construed its duty too narrowly and took a mistaken view of what the law required in the prevailing circumstances.*

*(8) The duty to provide reasonable accommodation must be ascribed a broad ambit. The ultimate test is that of reasonableness and proportionality. That involves putting a number of considerations into the balance including the practicability of what may be required, the costs involved, the disruption that may be caused to the service that the employer provides and the consequences for the disabled person of not providing the accommodation required. HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab; HK Danmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S [2013] I.R.L.R. 571 considered.*

*(9) Where an employer reaches an honest and informed decision having considered all of the available options the Court must show a high degree of deference to that decision and should not seek to substitute its opinion on what is possible or reasonable in the particular circumstances of that employment. If, however, the employer fails to properly understand the scope of its duty or fails to adequately consider all of the options that may be available they will have failed in their statutory duty toward the disabled person.*

*This case is of considerable importance in that it set out the extent of an employers duty to provide reasonable accommodation to a worker with a disability and that the duty extends to modifying the duties of the job where necessary. It also provided that the employer can only reach a bona fide decision that the provision of such facilities is not possible after all options are fully and fairly considered. The case is seen as having set a higher standard to be expected of employers that was previously considered to be the case. It should be noted that the decision is currently under appeal to the High Court.*

*This was not a 'test case'. There is no provision in Irish law by which a test case can be taken as each case must be decided on its own facts and a point of law cannot be determined other than in the context of a particular case. Nonetheless, if this decision is upheld on appeal it will undoubtedly be considered a seminal case in this area.*

Report by Judge Yigal Plitman, President, National Labour Court, Israel; Judge VardaWirt-Livne; Judge Rami Cohen, President of the Haifa Regional Court; Judge Steve ADLER, Past President, National Labour Court; Judge Nili Arad, Past President, National Labour Court and Judge (ret.) Elisheva Barak-Ussoskin, Past Deputy President, National Labour Court.

### 1. GENERAL LEGAL FRAMEWORK

#### *The effect of international instruments*

##### 1.1 Has your country ratified the UN CRPD (date and form of ratification)?

Yes. Israel signed the UN CRPD on March 30, 2007, and ratified it in September 2012.

##### 1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?

No. Israel is not a member of the E.U.

(b) When and how was it implemented (formal issues)? Not relevant.

(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities? Not relevant.

##### 1.3 What other relevant international treaties, ILO Conventions shall be applied to you country?

As of now, the UN CRPD is the only international convention relevant to workers with disabilities, which Israel is a party to. It should be noted that the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 was referenced in Israel case law (National Labour Court case 670/06 Roth v. Ram Mivnim Ltd., paragraph 10 to Judge Adler's opinion (October 1, 2009) (hereinafter- Roth)), as an additional international means for guaranteeing equal opportunities and equal treatment to persons with disabilities.

In addition, Israel is a party to several general international treaties regarding human rights- such as the CCPR (International Covenant on Civil and Political Rights), the CRC (Convention on the Rights of the Child), the ICESCR (International Covenant on Economic, Social and Cultural Rights) and the CEDAW (The Convention on the Elimination of All Forms of Discrimination against Women)- which also relate to the issue of people with disabilities.

#### *National legal framework*

##### 1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!

The main statute in Israel governing the issue of people with disabilities- specifically the one relating to employment is the Equal Rights for Persons with Disability Law, 5758-1998

(hereinafter: the Disability Law). This law was mostly influenced by its American counterpart- the Americans with Disabilities Act of 1990. However, the UN CRPD does have an impact on the Israeli legal system in some aspects.

From a legal standpoint, the UN CRPD complemented the national laws relating to equality for persons with disabilities. It has an interpretive power, and the courts use it for interpreting the different relevant statutes governing this issue, as the courts feel the legislator's intent must be reconciled with Israel's international obligations.

It should be noted that there is a bill pending, aiming to amend the Legal Capacity and Guardianship Law (5722-1962), which is affected by the UN CRPD.

From a social standpoint, the UN CRPD provides a framework and standards for periodic thinking on the nation's achievements and what has yet to be accomplished, for the advancement of persons with disability in our society until we will reach their total integration in it.

As mentioned above, though the UN CRPD was not specified in any of the relevant legislation by name, it was mentioned in a few cases- both by the National Labour Court and the Israeli Supreme Court- as a means for the advancement of people with disabilities in the society, prevent discrimination and guarantee a more accessible environment (Ram; Supreme Court decision 1118/14 Doe v. the Ministry of Welfare and Social Services (1.4.2015)).

#### 1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?

- The Disability Law, which deals with numerous aspects of the day-to-day lives of people with disabilities. This law establishes and strengthens their right for equal and active participation in society, and grants suitable response to their special needs in a manner that allows for an independent life, with privacy and respect, while utilizing their potential to the fullest extent.
- Rights of Persons with Disability Employed in Rehabilitation (Temporary Order) Law, 5767-2007 (hereinafter: the Rehabilitating Order). This law is meant to encourage employers to employ people, whose working ability is lower than 20% due to their disability, and integrate them in the general job market. Among other things, the law specifies the process the person with disability must go through in order to be recognized as "rehabilitating", and lists the rights he will be entitled to, in addition to prohibiting discrimination against such people for reasons not related to the nature of the position. Regular employee-employer relationship will not apply to the employment of a person in rehabilitation.
- Minimum Wage Law, 5747-1987 and the Minimum Wage Regulations (adjusted pay for disabled employee with diminished ability to work) (correction), 5770- 2009, which allow for the employer- subject to the authorization of the Ministry of Economy- to pay

his disabled employee a wage that is lower than the minimum wage mandated by the law, and adjust it according to that employee's competence.

- Equal Rights for persons with Disability Regulations (Priority in Parking Space in the Workplace), 5762-2001 (hereinafter: the Priority in Parking Regulations), which grants priority in parking space in the workplace for people whose disability effects their mobility.
- Equal Rights for Persons with Disability Regulations (State Participation in Funding Accommodations), 5766-2006 (hereinafter: the State Participation in Accommodation Regulations), which stipulates that the State will participate in the cost of accommodations the employer funded for each of his disabled employees.
- State Service Commission Regulations, chapter 35.2, which deals with the issue of equal rights for people with disabilities employed in the public service. It stipulates- among other things- that people with disabilities ought not be discriminated against, and must be provided with the suitable accommodations, as well as mandating proper representation of people with disabilities in the workplace.

#### 1.6 What role is there for collective agreements regarding the protection of workers with disability?

There is a collective agreement, concerning the encouragement and enhancing employment of persons with disabilities, which was signed between the employers' associations and the largest Israeli employees' organization (the Histadrut) on June 25, 2014. The collective agreement states that upon two years from its implementation any employer employing 100 workers or more, from which 3% are persons with disabilities, is regarded as meeting the requirement of appropriate representation in the workplace, in accordance with article 9 of the Disability Law. In addition, the collective agreement obligates the employer to appoint one of his employees to be in charge of the employment of persons with disabilities; and to ensure the optimal integration of persons with disabilities in the workplace. On September 21, 2014, the Minister of Economy has issued an extension order to this collective agreement, so it now applies to all relevant employers in the job market.

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

### 2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

According to the Disability Law, a person with disability- defined as someone with a temporary or permanent physical or mental deficiency, which fundamentally effects his ability to function in one or more aspects of his life- will not be discriminated against by an employer, or a potential employer in the following aspects: in being hired to the relevant position; in the terms of employment; in promotion opportunities; in training or professional continued education; in termination or awarding severance pay; and in receiving benefits or other payments awarded upon retirement. The prohibition on such discrimination is conditioned upon the person being



qualified for the position. The employer or the potential employer must also refrain from setting non relevant conditions for all of the above.

**2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find a uniform legal disability definition regarding the employment protection?**

There are no different definitions. All relevant statutes and regulations refer to the Disability Law when it comes to defining "a person with disability" for the purposes of that particular enactment.

**2.3. Has the UN CRPD or the jurisdiction of the European Union – hereinafter: CJEU (with special regard to the cases *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]) had any influence on the labour law definition of disability?**

Neither the UN CRPD nor the aforementioned decisions of the European Union Court of Justice had any bearing over the definition of a person with disability in the Israeli law, as the main statute governing this issue- the Disability Law- was enacted in 1998, and the relevant definition has not been changed since.

**2.4 How is disability required to be proven/ certified in employment litigation?**

Usually, medical records or certifications drawn by the party's physician stating his medical condition are considered sufficient proof.

### **3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

**3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?**

Yes. In Roth, both Judge Adler and Judge Plitman's decisions recognized the fact that in some severe degrees of mental disability a person may not be regarded as an employee of the relevant workplace, and that an employer-employee relationship may not be established to begin with.

It should be noted that today, the Rehabilitating Order clearly states that where a person's employment ability falls from 20% he might not be considered an employee. This is subject, in every case, to a decision made by the Ministry of Economy.

**3.2 Is there any special protection of persons with disability against termination of employment?**

Yes. As stated above, according to the Disability Law, being disabled may not serve as a reason for firing an employee to begin with. In addition, persons with disability are protected by the same rules and standards governing this issue with regard to all employees, i.e., their



termination must be done in good faith, and they are entitled to be heard before the employer reaches a final decision concerning them.

### 3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organization of working time, extra paid leaves, mobility allowances etc.?

According to the Priority in Parking Regulations, employers that allocate parking space to at least three of their employees are required to provide each of their employees, who have mobility difficulties, a parking space for their personal use during the work time. This parking space will be accessible to the said employee, located as close as possible to the entrance of that workplace, and will allow the disabled employee to arrive to and from his vehicle independently, safely and with dignity.

## 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Anti-discrimination law framework in employment matters*

#### 4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?

Yes. As stated above, the Disability Law contains such provisions. In addition, the general principle of equality applies, and guarantees- in appropriate cases- such protection from discrimination in every aspect of life.

#### 4.2 Which aspects of employment are covered by these special provisions?

See answer # 2.1.

### *Reasonable accommodation*

#### 4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?

Yes. This provision may be found in the Disability Law. In addition, the State Participation in Accommodation Regulations guarantees that the state will participate in the cost of such accommodations, in varying rates, based on the total number of employees employed in the workplace.

#### (b) What is the sanction of breaching this obligation?

The sanction is a civil remedy- a suit may be filed against the employer for violating these provisions. The relevant employee may be awarded compensation, even if the court is satisfied that no economical damage was caused, and in some cases, an injunction may be issued by the court, forcing the employer to provide the necessary reasonable accommodations.

(c) Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?

Yes, it is considered to be discrimination. However, it differs from other provisions related to discrimination in the sense that violating them will expose the employer to criminal action- in addition to a civil one- and if found guilty he may be fined. A failure to implement the accommodation requirement is not considered a criminal offence.

4.4 Has any provision and/or practice on reasonable accommodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases *Ring* and *Z.*)?

No. The abovementioned provisions dealing with the mandatory reasonable accommodations are part of the Disability Law, and have not been altered since its enactment.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (*actio popularis*)? Are they eligible to this with or without the consent of the concerned persons?

According to the Disability Law, legal proceedings with regard to discrimination may be initiated in the labour court by one of the following: the relevant employee; by the representative employees' organization in that workplace, and in its absence, the employees' organization in which the relevant employee is a member of. The actions initiated by these employees' organizations, do not require the consent of the concerned person with disability. In addition to these parties, the Commission for Equal Rights of Persons with Disability, or any other organization aimed to promote the rights of persons with disabilities, are also eligible to file suits on behalf of the disabled employee with regard to violations of the anti-discriminatory provisions listed in the Disability Law. However, this may only be done with the employee's consent.

5.2 (a) What remedies and forums are available in cases of alleged discrimination against persons with disabilities?

According to the relevant section in the Disability Law, the labour court has unique jurisdiction over claims involving discrimination in the workplace on the basis of disability, in both civil and criminal cases. The remedies include monetary damages and/ or an injunction (e.g. mandating the employer to hire the person who was discriminated against).

(b) Which are the most effective and/or most common sanctions?

We do not know which sanction is the most efficient; however the most common one is a monetary damages. It should be noted that it seems that sanctions are not a satisfactory

solution for the issue of discrimination against people with disabilities, as apposed to education, joint meetings and financial incentives for the employment of people with disabilities, which are considered more effective.

### 5.3 Is there any role for mediation in such cases?

Yes. Generally speaking, the labour courts sometimes refer parties to mediation procedures in a variety of cases. There is no prevention that such procedures will be applicable as well to cases regarding discrimination of people with disability.

### *Burden of proof*

#### 5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?

The Disability Law refers to the Equal Opportunities in the Workplace Law, 5748-1988 with regard to the issue of burden of proof (hereinafter: the Equal Opportunities Law). Accordingly, the burden of proof will be as follows: the employer will be the one who bears the burden to prove he did not discriminate the employee based on the employee's disability. The said shifting of the burden of proof to the employer is subject to the employee- or potential employee- showing that he met the conditions or qualifications the employer set for the eligibility for the matter in which there was discrimination (e.g., in the hiring process; job promotions; terms of employment; sending to training or professional continued education; or severance pay). Alternatively, the burden of proof may be shifted to the employer if he demanded information from the employee or potential employee- information, which was the basis for discrimination. With regard to termination, the employer will be the one who bears the burden to prove he did not discriminate based on the employee's disability, as long as the employee shows that his conduct and actions did not serve a just case for dismissal.

#### (b) How is the burden of proof provisions applied in court procedures?

See the above mentioned answer.

#### 5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (action popularis, sanctions, burden of proof etc.)?

Though the Equal Opportunities Law and the Disability Law were amended so the burden of proof has been shifted to the employer under certain circumstances- as explained in detail above- the explanatory remarks to the amending bill do not mention the UN CRPD or the Directive as an influence.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

### 6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?

The Israeli legal system is very similar to the Anglo-American legal system when it comes to the role of case law as a mechanism for developing the legal norms.

With regard to matters pertaining to the employment of persons with disabilities, it is usually the National Labour Court (hereinafter- the NLC), the highest labour court instance, which is responsible for developing the case law, by interpreting the relevant statutes and adding new substance to them, when needed. The Israeli Supreme Court, sitting as the high court of justice, rarely overrules the NLC decisions.

### 6.2 What is the tendency observed in your country's case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?

It seems that over the years, since 1999- the year the Disability Law came into force- there has been an increase in the number of suits filed in the issue of employment of people with disabilities. We believe that a reasonable explanation for this development may be the growth in the awareness of people with disabilities and of lawyers, to the rights of people with disabilities.

### 6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?

We are not familiar with such information.

### 6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision

### 6.5 Please, describe the most important court decisions (test cases) in this field

The Israeli legal data base shows that there are an abundant number of cases on the issue of people with disability. The following are a few examples:

- Supreme Court case 6069/10 Machmali v. The Prison Service (May 5, 2014)-

The plaintiff was a technology officer, employed by the Prison Service. Upon being diagnosed with a Perimyocarditis, he was forced to cut back on his hours, and only work for six hours a day. The Prison Service refused to promote the plaintiff to higher positions that would have allow him to receive higher ranks- though there was no doubt he was more than qualified and suitable for them- claiming, among other things, that due to the fact his condition prevents him from working full time he is not able to serve in many of the positions he applied for.

The court first declared that the plaintiff's medical condition entitles him to be regarded as a person with disabilities, and as such, to be protected by the Disability Law, meaning that the Prison Service is forbidden from discriminating against him based on his disability. Among

other things the Prison Service was obligated to consider making proper accommodations for the plaintiff's continued employment. The Court discusses in length the Disability Law, and particularly the issue of the requirement for making proper accommodations. The court concluded that the Prison Service did discriminate the plaintiff when using his disability as a justification for not promoting him. The court stated that based on the facts of the case, the nature of the plaintiff's job and the positions he applied for do not mandate working full time and being present at the prison for more than six hours a day. In addition, the court referred to other steps the Prison Service may take in order to overcome the potential difficulties that may arise from the restraints place upon the plaintiff due to his medical condition. Therefore, the court concluded that the plaintiff's disability must not be considered as a factor for rejecting his application for future positions that will allow him to receive advanced ranks.

National Labour Court case 670/06 **Roth v. Ram Mivnim Ltd.** (October 1, 2009)-

The issue was whether a mentally disabled person, working in a construction company for 10 years – upon the request of the Rehabilitation for People with Disability Foundation- is considered an employee of the company with regard to all rights deriving from this status, and his right for minimum wage.

The court presented in length the normative background regarding the issue of employment of people with disabilities- both existing laws and pending bills- and discussed the prohibition on discrimination; the manner in which the plaintiff began working for the company; and the current tests developed by case law for determining the existence of employee-employer relationship.

Based on the facts and circumstances of the specific case, the court (Judge Plitman and both of the lay members of the panel) concluded that there was no employee-employer relationship between the plaintiff and the company, and that the company simply provided the plaintiff with a working environment aiming to assist him in his rehabilitation, and therefore it should not be obligated to pay the plaintiff for rights guaranteed to its employees.

It should be noted that Judge Adler and Judge Rabinovich reached a different conclusion, and believed that in this case the plaintiff should be regarded as an employee of the company.

- Regional Labour Court (Nazerath) case 1732/04 **De Castro v. M.B.A. HazoreaCalibration Tech. ACS Ltd.** (July 10, 2005)-

The plaintiff worked as a senior technician in the defendant's electronic lab. After recovering from cancer, his doctor allowed him to work only four hours a day, and forbade him from working for the defendant's clients outside the lab or to exert himself. When the plaintiff went back to work, he was fired. The defendant claimed, among other things, that the restrictions placed upon the plaintiff made it impossible for the defendant to offer him any position and to continue his employment.

The court first determined that due to his illness and the physical disability that limited him and his performance in several aspects of his life- work included- the plaintiff is regarded as a person with disability, under the Disability Law, and may not be discriminated against based on his disability. The court ruled that the defendant was not willing to continue the plaintiff's employment, part time- in accordance with his medical certificate- though it had the option of doing so. The court reviewed the relevant normative background concerning the issue of discrimination against people with disability; the need to make the proper accommodations; and the burden of proof placed upon employers in such cases. The court stated that considering the duties placed upon the employer according to the Disability Law, the defendant was under the obligation to make the proper accommodations that will allow the plaintiff to return to work, and that these accommodations did not constitute a burden that is too heavy on the defendant. The court ultimately decided to grant the plaintiff's request, and ordered he will go back to work for the defendant and awarded him with a monetary damages for his anguish in the sum of NIS 50,000 (€ 12,100). No appeal was filed regarding this decision.

- Regional Labour Court (Beer Sheva) case 2968/01 Baliti v. Jerusalem Post Publications Ltd. (December 2, 2001)-

(A request for a preliminary injunction ordering the defendant to re-hire the plaintiff, until a final decision in the case will be given.)

The plaintiff, suffering from Polio, worked for the defendant in its print department. Due to incorporation of new computerized systems in the workplace, the need for the plaintiff's position decreased, and the defendant began downsizing the print department. Accordingly, the plaintiff- as well as three other employees- was fired. The issue in this case was whether the plaintiff's termination was lawful, considering the defendant's duties stemming from the Disability Law.

The Court stated that due to his disability, it was forbidden for the defendant to discriminate against the plaintiff. The court discussed in detail the obligations on the employer, which are set in the Disability Law, particularly the requirement to make the proper accommodations that will allow for the employee's continued employment. The court stated that among other things, the obligation to make the proper accommodations also mandates the employer to consider the employee's disability, upon making the decision to fire him in downsizing dismissal, and where the employee is not fired based on his own misconduct. According to the court, this does not constitute a burden that is too heavy, and the employer is the one who bears the burden of proving he gave the employee's disability an adequate consideration. In addition, the court states that the Disability Law obligates the employer to pursue and advance the appropriate representation of people with disability in the workplace, through affirmative action. In the end, the court granted the plaintiff's temporary relief, and ordered his dismissal-void. No appeal was filed regarding this decision.

### Report by Francesco Centofanti, Member of the Panel, Appeal Labour Court of Rome

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments*

- 1.1 Italy has ratified the UN CRPS (Conventions on the Rights of Person with Disabilities), and its Optional Protocol (both adopted on 13 December 2006), by Law 18/09, dated 3 March 2009.
- 1.2 (a) Italy is obliged to implement the EU Employment Equality Directive (n. 2000/78/EC, hereinafter the Directive).
- (b) The Directive was implemented by Legislative Decree 216/03, dated 9 July 2003.
- (c) No subsequent laws regarding the implementation of the Directive occurred.
- 1.3 ILO Convention n. 159 [Vocational rehabilitation and employment (disabled persons), 1983], ratified on 7 June 2000, shall be applied to Italy.

##### *National legal framework*

- 1.4-1.5 Equal dignity for all citizens is guaranteed by article 3 of the UN CRPD, establishing equality and non-discrimination principles while stressing that all citizens have the same legal status and therefore are equal before the Law. These principles are the pillars of ordinary Italian laws, such as law 104/92 and law 68/99. The first is a normative reference point about non-discrimination and equal opportunities of persons with disabilities, while structuring all guarantees and protection measures and preparing the conditions for a full social integration. The second law establishes the principle of equal treatment and job conditions and excludes handicap-related discrimination while introducing specific measures.

Legislative decree 216/03, implementing directive 2000/78/EC, has reinforced the prohibition of workplace discrimination, including career opportunities and remunerations, vocational guidance opportunities and vocational training.

With specific reference to public administration, Legislative Decree 165/01 establishes that equal opportunities shall be guaranteed along with the absence of any form of discrimination, both direct and indirect.

In addition, law 4/04 establishes the principle of non discrimination in terms of access to IT instruments and new technologies (article 9).

1.6 To the best of my knowledge, there are not collective agreements regarding the protection of workers with disability. The subject is directly regulated by law.

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

2.1. Law 68/99 has as its purposes the promotion of the inclusion and the integration of disabled persons in the world of work through support services and targeted employment. Legislative decree 216/03 sets the provisions for implementation of equal treatment between persons irrespective religion, belief, age, sexual orientation, and also disability, as regards employment and working conditions, by providing the necessary measures so that these factors are not the cause of discrimination.

2.2. Article 3, Law 104/92, defines a “handicapped person” as someone “having a permanent or a progressive physical, mental or sensory impairment that determines difficulties in learning, social relations and work integration, in such a way as to determine a process of social disadvantage or marginalization”. This notion stresses the limitations of faculties (impairments) and the social disadvantage (handicap), that is, on the elements that have a negative impact on the life of persons with disabilities. The law does not include any reference to the environment in which the “person with disabilities” lives and interacts, that is the background against which “impairments” shall be considered.

The definition of registered disability (“invalidità civile”) can be found in a law dated 1971 (Law 118/71), amended in 1988, according to which “mutilated and disabled people” are those people affected by congenital or acquired disability, even of a progressive nature, including mental disability or mental insufficiency caused by sensory or functional impairment, having reduced permanently the ability to work to the extent of 74% at least (or, if under 18 years old, persons with permanent difficulties to carry out their tasks and activities). In order to claim socio-sanitary assistance and attendance allowance, mutilated and disabled people shall be over the age of 65, with permanent difficulties to carry out the activities and tasks of their age. Again, the main reference is the reduction of the ability to work.

As to the notion of “disabled person” for job placement, Law 68/99 does not really introduce a real innovative notion of disability, but links the idea of persons “entitled to” to a percentage of disability, that is, to a generic idea of work ability.

As anyone can see, there is not an uniform legal disability definition, also regarding the employment protection.

2.3. The UN CRPS (ratified in Italy on 2006), and the judgments of the CJEU (Court of Justice of European Union) on the cases *Chacon-Navas* [C-13/05], *Ring and Skouboe Werge* [C-355/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12], had no influence on the above definitions of disability, which are previous.



2.4. Article 20, Law 102/09, attributes to the National Institute for Social Security (INPS Istituto Nazionale della Previdenza Sociale) a new role to play in assessment procedures of registered disability and handicap, while enhancing and optimizing some aspects of the assessment system. INPS assessment commissions are called to check all disability, handicap and impairment assessment forms, released by assessment commissions of local health units (ASL). INPS certifications have weight also in employment litigations.

### **3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

3.1. There are no legal restrictions/obstacles regarding the establishment of an employment relationship with persons mentally disabled. There were not even before the implementation of the UN CRPD.

3.2. The law forbids to dismiss a worker for the sole reason of his disability. This kind of dismissal would be discriminatory and void.

3.3. Law 68/99, already recalled, is aimed focuses on job placement and work integration of persons with disabilities while ensuring the respect of their abilities and attitudes. It represents the evolution of the Italian legislation in terms of occupation of people with disabilities, in particular Law 104/92, while integrating it with the emerging principles of the international norms aimed at protecting the rights of persons with disabilities.

Employers, both in the public and private sector, are obliged to guarantee the workplace to people who, not being affected by any disability in the moment when they have been hired, have acquired a disability as an effect of a work injury or a professional disease (article 1, par. 7).

The law obliges both public and private, employers with at least 15 workers, to hire disabled workers in accordance with reserve quota (art. 3).

Article 17 plays a particularly important role, since it requires public and private companies participating in a public call or having concession/convention agreements with public administrations, to present the declaration of the legal representative attesting the compliance with norms regulating the access to employment for persons with disabilities, under penalty of their exclusion.

The assessment of the implementation of law 1999 corresponds to the obligation, stated in article 31 of the UN CRPD, to collect data and statistics concerning disability, in order to elaborate specific policies to satisfy the needs of persons with disabilities.

In advance, Law 104/92 already governed, to the benefit of these persons, the procedure of permits to be absent from work and several mobility allowances.

As a general rule, applied by labour judges, employers have to arrange working time and opportunities for the people with disability, so as to facilitate their performances.

#### 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

##### *Anti-discrimination law framework in employment matters*

4.1 The law establishes a legal protection framework in favour of persons with disabilities who are victims of direct or indirect discrimination. Direct discrimination occurs when a person with disability is treated less favourably than a person without disability would be in a similar situation; indirect discrimination occurs when a measure, a criterion, a practice, an action, a pact or an apparently neutral behaviour put a person with disability in a disadvantaged position.

4.2. These provisions cover all aspects of employment.

##### *Reasonable accommodation*

4.3-4.4 The Italian legal framework did not state the obligation to adopt reasonable accommodation, and did not consider its violation as a form of discrimination against people with disabilities. Article 2 of law 68/99 sets out measures concerning “targeted job placement”, which are aimed at tackling issues about environment, instruments and human relations on work places and therefore can be considered as a form of reasonable accommodation. Nonetheless, the European Commission referred Italy to the CJEU pointing out that Italy has not completely transposed article 5 of Directive.

The European Commission considers that Italian law does not provide a general rule of reasonable accommodation for people with disabilities in all aspects of employment.

CJEU ruled in favour of the Commission (on 4 July 2013, *in case C-312/11*).

So, Italian government, with approval of Decree Law 76/13, ordered (article 9, par. 4 ter) that *"In order to ensure compliance with the principle of equal treatment of persons with disabilities, employers public and private are required to take reasonable accommodation, as defined by the UN Convention on the Rights of Persons with Disabilities, ratified pursuant to Law 3 March 2009, n. 18, in the workplace, to ensure to persons with disabilities the full equality with other workers. The public employers must ensure the implementation of this paragraph without new or increased burdens on public finance and human resources, financial and available under current legislation"*.

It is doubtful that this generic provision satisfies the obligations imposed by the Directive.

## **5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

### *Forums and sanctions*

5.1. Trade unions associations, and associations and organizations that represent the disability rights, may initiate a legal procedure on behalf of person with disability against alleged discrimination, with the consent of the person himself.

5.2. Through the decision that accepts the appeal, the judge might opt for a monetary compensation of the damage, might order the cessation of the behaviour, the conduct or the discriminatory act, if still undergoing, and might adopt any other measure to remove the effects of the discrimination.

5.3. Mediations (especially the conciliation procedures of collective agreements) are allowed.

### *Burden of proof*

5.4-5.5 In order to demonstrate the existence of a discriminatory behaviour, the applicant can bring factual evidence, based on serious, precise and consistent circumstances. The judge might evaluate them within the scope of application of article 2729, par. 1, of the Civil Code (concerning the simple presumptions left to the discretion of the Judge).

## **6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT**

6.1. The Supreme Court has no other role except the one to check if the previous judgments are in compliance with law.

6.2. The trend is not towards the growth of numbers of cases related to disability discriminations. It depends from the difficulties about giving evidence on topic.

6.3. The main complaints are related to the mobility allowances.

6.4. As told before, we haven't got, until recent times, reasonable accommodations.

6.5. In agreement with I said before, my Court hasn't got important test cases to be described in this field.

### Report by Jakob Wahl and Marit B. Frogner, Labour Court of Norway

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments*

##### 1.1 Has your country ratified the UN CRPD (date and form of ratification)?

Norway has ratified the convention, not the additional protocol.

Ratification date: 3 June 2013.

##### 1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?

No. However, Norway has chosen to implement the Directive.

##### (b) When and how was it implemented (formal issues)?

The rules of the Directive were included in the previous Working Environment Act (1977) Chapter 13 with effect from 1 May 2004.

However, with effect from 1 July 2001, the previous Working Environment Act (1977) prohibited the employer from discriminating applicants on the basis of disability. Whether the employer, as far as possible and reasonable, could accommodate the workplace for the applicant, should be taken into account when assessing whether the applicant had been subject to different treatment due to disability. A rule on burden of proof was also adopted.<sup>12</sup>

##### (c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?

There has been a gradual development and increased focus on discrimination in many areas, including disability.

##### 1.3 What other relevant international treaties, ILO Conventions shall be applied to you country?

- ILO Discrimination (Employment and Occupation) Convention, No. 111
- The European Social Charter

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<sup>12</sup> The preparatory works makes references to the Directive. As it at that time was not yet determined whether Norway was obliged to implement the Directive, the ministry did not propose amendments directly based on the Directive.

1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!

There has been a gradual development in the general legal framework in regard to discrimination – on different grounds, including disability. However, case law mainly seems to relate to discrimination on grounds of gender and age.

1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?

The Anti-Discrimination and Accessibility Act (Act of 21 June 2013 No 61 relating to a prohibition against discrimination on the basis of disability).<sup>13</sup>

The Act applies to all areas of society with the exception of family life and other relationships of a personal nature, cf. section 2. Thus, the scope of the Act is wide. The Act has rules on universal designs (designing or accommodating as regards to physical conditions so that it may be used by as many people as possible.)

According to section 4, direct and indirect discrimination on the basis of disability is prohibited.

The Equality and Anti-Discrimination Ombud and Equality and Anti-Discrimination Tribunal monitor and contribute to the implementation of the Act.

The Working Environment Act (2005) lays down a general obligation for the employer to, as far as possible, implement the necessary measures to enable an employee who suffers reduced working capacity as a result of accident, sickness, fatigue or the like to retain or be given suitable work (section 4-6).<sup>14</sup>

1.6 What role is there for collective agreements regarding the protection of workers with disability?

Statutory rules prohibiting discrimination on several grounds, including disability, has developed over the years. The major collective agreements are not important instruments in this regard. However, the Basic Agreement has a reference to section 4-6 of the Working Environment Act and states that the employer shall cooperate with the disabled employee.

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

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<sup>13</sup> The Act replaces the previous Act of 2008. Before 2008, prohibition against discrimination on the basis of disability in relation to work was included in the Working Environment Acts (In the 1977-act with effect from 1 July 2001. The 2005-act maintained the same rules until the implementation of the Anti-Discrimination and Accessibility Act in 2008.)

<sup>14</sup> The previous Working Environment Act 1977 had a similar rule.

The Anti-Discrimination and Accessibility Act does not define “disability”. The preparatory works of the Act discusses the term and the application in regard to for instance HIV, overweight, sign language etc. The scope of the protection is thus wide.

The Act applies, as mentioned above (1.5), to all areas of society (with the exception of family life and other relationships of a personal nature).

2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find an uniform legal disability definition regarding the employment protection?

See 2.1 above.

2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases Chacón-Navas [C-13/05], Ring and Skouboe Werge [C-335/11 and C-337/11], Kaltoft [C-354/13] and Z. [C-363/12]) had any influence on the labour law definition of disability?

No.

2.4 How is disability required to be proven/certified in employment litigation?

There are hardly any cases from the Courts of Appeal<sup>15</sup> concerning discrimination due to disability, and we are not aware of any case law where this has been an issue.

We have been in contact with the office of the Ombud. Based on complaints, the focus is whether there has been a discriminatory treatment.

### 3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?

There have not, as far as we know, been any cases concerning this.

In practice, the question would be which adjustments and accommodation that may be needed.

3.2 Is there any special protection of persons with disability against termination of employment?

There is a general requirement under Norwegian law that a dismissal must be “objectively justified”, cf. section 15-7 of the Working Environment Act.

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<sup>15</sup> Judgements from the Norwegian Supreme Court and the Courts of Appeal are available on Lovdata (<https://lovdata.no/>). First instance decisions are not included on a regular basis.

The Anti-Discrimination and Accessibility Act states that the prohibition against discrimination applies to all elements of the employment relationship, including termination, cf. 2.1 above and 4.1 below. Thus, the rules on burden of proof also applies, cf. 5.4 below.

There has not, as far as we know, been any case where the court has considered the validity of a dismissal in relation to the Anti-Discrimination and Accessibility Act. However, in a case from 2009<sup>16</sup> concerning dismissal and discrimination due to gender, the Court of Appeal found that a pregnant employee had been dismissed due to her pregnancy. Consequently, the dismissal was in breach of the Working Environment Act (protection against dismissal during pregnancy) and the Gender Equality Act. The employee was awarded compensation for economic and non-economic loss. When awarding compensation for non-economic loss, the court referred to case law by the European Court of Justice, and that the compensation should have a real dissuasive effect. When calculating the compensation, the fact that the employer had breached the Gender Equality Act was thus an aggravating factor.

### 3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?

There requirements regarding individual accommodation and adaption applies. This may, inter alia, include reduced working hours. In addition, the National Insurance (NAV) may assist, for instance with regard to adaption of the work place etc.

## 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Anti-discrimination law framework in employment matters*

#### 4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?

Yes. Chapter 5 of the Act has additional rules relating to employment.

Pursuant to section 21, the prohibition against discrimination applies to all aspects of the employment – from the advertising of the post, appointment, relocation and promotion, training and competence development, pay and working conditions and termination of employment.

The employer has a duty of disclosure towards a job applicant (section 22).

An employee that considers that the settlement of salary is discriminatory, may demand that the employer provide information about the level of salary for the other employee/employees that the employee compares him- or herself with (section 23).

There are rules on a duty to make efforts to promote the purpose of the Act (section 23), and to report on these efforts (section 24).<sup>17</sup>

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<sup>16</sup> LH-2008-000829

<sup>17</sup> This applies to employers in private sector that employ more than 50 employees and employers in public sector.

An employee and a job seeker with disability has a right to individual accommodation of the work place and tasks to ensure that they may obtain or retain a job, have access to training and other measures to develop their competence and carry out and have opportunity to advance in their work in the same way as other people (section 26). This obligation does not include accommodation that entails an “undue burden”. In this assessment, particular importance shall be attached to the effect of the accommodation on the dismantling of disabling barriers, the necessary costs and the undertaking’s resources.

#### 4.2 Which aspects of employment are covered by these special provisions?

See above, 4.1 – all aspects are covered.

##### *Reasonable accommodation*

#### 4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?

Yes, see 4.2 above.

The Working Environment Act has a general rule concerning adaption for employees with reduced capacity for work, see 1.5 above.

#### (b) What is the sanction of breaching this obligation?

Pursuant to section 31 of the Anti-Discrimination and Accessibility Act, an employee may demand compensation for economic loss and non-economic damages. In employment relationships, this applies regardless of whether the employer may be blamed for the discrimination.

#### (b) Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?

Yes, see 1.5 above.

#### 4.4 Has any provision and/or practice on reasonable accommodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases Ring and Z.)?

See 1.2 above.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

#### 5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (actio popularis)? Are they eligible to this with or without the consent of the concerned persons?



According to section 32 of the Anti-Discrimination and Accessibility Act, organisations whose purpose is to combat discrimination on the basis of disability may be used as a legal representative in cases heard by the courts pursuant to the Act. This does not apply in relation to the Supreme Court.

The Act does not allow for organisations to initiate legal proceedings without the consent of the concerned person.

## 5.2 (a) What redemies and forums are available in cases of alleged discrimination against persons with disabilities?

The Equality and Anti-Discrimination Ombud and Equality and Anti-discrimination Tribunal monitor and contribute to the implementation of the Act.<sup>18</sup>

The ombudsman is an alternative to court proceedings. A person who considers that he or she has been subject to discrimination may contact the Ombud to receive help and guidance. The goal is to help the parties to resolve the problem. The Ombud may also provide an opinion (a conclusion) on whether or not discrimination has occurred.

The Equality and Anti-discrimination Tribunal considers appeals against statements and decisions by the Ombud. Considerations are free of charge. The Tribunal only considers cases that have been considered by the Tribunal.

Decisions by the Tribunal may be brought before the ordinary courts. The court will make a full review of the matter.

A person may always decide to institute legal proceeding. (A consideration by the Ombud is no requirement before instituting legal proceedings.)

## (b) Which are the most effective and/or most common sanctions?

The court may award compensation for economic and non-economic loss. In case of an invalid dismissal, the employee is as a general rule entitled to continue in his or her employment.

## 5.3 Is there any role for mediation in such cases?

The Dispute Act has rules on mediation. Court held mediation is common in employment disputes.

### *Burden of proof*

## 5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?

Section 30 of the Anti-Discrimination and Accessibility Act has rules on burden of proof. If there are circumstances that give reason to believe that discrimination has occurred, this shall be considered to be the case unless the person responsible proves it probable that no discrimination has occurred.

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<sup>18</sup> The responsibilities and work of the ombud and tribunal are regulated by the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005.

### (b) How are the burden of proof provisions applied in court procedures?

In 2012, in a case relating to discrimination due to age, the Supreme Court considered a similar rule on burden of proof.<sup>19</sup> The court stated that a mere allegation about discrimination was not sufficient to transfer the burden of proof to the employer. There had to be “indications”, however, “reason to believe” was clearly less than an ordinary requirement for probability. If there are reasons to believe that discrimination has occurred, the employer must prove on a balance of probabilities that he has not discriminated against the employee.

### 5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?

Not that we are aware of.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

### 6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?

The Norwegian Supreme court has not considered any cases related to discrimination due to disability in connection with employment.

### 6.2 What is the tendency observed in your country’s case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?

We are as mentioned above not aware of any cases where the court has considered dismissal related to disability discrimination.

### 6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?

See answer above in relation to case law.

From 2007 to 2014, the Ombud has considered 96 complaints relating to disability in connection with employment.

An example is a complaint that was considered by the Ombud and later by the Tribunal. The employee’s working capacity was reduced to 50 % and thus required an adjustment of the working hours. The employer argued that the position was full time; if they employed her in a 50% position, they had to employ another person to cover the remaining 50%. They claimed that it had proven very difficult to find a qualified person, and it would be even more difficult if the position was part-time. She was therefore not considered to be the best qualified. The Ombud found that the requirement that she had to work full time was discriminatory, but the aim was legitimate, and the different treatment did not disproportionately affect the applicant.<sup>20</sup> The Tribunal did not agree.<sup>21</sup> The Tribunal stated that it may, in

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<sup>19</sup> Rt-2012-424.

<sup>20</sup> Complaint / sak nr. 13/478 <http://www.ldo.no/en/nyheiter-og-fag/klagesaker/2015/13478-arbeidsgivers-krav--var-ikke-i-strid-i-diskriminerings--og-tilgjengelighetsloven/>

some cases, be justified and necessary to require that the employee works 100%. However, this requirement was not included in the advertising of the post, and the Tribunal found that the employer had not established that the position could not be divided between employees. The different treatment was thus not “necessary”.

#### 6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision!

We are not aware of any “new” cases relating to reasonable accommodation.

In 1995 the Supreme Court considered the duty to accommodate for an employee who had developed a work related disability.<sup>22</sup> The employee had been transferred from the municipal parks department to work as a renovator in connection with redundancy measures. In connection with his work as a renovator, he developed eczema, mainly due to dissatisfaction and depression, and became unable to work (sick leave). The municipal was not able to find alternative and suitable work, and the employee was dismissed. The Supreme Court found that the dismissal was justified. The employer had tried to find alternative employment, and the employer’s duty to find alternative employment did not imply that the rights of other employees were reduced. (In this case, the employer could not transfer other employees to other work by virtue of the employer’s prerogative of management.)

The Ombud has considered several cases on reasonable accommodation. We have reviewed a few of the cases where employees have made complaints, and our impression is that the cases to large extent are based on an assessment of the factual circumstances in each case.

#### 6.5 Please, describe the most important court decisions (test cases) in this field!

So far, there have not been any important court decisions in this field.

## Slovenia

### Report by Miran Blaha, Supreme Court Judge, Slovenia

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments*

##### 1.1 Has your country ratified the UN CRPD (date and form of ratification)?

Yes, Convention was ratified by the National Assembly in 2008.

##### 1.2 (a) Is your country obliged to implement the EU Employment Equality Directive (Directive 2000/78/EC; hereinafter: Directive)?

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<sup>21</sup> Uttalelse sak 69/2014 -

<http://www.diskrimineringsnemnda.no/fullvisning/?id=2094117726&module=articles&smId=461488516&smTemplate=Fullvisning>

<sup>22</sup> Rt-1995-227

Yes

**(b) When and how was it implemented (formal issues)?**

Directive was implemented with Employment Relationship Act in 2002.

**(c) What have been the relevant and significant changes regarding the implementation of the Directive with regard to the discrimination of workers with disabilities?**

Definition of direct and indirect discrimination, prohibition of sexual and other harassment, the employer shall be liable to provide compensation in the event of violation of the prohibition of discrimination

**1.3 What other relevant international treaties, ILO Conventions shall be applied to your country?**

ILO Convention 159 concerning Vocational Rehabilitation and Employment (Disabled Persons)

European social Charter

*National legal framework*

**1.4 Please, evaluate the impact of the above mentioned international legal instruments on the development of your national legal system in relation to workers with disability in the field of labour law!**

**1.5 What are the relevant national labour law regulations in relation to workers with disability (especially the non-discrimination provisions)?**

With amendment to the Constitution disability was added as one of the explicitly stated personal circumstances which prohibits discrimination. The same provision also has Employment Relationships Act.

According to the Constitution disabled persons shall be guaranteed protection and work-training. Physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society. The education and training shall be financed from public funds.

Pursuant the Employment Relationships Act an employer must provide protection of disabled workers and disabled persons training or retraining in accordance with the regulations on training and employment of disabled persons and the regulations on pension and invalidity insurance. An employer must ensure a worker, with whom remaining capacity for work has been ascertained, the following:

- another work corresponding to his remaining capacity for work,
- part-time work with regard to his remaining capacity for work,
- occupational rehabilitation,

- wage compensation,

in accordance with the regulations on pension and invalidity insurance.

1.6 What role is there for collective agreements regarding the protection of workers with disability?

Rare and not particularly important

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW

2.1 How does your national law define the personal scope of employment protection in relation to persons with disabilities?

2.2 If there are different definitions in various employment laws, what differences may be identified? Is there a legislative effort to find an uniform legal disability definition regarding the employment protection ?

The definition of disability is found in the Vocational Rehabilitation and Employment of Disabled Persons Act and in the Pension and Disability Insurance Act.

Pursuant to the Vocational Rehabilitation and Employment of Disabled Persons Act disabled person is a person incapable of pursuing regularly and substantially gainful occupation because of a physical or mental impairment.

Pursuant to the Pension and Disability Insurance Act invalidity shall be ascertained if due to changes in health condition which cannot be reversed by treatment or by measures of medical rehabilitation the capacity of an insured person to secure or keep a job or to advance in career has been reduced.

2.3. Has the UN CRPD or the jurisdiction of the Court of Justice of the European Union – hereinafter: CJEU (with special regard to the cases *Chacón-Navas* [C-13/05], *Ring and Skouboe Werge* [C-335/11 and C-337/11], *Kaltoft* [C-354/13] and *Z.* [C-363/12]) had any influence on the labour law definition of disability?

No, but Labour and Social Courts take into account the judgments of the ECJ when deciding on the Rights of Persons with Disabilities on the basis of disability insurance and Employment Rights

2.4 How is disability required to be proven/certified in employment litigation?

In labor disputes, the disability must be proven by a final decision of the competent authority of the Institute for Pension and Disability Insurance

## 3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

3.1 Are there any restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability? Have these rules been amended as a result of implementing the UN CRPD?

Person with mental disability as a disabled person has the same status and rights as other people with disabilities. Due to the ratification of the Convention legislation in this part has not been amended or supplemented.

3.2 Is there any special protection of persons with disability against termination of employment?

The employer may terminate the employment contract of a disabled person owing to incapacity to carry out the work under the terms of the employment contract owing to disability and in the event of business reasons in cases and under the conditions laid down in the regulations governing pension and disability insurance or the regulations governing employment rehabilitation and the employment of disabled persons. The employer may terminate the employment contract concluded with a disabled worker with the remaining capacity for work, if he is incapable of securing a job or part-time work, the reasons for termination of employment contract shall be determined by a commission composed of: a representative of the Institute of Pension and Invalidity Insurance of Slovenia, a representative of the Labour Inspectorate of the Republic of Slovenia, a representative of the Employment Office and a representative of employers and a representative of trade unions.

3.3 What other protection/benefits/preferential treatment is provided by your national labour law, such as special organisation of working time, extra paid leaves, mobility allowances etc.?

See answer 1.5.

Employers who employ at least 20 employees are obliged to employ persons with disabilities in the context of a specified proportion of the total number of employees (quota between 2 and 6% of all the employees depending on the activity of employer).

Vocational Rehabilitation and Employment of Disabled Persons Act provides different types of employment for people with disabilities:

- employment in a normal working environment,
- supported employment is the employment of the disabled in the workplace in a normal working environment with professional and technical support to a disabled person, the employer and the working environment (professional support with information, advice and training, personal assistance, supervising, developing personal methods of work and evaluation of work performance and technical support to the adaptation of the workplace and means to work),

- sheltered employment is the employment of the disabled in the workplace and in the working environment, flexible working abilities and needs of the disabled person who is not employed in a regular job (protected workplace),
- employment in disability (social) enterprise, the company that employs and trains people with disabilities for at least 40% of all employees in the company.

#### 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

##### *Anti-discrimination law framework in employment matters*

4.1 Are there special provisions on the prohibition of discrimination against persons with disabilities in the field of employment?

4.2 Which aspects of employment are covered by these special provisions?

Pursuant to Vocational Rehabilitation and Employment of Disabled Persons Act and Employment Relationship Act it is forbidden the direct and indirect discrimination in employment of people with disabilities, during the course of employment and in connection with the termination of employment and in procedures of the rehabilitation of the disabled worker.

##### *Reasonable accommodation*

4.3 (a) Has the reasonable accommodation of the special needs of persons with disabilities been regulated in the field of employment?

Provision of 'reasonable accommodation' (Directive 2000/78/EC, article 5) was implemented in Slovenia with Vocational Rehabilitation and Employment of Disabled Persons Act and for disabled workers Pension and Disability Insurance Act.

Vocational Rehabilitation and Employment of Disabled Persons Act assure employment to the disabled parts that match their skills in various forms of employment (in the normal working environment with appropriate adaptations and support, in the special enterprises for disabled persons, etc.).

Under Pension and Disability Insurance Act employee suffering from invalidity shall be kept in employment by the employer and reassigned to a job suited to his remaining capacity for work and qualifications or training and shall be provided with occupational rehabilitation or part-time work shall be provided. In the event that employment or reassignment of an employee afflicted by invalidity to another job requires adaptation of premises and working implements, the The Institute of Pension and Invalidity Insurance of Slovenia may, in part or in whole, bear the costs of such adaptation.

The Health and Safety at Work Act lay down the rights and duties of employers and employees with respect to healthy and safe working practice, and measures to ensure health and safety at work, including the adjustment of workplaces, work environment and technology, the choice

of working and personal protective equipment and working and production methods, in particular, to eliminate monotonous work conditions and forced the pace labor and other harmful factors (humanisation of work).

(b) What is the sanction of breaching this obligation? Is this violation considered as discrimination? Are the same provisions, sanctions applied as for discrimination cases?

Prescribed are fines. In the event that the Court finds a violation of the prohibition of discrimination, the employer is liable to pay compensation. In the event of termination of the employment contract the court can declare unlawful the dismissal and ordered the employer to adapt the workplace for a disability worker.

4.4 Has any provision and/or practice on reasonable accomodation been introduced/amended as a result of implementing the UN CRPD or the Directive or the jurisdiction of the CJEU (with special regard to the cases *Ring* and *Z.*)?

No

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

5.1 Do NGOs and/or trade unions have a right to initiate a legal procedure on behalf of a group of persons with disabilities against alleged discrimination (actio popularis)? Are they eligible to this with or without the consent of the concerned persons?

No such options.

5.2 (a) What redemies and forums are available in cases of alleged discrimination against persons with disabilities?

(b) Which are the most effective and/or most common sanctions?

The payment of compensation and the finding that termination of employment contract is illegal and reintegration worker in a suitable job.

5.3 Is there any role for mediation in such cases?

The Advocate of the Principle of Equality deals with cases of suspected violation of the prohibition of discrimination (which also includes cases of workplace harassment). The procedure begins with a written or oral initiative entered in the records. The initiative may be anonymous; however, it must contain enough information to allow investigation of the case to proceed. The initiative must be made as soon as possible, but not later than one year after the violation took place. However, the Advocate may deal with the case after this period, if he or she assesses that the case is important or serious enough to warrant continuation. Treatment of a case is informal and free of charge.



A case usually proceeds in written form, where the Advocate may request that those involved provide them, by the deadline specified, with suitable clarifications and additional information necessary for an opinion to be issued. If the Advocate assesses that this will help to clarify the case, all involved parties may be invited to an interview (oral hearing).

If the victim of discrimination or a person assisting the victim of discrimination have been subjected to adverse consequences as a result of measures aimed at enforcing the prohibition of discrimination, the Advocate may, during investigation of the case, call on the legal entity or other subject at which the suspected violation of the prohibition of discrimination has taken place to take appropriate measures to protect the victim of discrimination or the person assisting them from reprisals, or to rectify the consequences of these reprisals.

The case is concluded with a written opinion in which the Advocate states their findings and assesses the circumstances of the case in relation to the existence or otherwise of a violation of the prohibition of discrimination. The Advocate notifies both parties of the findings. The Advocate may draw attention in the opinion to the irregularities identified, recommend ways in which they may be removed and call on the person suspected of violating the prohibition of discrimination to notify them of the measures to be taken by a specified deadline.

A labour inspector may, in addition to issuing (administrative) decisions in inspection procedures and imposing violation sanctions (fines), intervene in a dispute between an employee and employer. The consent of both parties is required. Any agreement signed has executory title (it is a special form of out-of-court settlement).

It is, of course, always possible to use other forms of amicable dispute settlement. Such a possibility can be prescribed as mandatory by law or collective agreement. In such a case, the access to court is deferred; the procedure of amicable dispute settlement must be initiated and it is only when it is not terminated within 30 days that the worker is permitted to file an action before the court (which does not apply to disputes on the existence and the termination of the employment relationship where direct access to the Court is prescribed).

Once the action is brought, the court offers the parties the possibility of an amicable resolution of settlement in all cases, except in the case the judge estimate to be inappropriate. Upon the proposal of the parties that concur with the attempt of an alternative dispute settlement, the court may at any time suspend the judicial proceedings for a period of up to three months, and refer the parties to the procedure of alternative dispute settlement.

In addition, the court must strive towards reaching a court settlement throughout the proceedings. This is also the whole purpose of the first hearing, known as the settlement hearing.

The worker and the employer therefore have many options to settle their dispute amicably or obtain a settlement, either before the filing of action or during the judicial proceedings. In labour disputes, this is usually the best solution and one that is quite often used by courts. Approximately 20% of cases end in a court settlement and approximately the same amount in other ways of a consensual resolution of disputes leading to a withdrawal of action or other conclusion of judicial proceedings that does not involve deciding on the merits. Slight reservations are only linked to what is known as court-associated mediation. The mediators can be or in fact mainly are judges, which means they have a double role to play – some say incompatible.

### *Burden of proof*

5.4 (a) How is the burden of proof regulated in discrimination cases? Who has to prove the causality between the discrimination ground and the differential treatment (disadvantage)?

(b) How are the burden of proof provisions applied in court procedures?

If, in the event of a dispute, a candidate for work or employee cites facts giving grounds for the suspicion that the prohibition of discrimination has been violated, the employer must prove that, in the case in question, the principle of equal treatment and the prohibition of discrimination have not been violated.

Differing treatment based on any personal circumstance, including disability, shall not constitute discrimination if, owing to the nature of the work or circumstances in which the work is performed, a certain personal circumstance might represent a significant and decisive condition in respect of the work and such a requirement is in proportion to and justified by a legitimate objective.

5.5 Has the UN CRPD or the Directive had any influence on the procedural provisions (actio popularis, sanctions, burden of proof etc.)?

No

## **6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT**

6.1 What role is there for the Supreme Court regarding the development and guidance of case law in this field?

Supreme Court ensures uniform application of laws, but decided only in cases when the revision is brought against the final judgment of the lower courts.

6.2 What is the tendency observed in your country's case law – a growing or decreasing number of cases related to disability discrimination? How do you explain such trends?

In general, the number of cases of discrimination is low, presumably because it is difficult to prove that discrimination, as well as awarded damages are relatively low. This also applies to cases of discrimination on grounds of disability.

6.3 What are the main topics of complaints related to discrimination based on disability: recruitment, promotion, equal pay, redundancy, other?

The largest number of cases is due to the termination of the employment of people with disabilities because their protection is no longer absolute.

6.4 Has there been cases on reasonable accommodation? If yes, please describe one of these cases and the decision!

6.5 Please, describe the most important court decisions (test cases) in this field!

Courts have determined whether the disabled person is offered suitable work, this is a job that corresponds to his remaining capacity. If such work is not accepted or if such work was not available the termination of the contract of employment was lawful and justified.

Cases where the court ordered reasonable accommodation are rare, mostly it comes to finding that there is not the appropriate work for disabled worker. Concrete example:

Worker has contract of employment for performing work in the workplace as deputy chief of service in a hotel.

He has recognized disability and has been granted the right to transfer to another job.

The employer sought the possibility of employment in another job that would meet its remaining capacity for work and professional qualifications or competence. Such options was not found, what was finally confirmed by the Commission to establish the basis for termination of employment contract with the Institute for Pension and Disability Insurance.

Employee was no longer able to perform work at the workplace deputy chief of service under conditions and in a manner as to be engaged in this work and the employer could not provide systematized or other relevant vacancy.

The Court also examined whether there is a possibility that the worker despite the constraints at work still be able to perform work as the deputy head of service. This would in some way lead to the definition of a new job at least as regards the description of work. Indeed, should delete all those work - practical work of a waiter - by the plaintiff due to health restrictions is not able to perform. From the findings of fact both courts of first and second instance even such a possibility did not exist. The work of waiter carrying out an important part of the assignment deputy chief of service and his work can not be adapted so that the work of the waiter would not have perform.

#### 1. GENERAL LEGAL FRAMEWORK

##### *The effect of international instruments.*

1.1. Yes. Ratification took place the 23. November 2007. 1.2.

a) Spain was not excluded of implementation

b) The fulfilment of its purposes had been got before, with the Law 8/10980. 10 march, Workers Statute and all the subsequent Laws

c) Before and after the Directive are relevant the D.L. 36/1978, the R.D. 1723/1981, 24 July, L. 13/1982 (first one including definition and ailments enlisting for degree evaluation and others causes as social ones). 7 April, L. 51/2003 2 December, L.62/2003 30 December (modifying L. 13/1982 to implement Directive) R.D. 364/2005, 8 April, L. 12/2001, 143/2006, 29 December Ley 62/2003 (modifying Law 13/1982 to implement Directive R.D. 1451/1983, 11 May, R.D. 4/2005, R.D. 2271/2004 (for civil servants) O.M. 17/12/2001 R.D. 1368/1985. 17 July. Law 39/2006, 14 December, Law 49/2007, 26 December, and the -----/2013

1.3. 159 ILO Convention, XIV Brazilian Convention

##### *National legal framework*

1.4 They provide basic leading to a wide scenery of protection to be implemented with tools each country has available. In the case of Spain there two branches of Law, Labour and Social security (and Welfare) and the specific area for breaching and sanctions. As we have seen, most of the principles have been fulfilled in an early time, most of all with the Law dated 1982.

17) No , it has not been .

1.5.

Labour Statute, arts 4.2.c) and 17.1), ley 51/2003 2nd December arts. and L. 62/2003, 315' Dember. The General Law for Social Security art. 144 (percentage 65%.) and the. L.2972007 269' December, breaching and sanctions

1.6

Collective agreement may include interesting provisions, especially regarding the increase of the minimum reservation guata of lobs for disabled people

## 2. THE DEFINITION OF DISABILITY IN NATIONAL LAW.

2.1 At this moment , the . 51/2003 2". December, article 1.2 .) defines it as "people with a degree of 33% or more disability granted by the administrative medical authority. includes related social security pensioners having been granted a permanent invalidity for their profession in any of its degrees, but for the partial one and public servants pensioners who are it because of retreat due the invalidity for their service .

2.2

No, there is just one form disability and its protection

2.3

May be there has been some influence because in the R.D. 197/ has disappeared in the previous definition, given by the L. 13/1982 its dependence of the different administrative authorities COMPROBAR EN LA CONFERENCIA O EN EL TRABAJO) .

2.4

The citizen goes through administrative — medical procedure then he/she is or is not granted the disability asked for . Afterwards, he/she may go to Labour Court and fight against decision He/she may use medical proof and can discuss , given the facts ,the gauge applied

## 3. LABOUR LAW INSTRUMENTE TO PROTECT PERSONS WITH DISABILITY

3.1.

Depending of the degree the person can be assigned a job but then the contract must be signed or authorized by his/hers representative, as it happens with any other contracts

3.2

When it happens through lack of adaptation to modified ways of working post happened lack of ability, justified layoff affecting an small number of employees may be just one ,a predetermined number of absences ,, the person has a 30 days' notice and six hours a month to search for a new job If the person has a representative (case of mental disease or under age ) , it is this one who is going to make use of those hours .

In other case not justified , he /she gets a compensation , 33 days by each years and if it is due to discrimination , the retaining of the job and may get a money compensation

3.3.

An Special treatment is the reservation quota meaning a number of jobs are reserved for disabled people. But in terms of special treatments it is easier to be seen in case of special centres for disabled workers where they special conditions. Anyway, sometimes this companies compete with "ordinary " companies to get a contract for normal activities where

ordinary request are accomplished and the trouble has come when at the moment of losing the contract and what happens with subrogation (compulsory for any worker, disabled or not, in some activities like cleaning of public spaces) As an example we may quote a judgement of mine about that question, the one given on the 21<sup>st</sup> of October the 2010 ( S. 806/2010) .

There are also the ENCLAVES, with its special Law .Its name bears some difficulty to connect with a labour concept and still more, to be translated into English. The word means spot, position but the idea has nothing to do with that, really meaning "ordinary" companies dealing with special work centres on special conditions

On a private capacity but rendering a national social service of huge importance, the "ONCE", National organization helping blind people and other disabilities, is a most worthy effort to develop a big and extremely well organized help today not only for blind but also for any other handicaps.

#### **4. ANTIDISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

##### *Anti-discrimination law framework in employment matters*

###### 4.1

Yes. To be seen art. 9.2 and 49 Spanish Constitution , Art. 4.2c), 17.1, 54.2g) and 16 Labour Statute , L. 13/1982 ( : Social Integration Disabled , National Agreements ( 1997 and 2002 ), L. 51/2003 rd December with its implement : L. 62/2003 30 the December chapter III, art. 4 and 9 including positive actions and the modified L.13/1982 ( art. 37 and 37bis )

###### 4.2

Direct or indirect discrimination, bullying , reasonable accommodation and positive action.

###### 4.3

a) Yes. See L 51/2003 rd December Universal accessibility, environment , process goods services , tools devices limits derived from reasonable „ proportion , expenses discrimination effects , structure , public budgeted help possibility for mediation  
L.62/2003 30th December adds sees for incentives, tax relief, and social security contributions relief. Special centres.

b) According to the L. 49/2007 the breach may be light severe or most severe one being the sanction a fine with a maximum of 1.000.000 €

b) (7).

Yes it can be.

Yes, they are

4.4

As it has been said. The L.51/2003 2nd December had carried on the most visible modifications.

## 5 PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and actions*

5.1

Yes , the can.Trade Unions are seen at the (art. 16-22 Law procedure and so their representatives , needing consent , in the case of Trade Unions or other Organization

5.,2.

a) As any other workers through Labour courts

b).

5.3. Yes . it is seen at 4.3a) and 17 L. 51/2003 2" December  
Burden of proof.

5.4.

The employee must provide the INDICIO and the employer must proof that tit does not involve any discrimination aim at all

5.5 as it had been said above 5.6

Procedural provisions about discrimination cases are equal to any claims , difference being in including disability in a source of discrimination.

## 6.RECENT DEVELOPMENTS IN CSE LAW AND THE ROLE OF THE SUPREME COURT .

6.1

In fact the only role would be the taking of the case for discrimination given the scarce possibility for claims about the granting og the benefits because of the filters through which the suits are examined .

6.2

no records at the moment

6.3

No records at the moment

6.4

Not as far as know.

6.5

The only cases we have had was the one described in number 3.3 . A decision about disabled worker who rendered his /her services for a "special" company meaning it have contracts only with disabled people and then , on losing the contract, the new company denies subrogation of the worker . I proposed to maintain the claimant in his / her job and it was accepted by the MAJORITY, with the written opposition of a part of the court.

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## Sweden

Report by Judge Cathrine Lilja Hansson, President, National Labour Court

### 1. GENERAL LEGAL FRAMEWORK

#### *The effect of international instruments*

1.1 Sweden ratified the UN CRPD in 2008. At the same time Sweden also ratified the Conventions Optional Protocol

1.2 (a) Sweden is obliged to implement the EU Employment Equality Directive.

(b) The Directive was implemented in 2003, through amendments of the 1999 Act against Discrimination on Grounds of Disability.

(c) Sweden adopted an Act against Discrimination on Grounds of Disability in 1999, that is prior to the adoption of the EU Employment Equality Directive, but after the expansion of the EU competence in field of discrimination in the Amsterdam Treaty (1997). The implementations of the EU Employment Equality Directive in 2003 consisted of some minor adjustment.

1.3 In Sweden a dualistic approach to international law is mainly applied (except in relation to EU law and ECHR). That means that international treaties shall – as a starting point – be transposed into national law through legislation in order to be applied by Swedish Courts.

#### *National legal framework*

1.4 The Swedish act of 1999 was to a large extent framed with the EU law concerning equal treatment between men and women as its role model. The definition of disability (*funktionshinder*) was based on the definition of WHO from 1980, which also was found in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities from 1993.

1.5 The 1999 Act against Discrimination on Grounds of Disability has, together with other discrimination acts, been merged in to the 2008 Discrimination Act.



- 1.6 Collective agreements play an important complementary role in relation to the 2008 Discrimination Act. Collective agreements are usually based on the idea that a pay gap should be fair. An employee's salary shall be determined on the basis of the agreements specified criteria and these should be factual. No unwarranted considerations should be taken. This means that discrimination is not accepted. How it is reflected in the agreements vary. The most common formulation is that "discriminatory or objectively unjustified differences in pay between employees should not occur."

## **2. THE DEFINITION OF DISABILITY IN NATIONAL LAW**

- 2.1 Disability is, according to the 2008 Discrimination Act, defined as a permanent physical, mental and intellectual limitation of a person's functional capacity that as a consequence of an injury or illness existed at birth, arose thereafter, or can be expected to arise.

The ban on discrimination on grounds on disability covers, as far as concerns working life, employees, persons who applies or asks for an employment, persons on vocational training. It also applies to temporary agency worker in relation to the user company.

- 2.2 There are no different definitions in various employment laws.
- 2.3. The UN CRPD or the case of law the Court of Justice of the European Union has not altered the definition applied in the 2008 act.
- 2.4 The starting point is that the person claiming discrimination on grounds of disability has to prove that he or she is disabled. The principle of free evaluation of evidence is applied in Swedish procedural law and any kind of evidence might be put forward to prove the existence disability. In practice it seems that the issue of a person is disabled is often not disputed.

## **3. LABOUR LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY**

- 3.1 There are no restrictions/obstacles regarding the establishment of an employment relationship regarding a person with mental disability, unless they are under a trustee, which will be the case only if the person is not able to take care of himself/herself or his/her possessions and no other means of protecting the person is available.
- 3.2 One of the main aims of the just cause requirement in the Employment Protection Act is to protect employees which due to age, sickness or disability is not fully productive. In such cases the employee may be dismissed only if the employee's performances are so poor that the work the employee is able to do is of no or little value for the employer, and it is not possible to put the employee in an equal situation as other workers by reasonable accommodations.
- 3.3 There are a wide range of labour market policies which aims at raising the employability of persons with disabilities.

## 4. ANTI-DISCRIMINATION LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Anti-discrimination law framework in employment matters*

- 4.1 Discrimination against persons with disabilities is covered by the general prohibition on discrimination in the 2008 Discrimination Act.
- 4.2 The prohibition on discrimination covers in practice every aspect of employment, including, asking for or seeking employment, wage and other employment conditions, harassment and dismissals.

### *Reasonable accommodation*

#### 4.3-4.4

The regulation on the reasonable accommodation in the 2008 Discrimination Act was amended from the 1 January 2015. According to the amendment a violation of the obligation concerning reasonable accommodation considered as discrimination. The same sanctions apply as for discrimination (see below). The amendment was not motivated with reference to the UN CRPD or the Directive or the case law of the CJEU.

## 5. PROCEDURAL LAW INSTRUMENTS TO PROTECT PERSONS WITH DISABILITY

### *Forums and sanctions*

- 5.1 Trade Unions have a right to initiate a legal procedure on behalf of its members. Also the Equality Ombudsman and NGO:s may initiate a legal procedure on behalf of individuals, if they consent to it.
- 5.2 (a) Disputes between an employee and an employer concerning discrimination are considered as a labour dispute and the Labour Dispute Act will apply. This means that the disputes will be heard by the Labour Court (as the first and last instance, or second or last instance).  
  
(b) The most common sanction is a form of punitive damages called *diskrimineringserättning*.
- 5.3 No special forms of mediation apply in discrimination cases. The ordinary grievance negotiations between the labour market parties apply.

### *Burden of proof*

- 5.4-55. Sweden has adopted a rule on burden of proof which is almost identical with Article 10 of the EU Employment Equality Directive.

## 6. RECENT DEVELOPMENTS IN CASE LAW AND THE ROLE OF THE SUPREME COURT

6.1 Disputes about employment discrimination belongs to the Labour Court's jurisdiction. Supreme Court judges in disputes about discrimination in areas other than employment.

6.2 It is difficult to talk about tendencies because there are so few cases.

6.3 The Labour Court has in recent years judged in disputes concerning

- Visually impaired been denied training at nursing homes
- Visually impaired been refused employment as administrator of social insurance
- Dismissal of a bus driver with cerebral infarction.
- Dismissal of process workers who had sleep apnea.

6.4 The questions of reasonable accommodation has been dealt with in some dismissal-cases. It follows from the Employment Protection Act and the Discrimination Act that a dismissal on the ground of lack of capacity to perform work will not be lawful if it reasonable that the employer accommodate the work or workplace in order to compensate for the lack of capability. I two cases it has been discussed if an adjustment of the working time would have made it possible for the employee to perform his/her work (AD 2014 nr 41, teacher with fibromyalgia and AD 2013 nr 78 bus driver with cerebral infarction).

6.5 A severely visually impaired person applied for a job at the Social Insurance Agency as an administrator of cases of sickness. She was denied employment on grounds of her disability. The Labour Court found that it was not reasonable for the Social Insurance Agency to make such support and adaptation which would have been required to create a situation for the visually impaired person which was comparable to that of people without this disability. The person had therefore not substantive conditions to uphold the employment. The Labour Court found that the Social Insurance Agency was not guilty of direct discrimination (AD 2010 nr 13).