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European Anti-Discrimination Law Review

THE EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE NON-DISCRIMINATION FIELD

In this Issue:

- Interpreting the EU Equality Law in Light of the UN CRPD
- Ex officio investigations into violations of the principle of equal treatment
- European Legal Policy Update
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Introduction

The European Network of Legal Experts in the Non-discrimination Field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network covers all 27 EU Member States, one acceding country (Croatia)¹ and candidate countries (the Former Yugoslav Republic of Macedonia, Iceland and Turkey). The EEA countries (Liechtenstein and Norway) have also been part of the Network since January 2012. There is one national expert per country.

The aim of the Network is to monitor transposition of the two anti-discrimination directives² at the national level and to provide the European Commission with independent advice and information. It also produces annual country reports, a comparative analysis of anti-discrimination law, the *European Anti-discrimination Law Review* and various thematic reports. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the seventeenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the Non-discrimination Field. Lisa Waddington, member of the Network's executive committee responsible for coordinating the disability ground and Law Professor at Maastricht University, comments on and analyses the recent European Union Court of Justice case *HK Danmark (Ring and Skouboe Werge)*. Janka Debrecéniová, Slovakian country expert for the Network, contributes an article on the role of labour inspectorates and other bodies in discrimination cases.

In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union, the case law of the European Court of Human Rights and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States, the one acceding country and three accession candidate countries and the two EEA countries can be found in the section on News from the Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Catharina Germaine-Sahl) on the basis of information provided by the national experts and their own research. The Review provides an overview of the latest developments in anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2013).³

In 2013 a new update of the comparative analysis, *Developing anti-discrimination law in Europe – the 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, has been released, with information on Iceland, Liechtenstein and Norway included for the first time. In addition, two thematic reports on housing discrimination and on the case law of the Court of Justice of the European Union regarding the two anti-discrimination directives have been published. A thematic report on reasonable accommodation beyond disability written by Professors Emmanuelle Bribosia and Isabelle Rorive and one on measures to combat discrimination beyond employment written by Professor Aileen McColgan are in preparation.

In November 2013, the Network together with the European Network of Legal Experts in the Field of Gender Equality will organise a legal seminar involving representatives of the Member States, candidate countries and EEA countries, equality bodies and their own members. The legal seminar will deal with the six grounds of discrimination protected at the EU level and involve approximately 200 participants.

Isabelle Chopin

Piet Leunis

¹ By the time of publication, Croatia had become a full EU member state (1 July 2013).

² Directives 2000/43/EC and 2000/78/EC.

³ This section includes a selected number of cases only. For more cases or information please check the Network's website: <http://www.non-discrimination.net>.

Meet ordinary people in this Review,
facing discrimination.

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Mats | 2005



Margrethe | 1978



HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities

Lisa Waddington⁴

Introduction

The Court of Justice of the European Union (CJEU) has handed down surprisingly few rulings related to disability discrimination under the Employment Equality Directive (Directive 2000/78/EC)⁵ in the 13 years since its adoption. Aside from the case considered in this article, the most significant judgments to date have been *Chacón Navas* (2006),⁶ in which the Court elaborated a definition of disability for the purposes of the Directive, and *Coleman* (2008),⁷ in which the Court held that the Directive protected a worker from direct discrimination and harassment on the grounds that she had a child with a disability (discrimination by association).⁸ The case of *HK Danmark (Ring and Skouboe Werge)*⁹ marks a significant addition to this slowly emerging body of case law, and amounts to the Court's most wide ranging consideration of disability discrimination to date. In *HK Danmark (Ring and Skouboe Werge)* the Court 'revisited' its definition of disability as originally developed in *Chacón Navas*, addressed the provision on reasonable accommodation for the first time in any detail, and, also for the first time, explored the prohibition of indirect discrimination in the context of disability. Moreover, this was the first case in which the Court was called upon to interpret the disability provisions of the Directive following the EU conclusion of the UN Convention on the Rights of Persons with Disabilities (CRPD). This combination of factors make *HK Danmark (Ring and Skouboe Werge)* a particularly rich and important judgment for understanding how the Employment Equality Directive addresses disability discrimination, and, more generally, the relevance of the CRPD for the interpretation of EU law in the context of disability.

This article explores the key elements of the judgment, taking account of the Opinion of Advocate General Kokott. The article begins by discussing the factual background to the case and the questions submitted for a preliminary ruling, before proceeding to consider the most important and significant dimensions to the ruling.

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⁵ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

⁶ Case C-13/05 *Chacón Navas* [2006] ECR I-6467.

⁷ Case C-303/06 *Coleman v Attridge Law and Steve Law*, [2008] ECR I-5603.

⁸ An additional case, which focused mainly on age discrimination in the context of redundancy payments, but which also addressed the relevance of an individual being entitled to a disability pension, is Case C-152/11 *Odar*, judgment of 6 December 2012.

⁹ Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)*, Judgment of 11 April 2013.

Factual Background

Like *Chacón Navas*, this case concerned two individuals who had been absent from work and on sick leave, and who were subsequently dismissed. The Advocate General therefore noted in her Opinion that the question that lay at the ‘heart’ of the preliminary ruling proceedings was:

When is there a disability within the meaning of Directive 2000/78/EC ... and how is the concept of disability to be distinguished from that of sickness?¹⁰

Danish law (i.e. the Law on the legal relationship between employers and salaried employees, the *For-skelsbehandlingslov*, hereinafter referred to as the ‘FL’ in line with the abbreviation used by the Court in its judgment, paragraph 5(2)) allows for dismissal with a shortened period of notice if a worker has been absent from work on paid sick leave for a total of 120 days over a twelve-month period. Both Ms Ring and Ms Skouboe Werge, who were represented by their trade union in this case, were dismissed in accordance with this law. Ms Ring experienced back pain which could not be treated. Following her dismissal she obtained part-time employment as a receptionist with another employer. Ms Skouboe Werge’s situation was somewhat different. Following an injury, Ms Skouboe Werge took a period of full-time and part-time sick leave, and was subsequently dismissed. She was later assessed as having a loss of working capacity of 65%.

The trade union submitted that both employees had a disability and were consequently protected by the Danish Anti-Discrimination Law (Law No 1417 amending the law on the prohibition of discrimination on the labour market), which itself transposes the Employment Equality Directive. As required by Article 5 of the Directive, the Anti-Discrimination Law obliges employers to make a reasonable accommodation for persons with a disability. Paragraph 2a of the Anti-Discrimination Law mirrors the Directive and provides:

Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to enable a person with a disability to undergo training. This does not however apply if such measures would impose a disproportionate burden on the employer. The burden shall not be regarded as disproportionate if it is sufficiently remedied by public measures.

The trade union argued that, since both employees were disabled, their employers were obliged to accommodate them in accordance with this law by allowing them to work reduced hours. In addition, the trade union argued that the law providing for a shortened period of notice following dismissal could not apply to these workers, because their absences from work were due to a disability (para. 23).

In response, the employers claimed that both workers were not disabled within the meaning of the Employment Equality Directive, since ‘the only incapacity that affects them is that they are not able to work full-time’ (para. 24). The employers also argued that reduced working hours did not amount to an accommodation as foreseen in Article 5 of the Directive, and that a dismissal of a worker with a disability in accordance with paragraph 5(2) FL did not amount to discrimination, and was not contrary to the Directive (para. 24).

In response to this set of facts, the Danish court submitted a series of preliminary questions to the CJEU. The most elaborate questions related to the concept of disability, and essentially sought clarification as to the meaning of this concept in light of the *Chacón Navas* judgment. The referring court also wished to know whether a reduction in working hours could amount to reasonable accommodation as foreseen

¹⁰ Para. 1 of AG’s Opinion. Footnotes deleted from quotation.

in Article 5 of the Directive, and whether the Directive precluded the application of paragraph 5(2) FL, allowing for a dismissal with a shortened period of notice, where the absence from work was caused by a disability or where the absence from work was caused by a failure of an employer to make a reasonable accommodation to meet the needs of a persons with disability.

Judgment

This article now proceeds to reflect on how the CJEU addressed all of the issues identified in the questions submitted for preliminary ruling. However, before doing so, the article considers the relevance of the CRPD to the ruling.

The CRPD

The European Union concluded the CRPD in December 2010, with the Convention coming into force for the EU a month later, in January 2011. The CRPD is a mixed agreement, meaning that both the Member States and the EU share competences in many of the covered areas. Attached to the instrument of formal confirmation which the EU deposited with the Secretary General of the UN when concluding the CRPD, is a Declaration of Competences, which contains a list of areas in which the EU shares competence with the Member States.¹¹ Amongst these is combating discrimination on the grounds of disability. The Declaration also contains a list of EC legislative instruments which illustrate the competence of the EC/EU with regard to fields falling under the CRPD, and this list refers to the Employment Equality Directive.

Following the conclusion of the Convention, the EU is bound by the obligations therein to the extent of its competences. Amongst the core principles of the CRPD are equality and non-discrimination, and these find repeated references throughout the Convention. The CRPD *inter alia* defines or provides guidance on both the concepts of disability (Art. 1) and reasonable accommodation (Art. 2).

HK Danmark (Ring and Skouboe Werge) was the first significant disability discrimination-related preliminary reference to reach the Court following the conclusion of the CRPD by the EU, and it was therefore the first opportunity for the Court to expand on the significance of the Convention for the interpretation of the Employment Equality Directive. In the judgment, the Court noted, as a preliminary observation, that under Art. 216(2) TFEU international agreements concluded by the EU are part of EU law and are binding on its institutions and prevail over acts of the EU (para. 28). In addition, given the primacy of international agreements over instruments of EU secondary law, such law must be interpreted in a way which is consistent with international agreements as far as possible (para. 29). Based on this, the Court stressed that the UN Convention forms ‘an integral part of the European Union legal order’ (para. 30) and the Employment Equality Directive must be interpreted ‘in a manner consistent with that convention’ (para. 32).

The Concept of Disability

The Danish court asked a series of questions relating to the concept of disability. These questions sought clarification regarding the Court’s earlier judgment in *Chacón Navas* and took account of the particular context in which disability had been understood by the courts with regard to discrimination in Denmark.

In *Chacón Navas* the Court had defined disability in the context of the Employment Equality Directive as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’ (para. 43). It had held that, for any limitation to be regarded as a ‘disability’, ‘it must be probable that it will last for a long time’ (para. 45).

¹¹ See Council Decision (EC) on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 20 March 2007, 7407/07.

The Court stressed that for the purposes of the Directive, 'disability' was different from 'sickness' (para. 44), and there was nothing in the Directive 'to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness' (para. 44). The Court also held that sickness could not be added to the list of grounds covered by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty (now TFEU) (paras. 55-57).

This judgment left the status of persons who had a sickness under the Directive unclear. One possible interpretation was that people who were sick did not fall within the personal scope of the Directive at all, whilst a broader interpretation allowed for such individuals to be protected, as long as their condition led to the required degree of limitation. In light of this uncertainty, the Danish court asked whether a condition caused by either a medical diagnosed incurable illness or a medically diagnosed temporary illness, could be regarded as a disability within the meaning of the Directive.¹² The court further asked whether a person who, because of a physical, mental, or psychological impairment could not, or could only to a limited extent, carry out his work, where it was probable that this situation would last for a long time, was covered by the Directive.¹³

Turning to the particular Danish context which framed the questions of the referring court, one can note that the Danish Anti-Discrimination Law does not define 'disability' and the Preparatory Works, which can be used when interpreting the law, are also rather unclear. The Preparatory Works specify that the concept of disability must be understood as 'physical, psychological or intellectual impairment [which] must be compensated in order for that person to function on an equal footing with other citizens in a similar situation'.¹⁴ Maria Ventegodt Liisberg has argued that 'compensation may be understood as public benefits and assistance provided to persons with disabilities such as e.g. personal assistance and wage subvention for employment on the open labour market'.¹⁵ Ventegodt Liisberg, writing before the Court handed down its ruling in *HK Danmark (Ring and Skouboe Werge)*, has examined Danish case law on this topic and concluded that the 'definition of disability ... has crystallised in Danish case law according to which a person with a permanent impairment which entails a need for significant compensation is disabled'.¹⁶ In light of this background, the Danish court also asked whether a person who had a permanent reduction in functional capacity which did not lead to a need for special aids, but simply led to the individual being unable to work full-time, could be regarded as disabled for the purposes of the Directive.¹⁷

The Court addressed these two sets of questions together and recalled its judgment in *Chacón Navas*, which it stressed was decided before the EU became a party to the CRPD (para. 37). The Court then proceeded to refer to provisions in the Convention which elaborate on the concept of disability, including Article 1 which states that 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (para. 37). In light of the obligation to interpret the Employment Equality Directive in a manner which is consistent with the Convention, and drawing closely on Article 1 CRPD, the Court held that the concept of 'disability' must be understood as:

¹² Questions 1(b) and (c), para. 26.

¹³ Question 1(a), para. 26.

¹⁴ Danish Preparatory Works, Proposal L92 of 11 November 2004, '4.1. Handicapkriteriet' and 'Bemærkninger til de enkelte bestemmelser', 'Til nr. 2'. Cited in Maria Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, (Intersentia, 2011) at 171.

¹⁵ Maria Ventegodt Liisberg, *Disability and Employment, A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, (Intersentia, 2011) at 171.

¹⁶ *Ibid.*, at 174.

¹⁷ Question 2, para. 26.

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. (para. 38)

The Court confirmed that the impairment must be ‘long-term’, once again referring to Article 1 CRPD (para. 39) and, following the advice of the Advocate General, held that a curable or incurable illness which led to the required degree of limitation on a long-term basis did fall within the concept of ‘disability’ within the meaning of the Directive (para. 41). It clarified its ruling in *Chacón Navas*, and stated that an illness which did not entail such a limitation was not covered by the concept of ‘disability’.¹⁸

Turning to the second question identified above, the Court stressed that a disability does ‘not necessarily imply complete exclusion from work or professional life’ (para. 43). The Court noted that a ‘disability’ must be understood as a ‘hindrance’ to the exercise of professional life, and a person with a disability who was only able to work part-time was capable of being covered by the concept (para. 44). The Court also held that there was no requirement that an individual require accommodation measures, such as the use of special equipment, in order to be regarded as disabled (para. 45). It noted that the Directive does provide an obligation to make a reasonable accommodation to disabled individuals, and stated that accommodation measures are ‘therefore the consequence, not the constituent element, of the concept of disability’ (para. 46).

A reasonable accommodation and a reduction in working hours

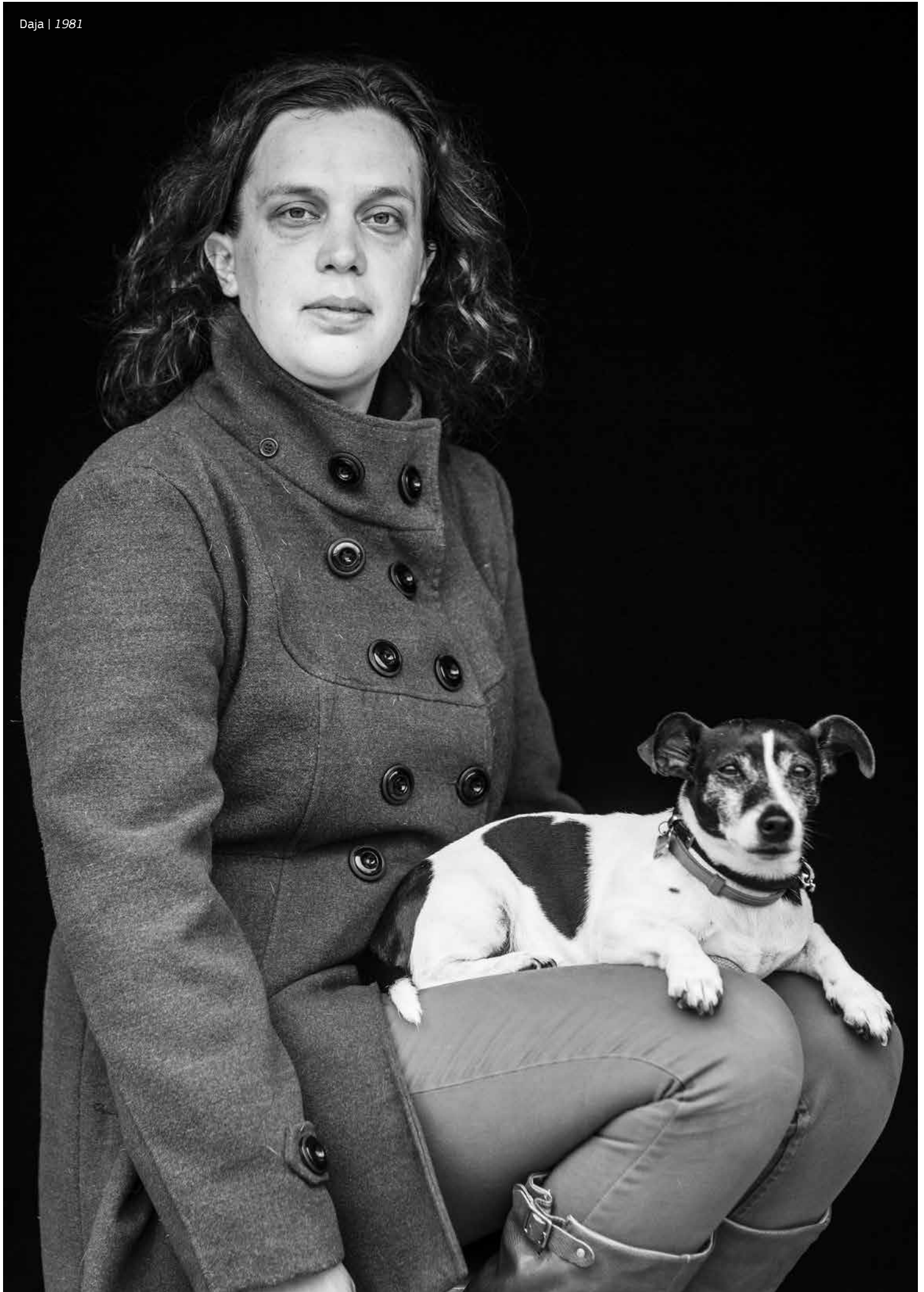
The Employment Equality Directive requires that employers be obliged to make a reasonable accommodation to meet the needs of a disabled person. In addition to this obligation, which is found in Article 5 of the Directive, recital 20 of the Directive gives examples of such accommodations, including adaptations to ‘patterns of working time’. Since the Directive did not explicitly mention a reduction in working hours as a form of accommodation, the Court found that it had to interpret the concept of ‘patterns of working time’ to determine whether this could include reduced working hours (para. 50). The employers in this case argued that the concept only referred to issues such as the patterns and rhythms of work and timing of breaks.

Referring once again to the CRPD, and to Article 2 thereof in particular, which includes a definition of reasonable accommodation,¹⁹ the Court found that the concept of reasonable accommodation ‘must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers’ (para. 54). In light of this, and noting that the list of accommodation measures in recital 20 of the Directive is not exhaustive (para. 56), the Court found that both the Directive and CRPD ‘envisage not only material but also organisational measures’ (para. 55).

The Court then went on to note the limits to the reasonable accommodation obligation, namely that the accommodation must not impose a disproportionate burden on the employer (para. 58). It stated that this was a matter for the national court to assess, in light of the guidance given in recital 21 of the Directive, which specifies that account must be taken in particular of the financial and other costs entailed, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or other

¹⁸ In fact the judgment states that ‘an illness not entailing such a limitation is not covered by the concept of “discrimination” within the meaning of Directive 2000/78’. Para. 42.

¹⁹ The Article provides that “‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.



assistance (para. 60). However, the Court proceeded to give its own reflections on this matter, in order to provide some guidance to the national courts. It noted that, immediately after dismissing Ms Ring, her former employer advertised a part-time position at the location where she had worked. The Court noted '[t]here is nothing in the documents before the Court to show that Ms Ring was not capable of occupying that part-time post or to explain why it was not offered to her' (para. 62). It further recalled that Ms Ring had found employment as a part-time receptionist with another company shortly after her dismissal. The Court also noted that Danish law provides for public assistance to employers to facilitate the employment of persons with disabilities (para. 63).

The Court concluded by finding that 'a reduction in working hours may constitute one of the accommodation measures' covered by the Directive (para. 64).

The compatibility with the Directive of legislation allowing for a shortened period of notice, where the absence from work is caused by a failure to make a reasonable accommodation

In this instance the Court succinctly found that the Directive precludes national legislation, such as that at issue in this case, where the absence from work, which itself allowed for adverse treatment, was the consequence of an employer's failure to make a reasonable accommodation. The Court found that in such cases 'the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability' (para. 66).

The compatibility with the Directive of legislation allowing for a shortened period of notice, where the absence from work is caused by a disability

The Court considered whether Danish legislation was 'liable to produce discrimination against persons with disabilities' (para. 71). It noted that the legislation applied in the same way to disabled as to non-disabled workers, and so did not amount to direct discrimination (paras. 72-74). However, the Court found that the measure did indirectly disadvantage workers with a disability, as such a worker 'has the additional risk of an illness connected to his disability' and is therefore more likely to be absent from work for the required number of days (para. 76). The Court referred to the findings of the Advocate General, who had argued that disabled individuals ran the risk of contracting both a 'general' illness and an illness connected with their disability, whereas other workers only ran the former risk (para. 67 of AG Opinion).

Having found that the legislation was liable to indirectly disadvantage workers with a disability, the Court turned to the question of whether the measure was objectively justified by a legitimate aim, and whether the means used to achieve the aim were appropriate and did not go beyond what was necessary. The Danish Government argued that the law aimed to encourage employers to recruit and employ workers who were likely to be repeatedly absent from work as a result of illness, by allowing them to be dismissed with a shortened period of notice, if the absences were lengthy, as well as allowing such workers to retain employment during periods of illness (para. 78). The measure was in line with the Danish approach to labour market regulation, which combined flexibility and freedom of contract, as well as protection of workers (para. 79). The Court found that these aims could, in principle, be regarded as objectively justifying a difference in treatment on the grounds of disability such as that provided for by the impugned law (para. 83).

The second element of the justification test required that the means used to achieve the aim be appropriate (para. 84). The Danish Government argued that the relevant provision was the most appropriate means for enabling the recruitment and maintenance in employment of people who have, or potentially have, a reduced work capacity as well as meeting 'the superior objective of a flexible, contractual and secure labour market' (para. 85). In response, the Court referred to the 'broad discretion' enjoyed by

Member States in choosing aims in the fields of social and employment policy and in defining measures to achieve those aims, and concluded that 'it does not appear unreasonable' to consider that the provision 'might be appropriate for achieving the aims mentioned' (para. 87).

With regard to the last element of the justification test, namely whether the provision went beyond what was necessary to achieve the aims pursued, the Court held that the measure 'must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered' (para. 89). This was a matter for the referring court to decide on, and that court had to examine 'whether the Danish legislature, in pursuing the legitimate aims of, first, promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, omitted to take account of the relevant factors relating in particular to workers with disabilities' (para. 90). In that respect, the Court stated that 'the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked' (para. 91).

Analysis

The article now proceeds to analyse the four key elements addressed by the Court, as discussed above.

The CRPD

The Court explicitly held that the Directive had to be interpreted in a manner consistent with the Convention, and this influenced its interpretation of both the concepts of disability and reasonable accommodation. Whilst this was important in the context of the Directive, this approach may well be of potentially wider significance. The aforementioned Declaration of Competences contains a long list of areas in which the EU has exclusive or shared competence. Annexed to the Declaration is a list of almost fifty EC legislative instruments which illustrate the competence of the EC/EU with regard to fields falling under the CRPD, and further EU instruments which contain an explicit reference to disability have been adopted subsequently. Given that the CRPD is superior to secondary legislation in terms of the hierarchy of EU legislation and the confirmed obligation to interpret that law in line with the Convention, this may require a 'Convention-confirm' interpretation or re-interpretation of certain provisions of EU law, as happened in this case with regard to the definition of disability.

The Concept of Disability

The definition of disability developed by the Court in *Chacón Navas* was much criticised for being based on the medical or individual model of disability.²⁰ According to the definition developed by the Court in that case, the cause of the disadvantage (or the 'limitation') was the 'impairment' which an individual had, and it was the 'impairment' which hindered participation in professional life. Therefore, the problem lay in the impaired individual, and not in the reaction of society to the impairment or the organisation of society.

This model can be contrasted with a social model of disability, which is reflected in the CRPD. The social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than

²⁰ See e.g. Lisa Waddington, 'Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006', *Common Market Law Review*, 2007, Vol. 44, Issue 2, 487-499.

from the inability of people with impairments to adapt to the environment.²¹ According to this model, disability is the result of an interaction between an impairment and an inaccessible and discriminatory environment, rather than being the consequence of a medical condition which results in reduced ability. In *HK Danmark (Ring and Skouboe Werge)* the Court, taking note of the CRPD, explicitly embraced this social model.²² In doing so the Court has finally caught up with the other institutions. Both the Commission and the Council recognised the need to base policy on the social model of disability as early as 1996. In July of that year the Commission adopted a Communication on Equality of Opportunity for People with Disabilities.²³ The Communication noted that the way in which society is organised serves to exclude citizens,²⁴ and spoke of the evolution towards ‘an equal opportunities model in the field of disability policy’ within the Member States of the EU.²⁵ The ongoing commitment of the EU institutions to the social model of disability is also reflected in the revised version of a proposal for a new non-discrimination directive which extends beyond employment and covers disability, amongst a number of other grounds.²⁶ The European Parliament proposed inserting text based on Article 1 of the Convention,²⁷ and this was taken over and included in the proposal.

The Court’s judgment in *HK Danmark (Ring and Skouboe Werge)* also distinguished between short-term illnesses leading to mild impairments, which are not to be regarded as a ‘disability’, and long-term impairments which can be caused by sickness and, which in interaction with various barriers, do meet the required threshold, and are therefore to be regarded as ‘disabilities’. The Court therefore resolved the uncertainty created by the *Chacón Navas* judgment and clearly stated that sickness can be a cause of disability. This followed the advice of the Advocate General who stated: ‘[t]o define the scope of the directive by reference to the cause of the disability would be arbitrary and would thus be contrary to the very aim of the directive giving effect to the principle of equal treatment’. (para. 32). One issue which has not been resolved, and which was not at issue in this case, is whether an individual needs to have a minimum degree or percentage of disability in order to be covered. Such an approach is adopted in some Member States,²⁸ and this has the effect of excluding persons with lesser degrees of disability, and individuals who have not been accessed by the social security office in order to determine a disability degree, from the protection from discrimination. However, following the social model of disability, it is arguable that a specific percentage of disability or reduced working capacity should not be required, but the focus should be on the interaction

²¹ For further comment on the social model see M. Oliver, *Understanding Disability: From Theory to Practice*, (Macmillan Press Ltd., 1996), and M. Priestley, ‘Constructions and creations: idealism, materialism and disability theory’, (1998) 13 *Disability and Society* 1, 75-94.

²² It is also noticeable that the Advocate General seemed to feel that the definition of disability developed in *Chacón Navas* might not meet the standard of the CRPD. She stated: ‘there might be certain circumstances in which the definition given in *Chacón Navas* falls short of the definition contained in the UN convention’ (para. 27 of Opinion).

²³ Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM(96) 406 final.

²⁴ *Ibid.*, para. 2.

²⁵ *Ibid.*, para. 20. See also Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, [1997] OJ C/1.

²⁶ European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 425, Brussels, 2 July 2008.

²⁷ European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 0426 – C6-0291/2008 – 2008/0140(CNS)), amendment 17.

²⁸ See country reports of the current Network and Lisa Waddington and Anna Lawson, *Disability and non-discrimination law in the European Union*, European Network of Experts in the Non-discrimination Field, European Commission, 2009, at 18-24.

between an individual's impairment and various barriers, and the resulting hindrances to participation in professional life, and more generally on the ground for the adverse treatment.

It is also noticeable that, applying a common sense approach, both the Court (para. 43) and the Advocate General (para. 45) found that the Directive did not apply only to those persons whose disability prevented them from working altogether. Given that the Directive prohibits discrimination with regard to employment, it would be nonsensical to restrict its personal scope to those unable to participate in the labour force.

Reasonable Accommodation

As with the concept of disability, the Court's understanding of the reasonable accommodation obligation was influenced by the CRPD. Both the Court (para. 55) and the Advocate General (para. 57) found that an accommodation could be a material or physical measure, e.g. providing an accessible computer or additional physical support, or an instrumental measure, e.g. reducing working hours, and thereby indicated that a wide range of measures could potentially amount to an accommodation. It is also noticeable that the Court found that the Directive precluded a national law which allowed for a dismissal with reduced notice following an extended period of sick leave, where the absence from work was due to the employer's failure to make a reasonable accommodation as required by Article 5 of the Directive. This finding can be extended to preclude any law which allows an employer to treat a disabled worker adversely, for example by giving a poor assessment, denying a promotion, or refusing to give a pay rise, where the 'poor performance' which justified this adverse treatment is based on an initial failure to provide an accommodation. Therefore, the Directive not only requires that employers are obliged to make a reasonable accommodation, but also that employers are estopped from relying on their own failure to make an accommodation to justify other forms of adverse treatment. To have held otherwise would have significantly reduced the effectiveness of the Directive.

In terms of the disproportionate burden test, which justifies a failure to provide an accommodation, the Court gave strong guidance to the national court in the case of Ms Ring, who seemed to have taken up a part-time position with another employer very similar in nature to one advertised by her former employer shortly after her dismissal. The Court was clearly indicating that this was a factor to be considered when reflecting on whether allowing Ms Ring to work part-time would have been disproportionate burden for her original employer, and this is also a relevant consideration for future cases.

The Application of the Prohibition of Indirect Discrimination

This was the first case in which the Court was called upon to interpret the prohibition of indirect discrimination in the context of disability. The Court found that workers with a disability were liable to be at a greater risk of being disadvantaged by the law, since they were more likely to take frequent or extended sick leave. This is certainly true for individuals with some conditions, and particularly those which also qualify as sicknesses, such multiple sclerosis or cancer, but this will not be the case for all individuals with a disability. For example, many people who are blind or have a hearing impairment will not necessarily take more sick leave than non-disabled workers. Nevertheless, the Danish law does seem likely to indirectly disadvantage some workers with disabilities who would need to take additional sick leave, even if this is not the case for all workers with disabilities. Neither the Court nor the Advocate General distinguished between the different groups of disabled workers in this respect.

The Court applied the objective justification test and the judgment was not innovative in this respect. What was noticeable was its instruction to the Danish court to 'take account of relevant factors relating in particular to workers with disabilities' (para. 90), noting that such workers often find it difficult to re-enter the workforce following dismissal and have 'specific needs in connection with the protection their

condition requires' (para. 91). Nevertheless, to provide such additional protection may pose a challenge to the Danish flexicurity model, which places a heavy emphasis on the freedom of employers to regulate their workforce. Maria Ventegodt Liisberg has previously argued that 'the hands-off approach towards the regulation of the labour market adopted by the Danish State means that the general structures of the Danish labour market are not inclusive towards persons with disabilities.'²⁹ She argues that this has led to a weak protection against discrimination on the ground of disability, and the present case may be illustrative in that respect. Moreover, neither the Court nor the Advocate General noted that in some EU Member States workers with disabilities enjoy additional protection from dismissal, in contrast to the impugned Danish law which actually made it easier to dismiss such workers. For example, in Germany a worker's severe disability status has to be taken into account in case of large scale dismissals (*betriebsbedingte Kündigungen*),³⁰ and there is a special procedure involving public authorities in the case of an individual dismissal of a severely disabled person.³¹ In addition the employer is under an obligation to cooperate with the representative body of disabled persons and the integration authority to avoid dismissal.³²

Nevertheless, the Court showed some awareness of the particular challenges workers with disabilities face, and instructed the national court to take this into consideration when determining whether a measure which indirectly disadvantaged such workers was justified. The Court has therefore emphasised the need for a particularly strict scrutiny when such measures are at issue.

Conclusion

HK Danmark (Ring and Skouboe Werge) is an interesting and enlightening ruling, both because of the number of elements which it addresses, and because of the content of the judgment. The Court took full account of the CRPD, which is now binding on the EU, and embraced the social model of disability, thereby taking a step back from its earlier decision in *Chacón Navas*.

²⁹ Maria Ventegodt Liisberg, 'Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective', in Lisa Waddington *et al.* (eds.), *European Yearbook of Disability Law*, Volume 4 (Intersentia, 2013).

³⁰ Section 1.3 Law on Protection against Dismissal (Kündigungsschutzgesetz, KSchG).

³¹ Section 85 *et seq.* Social Code IX (Sozialgesetzbuch IX, SGB IX). There is a period of three months between dismissal and conclusion of employment (comparable with a period of notice), Section § 89.1 Social Code IX (Sozialgesetzbuch IX, SGB IX); an extraordinary dismissal is nevertheless admissible.

³² Section 84 Social Code IX (Sozialgesetzbuch IX, SGB IX).



Ex officio investigations into violations of the principle of equal treatment: the role of labour inspectorates and other bodies

Janka Debrečéniová³³

Introduction³⁴

This article argues that although there is no explicit legal requirement for the EU Member States to conduct *ex officio* investigations into violations of the principle of equal treatment as defined by some of the EU anti-discrimination directives (the focus of this article is on the Racial Equality Directive³⁵ and the Employment Equality Directive,³⁶ as well as partly on the Recast Directive³⁷), this type of investigation – in other than criminal proceedings³⁸ – is essential for combating discrimination and thus meeting the core requirements of the directives. The focus of the article is on the field of employment only, although its content is, with the necessary adjustments, also applicable to fields outside of employment.

In EU Member States, the bodies traditionally entrusted with the task of *ex officio* investigations into violations of labour standards are labour inspectorates. However, the tradition has not yet fully ‘absorbed’ the relatively recent legal developments in EU law in the field of the right to equality (mainly connected to the adoption of the anti-discrimination directives), and so labour inspectorates do not carry out tasks connected to non-discrimination on an everyday basis, or do not carry them out at all. At the same time, there are some (relatively) new institutional frameworks, emerging from the requirements of the directives, which in some instances also encompass tasks of *ex officio* investigation. These frameworks are represented by equality bodies and by the non-discrimination related tasks with which ombudspersons are vested. No clear pattern can be discerned in the designation of institutions and the design of the overall institutional framework for *ex officio* investigations. However, the parallel existence of various types of

³³ A lawyer working for the organisation Citizen, Democracy and Accountability (based in Slovakia) and the country expert for Slovakia of the European Network of Legal Experts in the Non-discrimination Field.

³⁴ The country-specific information necessary for the drafting of this article was provided by the national experts from the European Network of Legal Experts in the Non-Discrimination Field.

³⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

³⁸ EU criminal law does not cover the field of anti-discrimination. Besides, criminal law as such has both substantive and procedural limits in discrimination matters: not every manifestation of discrimination can be sanctioned by the harshest sanctions that the law provides, and even where criminal law regulates discriminatory behaviour, the procedural requirement to prove intent beyond doubt makes it hard to apply criminal sanctions (for a more elaborate discussion on the limits of criminal law with regard to discrimination and also for a more general discussion on sanctions and remedies in anti-discrimination law, see for example Suk, J. C., ‘Criminal and Civil Enforcement of Antidiscrimination Law in Europe’ in *European Anti-Discrimination Law Review*. Utrecht, Brussels: Human European Consultancy, Migration Policy Group, 14/2012, pp 11-20, also available at: <http://www.non-discrimination.net/content/media/Review%2014%20EN.pdf>, last visited on 17 July 2013). This is, however, by no means to say that criminal law should not play a significant role in enforcement of the right to equality and non-discrimination.

bodies sets the context in which the issue of *ex officio* examinations into violations of the principle of equal treatment should be examined.

The first part of the article puts forward the basic arguments of principle for why States should be obliged to conduct *ex officio* investigations into violations of the principle of equal treatment. The second and the third parts argue that it can be inferred from both the EU anti-discrimination directives and from international law conventions that such investigations should be in place in individual Member States to enable them to carry out their duty to implement the principle of equal treatment effectively. The third part also looks at labour inspectorates as specific bodies provided for under the International Labour Organisation (ILO) framework and at their potential and possibilities to conduct *ex officio* investigations into violations of the principle of equal treatment. The fourth part examines the actual situation in the EU Member States with regard to the existence and functioning of bodies obliged to/entitled to conduct *ex officio* investigations into breaches of the principle of equal treatment in the field of employment. In particular, it focuses on labour inspectorates as bodies authorised to conduct such investigations, as well as on equality bodies and ombudspersons.

Arguments for *ex officio* investigations into violations of the principle of equal treatment

It is a well-established fact that in cases of discrimination, the main fora through which States provide remedies and sanctions are civil, administrative and labour courts.³⁹ Judicial procedures usually require individuals affected by discrimination to take the initiative and submit a complaint to the respective court, and to sustain the initiative during the proceedings as well.

If the initiative is left with individuals affected by discrimination to initiate judicial proceedings or file a complaint to another body to have discrimination adequately remedied, the result may well be that the overwhelming majority of discriminatory treatment does not even come to the attention of the institutions with remedial and sanctioning responsibilities. In Slovakia, for example, a nationwide survey carried out in 2012 showed that out of the respondents who subjectively felt discriminated against, only a tiny percentage (4.7%) had sought a legal remedy. More than 92% had not taken any steps to seek a remedy. Reasons why such a high number of people who felt they had faced discrimination did not take any legal steps included lack of trust in the institutions that could successfully resolve discrimination (13.1% of all responses), lack of evidence (11.8% of responses), the fact that the people who felt they had suffered discrimination did not consider it important to resolve their case (11.6%), and lack of information as to where and who to turn to for legal assistance (more than 10%).⁴⁰

If we add other notoriously-known factors that deter individuals from seeking remedies when they have experienced discrimination, such as fear of having to bear the respondents' legal costs if the case is lost, lack of financial means to cover their own costs (such as legal representation and court fees which might not be reimbursed even if litigation is successful), fear of the potential stigma of being branded as a

³⁹ For a more general overview of the bodies and procedures available for remedying discrimination in the EU Member States, see chapter 4 of the publication *Developing Anti-discrimination Law in Europe: The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, prepared by Isabelle Chopin and Thien Uyen Do for the European Network of Legal Experts in the Non-discrimination Field and published in October 2012 by the European Commission. The comparative analysis is available at <http://www.non-discrimination.net/content/media/Developing%20Anti-Discrimination%20Law%20in%20Europe%202012%20EN%20.pdf> (last visited on 25 July 2013).

⁴⁰ See Durbáková, V., Holubová, B., Ivanko, Š., Liptáková, S., *Hľadanie bariér v prístupe k účinnej právnej ochrane pred diskrimináciou*. Košice: Poradňa pre občianske a ľudské práva, 2012. The publication is also available at <http://poradna-prava.sk/wp-content/uploads/2012/11/Publikáciu-si-môžete-stiahnuť-tu-105-MB.pdf>, last visited on 20 July 2013. See pp 27-49 and p 129 of the study.

‘troublemaker’ after filing a legal complaint, fear of losing a job, fear of victimisation, stress connected to the proceedings and fear of confrontation with a person in power, the length of the proceedings, etc., it becomes clear that systems in which the available remedies are based mainly or exclusively on individuals taking the initiative cannot be a means for effective elimination of discrimination. Thus, it is essential that States, when seeking to combat discrimination, do not wait for the affected individuals but take the lead by identifying and sanctioning discrimination themselves – by introducing adequate institutional and procedural mechanisms for identifying and remedying discrimination on their own initiative. The absence of such mechanisms implies that the responsibility for coping with the huge structural problem of discrimination is laid upon the affected individuals and groups who at the same time constitute the most vulnerable segments of society.

This is by no means to say that adequate and efficient mechanisms for judicial protection in cases of discrimination should not remain in place or be introduced, or that new mechanisms should not be developed to tackle the specific and structural nature of discrimination (such as specific types of mediation or conciliation). Neither is it to say that *ex officio* investigations can embrace discrimination in all its scope and gravity. It is only to say that States cannot exercise their responsibility to eliminate or reduce discrimination if they do not assume the burden of dealing with discrimination that currently rests almost exclusively on its victims and if they do not take the initiative by themselves on a systemic and systematic level.

The Racial Equality and the Employment Equality Directives and the duty to conduct *ex officio* investigations

The relevant provisions of the Directives do not explicitly require EU Member States to introduce procedures in which it would be for the body in question to take the initiative of conducting investigations into possible violations of the principle of equal treatment, without having to wait for complaints and submissions by the parties. The relevant articles of the Directives stipulate that

Member States shall ensure that judicial **and/or** administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive **are available to all persons who consider themselves wronged** by failure to apply the principle of equal treatment to them (...).⁴¹

The Directives do not prescribe whether a particular type of procedure (i.e. judicial or administrative) is to be used,⁴² nor particular features of this procedure (e.g. a requirement to conduct *ex officio* investigations⁴³). Nonetheless, it is arguable that the requirement upon the Member States to adopt ‘all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues’ generated by the Court of Justice of the European Union (CJEU) in the context of Directive

⁴¹ Article 7(1) of the Racial Equality Directive; Article 9(1) of the Employment Equality Directive. Emphasis added by the author.

⁴² Although it is now more or less established that judicial procedures should apply unconditionally. See Ellis, E., *EU Anti-Discrimination Law*. New York: Oxford University Press Inc., 2005, p 260. Ellis argues that it would be hard to imagine that a mere administrative procedure would suffice, due to a potential violation of the principle of the judicial protection of fundamental rights enshrined in Article 6 of the European Convention on Human Rights which, as the CJEU held in *C-185/97 Coote v Granada Hospitality Ltd* [1998], ‘underlies the constitutional traditions common to the Member States’.

⁴³ Which is of course not the exclusive domain of administrative procedures and which is also, in some Member States, one of the features of some of the relatively new types of procedures that have emerged within ombudspersons’ offices and equality bodies (which do not constitute typical administrative procedures).

76/207⁴⁴ leaves no doubt that if existing remedies require an unconditional initiative from the persons affected by discrimination and these individuals are seriously hindered by practical barriers in accessing justice from taking this initiative, the Member States are not 'putting into effect' the principle of equal treatment, as the Directives require.⁴⁵ In a case like that, there are individuals under the jurisdiction of the Member States to whom no existing procedures are available. One of the ways out of this could be introducing procedures that will 'change the paradigm' – i.e. that will stop requiring affected individuals from having to take the initiative.

The provision of the Racial Equality and the Employment Equality Directives on the defence of rights quoted above needs to be read and applied in conjunction with the provision on sanctions contained in the Directives:

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.⁴⁶

It is arguable that it is not enough to introduce sanctions that could be effective, proportionate and dissuasive in theory, but that it is also essential to introduce institutional and procedural frameworks under which these in principle effective, proportionate and dissuasive sanctions may be applied in practice.

***Ex officio* investigations into discrimination in international law**

UN Conventions

Like EU law, the relevant UN conventions prohibiting discrimination in the field of employment, all of which have been ratified by all EU Member States,⁴⁷ do not contain an explicit duty for States Parties to conduct *ex officio* investigations into violations of the prohibition of discrimination in employment (and in other fields). However, they all contain provisions that require States Parties to take all steps to eliminate discrimination and to guarantee effective legal protection against it. For example, the International Covenant on Economic, Social and Cultural Rights obliges the States Parties 'to take steps ... with a view to achieving progressively the full realisation of the rights recognised in the ... Covenant by all appropriate means'.⁴⁸ The International Convention on the Elimination of All Forms of Racial Discrimination obliges States Parties 'to bring to an end by all appropriate means ... racial discrimination by any persons, group or organisation'.⁴⁹ By the same token, the Convention on the Rights of Persons with Disabilities obliges States Parties '[t]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise'⁵⁰ and to 'guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.⁵¹

⁴⁴ 14/83 *Sabine Von Colson and Elisabeth Kamann v Land Nordrhein-Wetsfalen* [1984].

⁴⁵ Article 1 of the Racial Equality Directive, Article 1 of the Employment Equality Directive.

⁴⁶ Article 15 of the Racial Equality Directive, Article 17 of the Employment Equality Directive.

⁴⁷ Apart from three instances in which the Convention on the Rights of Persons with Disabilities has been signed but not ratified; see the table containing an overview of ratifications forming Annex 1 to this article.

⁴⁸ Article 2(1).

⁴⁹ Article 2(1)(d).

⁵⁰ Article 4(1)(b).

⁵¹ Article 5(2).

Under the International Covenant on Economic, Social and Cultural Rights, ensuring non-discrimination and equal protection of employment is a core obligation for the States Parties.⁵² The Committee on Economic, Social and Cultural Rights (hereafter ‘the Committee’), providing interpretation of the Covenant through its general comments, has been particularly instructive in making it clear that it is not only judicial but also other (mainly administrative) types of remedies that are needed in order to fulfil the obligations contained in the Covenant. Although the general comments do not state explicitly that States Parties to the Covenant should also introduce *ex officio* procedures through which they would identify and sanction violations of the prohibition of discrimination without a need for complaints from individuals, it can be inferred from the content and overall sense of some of them that such procedures may well be needed in order to achieve the requirements of the Covenant, should the circumstances in the particular State Party so require. In one of its general comments, the Committee also makes a specific reference to the need for effectively functioning labour inspectorates (see below).

In particular, the Committee has reiterated the obligation of each State Party ‘to use all the means at its disposal to give effect to the rights recognized by the Covenant’⁵³ and has also emphasised that ‘appropriate means of redress, or remedies, must be available to any aggrieved individual or group (...)’.⁵⁴ The Committee is further very straightforward in saying that ‘[a]lthough the precise method by which Covenant rights are given effect in national law is a matter for each State Party to decide, the means used should be appropriate in the sense of producing results (...)’.⁵⁵ With regard to a specific need for administrative remedies (which often involve procedures initiated by administrative bodies on an *ex officio* basis), it goes on to say that ‘[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State Party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective’.⁵⁶ The Committee, however, emphasises that in the case of obligations concerning non-discrimination, ‘provision of some form of judicial remedy would seem indispensable’.⁵⁷

The Committee has also recommended that ‘[n]ational legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights’.⁵⁸ According to the Committee, ‘institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2,⁵⁹ including actions or omissions by private actors’.⁶⁰

⁵² General Comment of the Committee on Economic, Social and Cultural Rights No 18 on the Right to Work, para. 31.

⁵³ General Comment No 9 – Substantive Issues Arising in the Implementation of the Covenant, para. 2.

⁵⁴ Ibid.

⁵⁵ Ibid, para. 5.

⁵⁶ Ibid, para. 9.

⁵⁷ Ibid, para. 9.

⁵⁸ General Comment No 20 – Non-discrimination in economic, social and cultural rights, para. 40.

⁵⁹ Article 2, paragraph 2 of the Covenant stipulates that ‘[t]he States Parties ... undertake to guarantee that the rights enunciated in the ... Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

⁶⁰ General Comment No 20 – Non-discrimination in economic, social and cultural rights, para. 40.



The Committee also requires that '[n]ational policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen and other national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 3 [equal right of men and women to the enjoyment of economic, social and cultural rights] and provide remedies for such violations. States parties, for their part, should ensure that such remedies are effectively implemented'.⁶¹ With regard to the same article, the Committee also recommends that 'the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate'.⁶²

Labour inspectorates as a specific mechanism for ex officio investigations (ILO framework)

Labour inspection is a special mechanism designed for securing the enforcement of some labour standards under the system of the International Labour Organisation (of which all EU Member States are members⁶³). The first convention on labour inspection was adopted in 1947 (Labour Inspection Convention No 81) and regulates the requirements for labour inspection in industrial and commercial workplaces. The subsequent Labour Inspection (Agriculture) Convention No 129 was adopted in 1969 and regulates the system of labour inspection in agriculture. The Protocol of 1995 to the Labour Inspection Convention of 1947 extended the scope of labour inspection to the non-commercial services sector, which in practice means the public sector. Exemptions for certain fields such as the national/federal government administration, the armed services or the police are allowed under the Protocol. All EU Member States are parties to Convention No 81 of 1947 and the majority of them are also parties to the Agriculture Convention No 129 of 1969. However, only Cyprus, Finland, Ireland and Sweden have ratified the Protocol of 1995.

Pursuant to the ILO labour inspection conventions, the function of the system of labour inspection shall be:

to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, weekly rest and holidays, safety, health and welfare, [the employment of women],⁶⁴ children and young persons, and **other connected matters**, in so far as such provisions are enforceable by labour inspectors.⁶⁵

As can be seen from this definition, issues of (non-)discrimination and equal treatment are not an explicit component of what the ILO indispensably requires to be the material focus of labour inspection systems. However, it is arguable that in the case of EU Member States it can be legitimately expected that issues of equality and non-discrimination become an integral component of the focus of labour inspections. This argumentation is not only supported by the open-ended list of issues that explicitly fall under the scope of labour inspection, but also by the fact that the States have a relatively wide margin for deciding which particular issues fall under the scope of labour inspection in each respective country,⁶⁶ and by the fact that equality and non-discrimination are 'connected matters'. The argument is also substantiated by the exist-

⁶¹ General Comment of the Committee No 16 – The equal right of men and women to the enjoyment of all economic, social and cultural rights, para. 38.

⁶² Ibid, para. 24.

⁶³ See an overview of the relevant ILO conventions (including those containing equality and non-discrimination clauses) and their ratifications by EU Member States in Annex 1 to this article.

⁶⁴ 'The employment of women' is only included in the material scope of the Labour Inspection (Agriculture) Convention No 129 of 1969.

⁶⁵ Article 3(1)(a) of the Convention No 81 and Article 6(1)(a) of the Convention No 129. Emphasis added by the author.

⁶⁶ See the formulation 'in so far as such provisions are enforceable by labour inspectors' contained in the closing part of the quoted provision.

ence, in the EU Member States, of the principle of equality and non-discrimination as a firm component of every aspect of employment (pursuant to both EU law and international obligations stemming from the UN and the ILO systems), and by the Member States' undisputed obligation to provide effective remedies and to use all available means at their disposal to implement the legal requirements related to the right to equality and non-discrimination. The non-insertion of these principles into the material scope of labour inspections as mechanisms existing within the respective States would thus be contrary to their numerous legal obligations. In other words, EU Member States should read the provisions of EU law, international law and their national legal orders conjunctively and use all available means – including the mechanisms of labour inspections – to create effective systems for implementing their legal obligations in the field of non-discrimination with regard to remedies. This is particularly the case of countries where no mechanisms other than labour inspectorates exist for conducting *ex officio* investigations⁶⁷ into discrimination in the field of employment, or where no such mechanisms exist at all.⁶⁸

The ILO conventions on labour inspections also list the powers which labour inspectors shall have with regard to investigations into possible labour standard violations as well as powers following findings of such violations. Although the principle of equal treatment is not under the explicit scope of labour inspections, the types of investigative and remedying or sanctioning powers listed in these conventions are phrased in such a way that they can easily be applied also to violations of this principle.

Both of the ILO labour inspection conventions provide that '[p]ersons who violate or neglect to observe legal provisions enforceable by labour inspectors shall be liable to prompt legal [...] proceedings without previous warning',⁷⁰ and that '[i]t shall be left to the discretion of labour inspectors to give warning and advice instead of instituting or recommending proceedings'.⁷¹

Both of the conventions stipulate that '[a]dequate penalties for violations of the legal provisions enforceable by labour inspectors and for obstructing labour inspectors in the performance of their duties shall be provided for by national laws or regulations and effectively enforced'.⁷²

Labour Inspection (Agriculture) Convention No 129 also contains a provision stating that '[i]f labour inspectors in agriculture are not themselves authorised to institute proceedings, they shall be empowered to refer reports of infringements of the legal provisions directly to an authority competent to institute such proceedings'.⁷³ Labour Inspection Convention No 81 contains no such provision.

⁶⁷ The ILO conventions on labour inspection do not contain an explicit provision on whether labour inspectors can act upon their own initiative. However, a provision contained in both of the conventions obliging labour inspections to inspect workplaces 'as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions' leaves us with no doubt that fulfilling this obligation is not possible if labour inspections are not obliged to act on an *ex officio* basis. See Article 16 of the Labour Inspection Convention No 81 and Article 21 of the Labour Inspection (Agriculture) Convention No 129.

⁶⁸ There are labour inspectorates or similar bodies in all Member States, although they do not always have powers in the field of equal treatment (see below).

⁶⁹ The Labour Inspection (Agriculture) Convention No 129 speaks about 'legal and administrative proceedings'.

⁷⁰ With the exception of possible cases of previous notice to carry out remedial or preventive measures provided for by national law. See Article 17(1) of the Labour Inspection Convention No 81 and Article 22(1) of the Labour Inspection (Agriculture) Convention No 129.

⁷¹ Article 17(2) of the Labour Inspection Convention No 81, Article 22(2) of the Labour Inspection (Agriculture) Convention No 129.

⁷² Article 18 of the Labour Inspection Convention No 81, Article 24 of the Labour Inspection (Agriculture) Convention No 129.

⁷³ Article 23 of the Labour Inspection (Agriculture) Convention No 129.

Bodies conducting *ex officio* investigations into breaches of the principle of equal treatment in the EU⁷⁴

General overview

At the moment, the majority of the EU countries have some form of procedure for *ex officio* investigations into violations of the principle of equal treatment in the field of employment with regard to the grounds contained in the Racial Equality, Employment Equality and Recast Directives. The countries with no such procedures are Denmark, Germany, Ireland and Sweden. On the other hand, there are quite a few countries where *ex officio* investigatory powers into violations of the principle of equal treatment in employment are vested in more than one body (Austria, Bulgaria, Croatia, Finland, France, Latvia, Luxembourg, Malta, the Netherlands, Poland and Romania).

Such powers are most frequently entrusted, either explicitly or implicitly, to labour inspectorates. This is the case in Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In eight of these countries (Belgium, the Czech Republic, Greece, Italy, Portugal, Slovakia, Slovenia and Spain), labour inspectorates are the only bodies authorised to conduct *ex officio* investigations into violations of the principle of equal treatment in employment.

Among the labour inspectorates that are also authorised to conduct investigations in the field of equal treatment there are, however, quite a few inspectorates whose mandate in this field is only formal (and usually implicit) and which do not carry out tasks related to equality and non-discrimination in practice (for example in Italy, Lithuania, Romania, Slovenia).

In the Member States where labour inspectorates do not have investigatory powers into violations of the principle of equal treatment (Austria, Cyprus, Denmark, Estonia, Germany, Hungary, Ireland, Sweden and the UK), their tasks are limited to the enforcement of labour standards in the field of health and safety, working environment, holidays, working hours, etc. In Hungary, the tasks of labour inspection used to also encompass the issues of equal treatment (although this was one of a very few issues where investigations were only possible upon a complaint) but in 2011 these powers were taken away from the labour inspectorates,⁷⁵ on the basis that another institution (the Equal Treatment Authority) was vested with specialised powers in the non-discrimination field.

In quite a number of EU Member States (Austria, Bulgaria, Estonia, France, Hungary, Luxembourg, Malta, the Netherlands, Romania and the UK), equality bodies are entrusted with *ex officio* investigatory powers into violations of the principle of equal treatment in the field of employment (but in general also in other fields). In six countries (Croatia, Finland, Latvia, Lithuania, the Netherlands and Poland) such investigatory powers (in general for fields outside of employment as well) are vested in ombudspersons.⁷⁶ In two instances (Cyprus and Malta), such powers have been granted to other bodies.⁷⁷

⁷⁴ Some of the information contained in this section is also summed up in a table forming Annex 2 to this article, which in some cases provides more detailed information.

⁷⁵ By Act CXCI of 2011.

⁷⁶ In Finland, this is only the case of the Ombudsman for Equality (mainly investigating gender discrimination in employment). The Minority Ombudsman (dealing with grounds other than gender) has competence only outside the field of employment.

⁷⁷ In Cyprus, there is a special department within the Ministry of Labour called 'the Promotion of Equality in the Workplace'. Malta has an equality body called (in a literal translation) the 'National Commission Persons with Disability'.

In countries where bodies with *ex officio* investigatory powers into discrimination in employment exist, they usually apply to both private and public employment.⁷⁸ The grounds of discrimination dealt with by these bodies usually exceed the grounds contained in the three Directives (with the grounds enumerated copied into either labour legislation or national constitutions – which is mainly the case for ombudspersons). However, there are a few instances in which no *ex officio* procedure is available with regard to some of the Directives' grounds (in Austria and Cyprus, disability is not covered by any of these bodies; in Estonia, disability and age are missing from the listed grounds; in Greece, gender lacks protection).

Investigatory and decision-making powers of bodies executing ex officio investigations into violations of the principle of equal treatment

In all of the *ex officio* procedures existing in EU Member States, it is, more or less, for the body in question to investigate the facts of the case (with or without a shift in the burden of proof – see below). However, the particular investigatory powers at the disposal of these bodies differ. The strongest investigatory powers are vested in labour inspectorates, and they more or less copy the powers provided for by the ILO conventions on labour inspection. The powers of equality bodies and ombudspersons vary but in many cases, these bodies lack some very important procedural powers – such as the possibility to interview persons (in which case the procedures become written only).

In quite a few instances, the bodies with *ex officio* investigatory powers are also empowered to issue legally binding decisions. This is, however, not the case in Austria, Belgium, Croatia, Cyprus, Estonia, Finland, France and Malta.

Most legally binding decisions can be issued by labour inspectorates (Bulgaria, the Czech Republic, Greece, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain), some by equality bodies (Bulgaria, Hungary, Romania, the UK), and in one case legally binding decisions can be issued by an ombudsperson (Lithuania⁷⁹).

The types of decisions vary but in general it can be said that if legally binding decisions can be issued by labour inspectorates, they usually mirror the types of decisions provided for by the ILO conventions on labour inspection. There are, however, only 11 countries where labour inspectorates can impose fines on employers (Bulgaria, the Czech Republic, Greece, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain),⁸⁰ and only four countries where fines can be imposed on co-employees as well (Bulgaria, the Czech Republic, Portugal, Slovakia). The fines for employers vary greatly across the EU and can range from EUR 25 (Luxembourg) to EUR 185.515 (Spain).⁸¹ An interesting system of fines can be found in Portugal, where the actual amount of the fine depends on the turnover of the employer. However, it is very rare for fines to be imposed by labour inspectorates and they are far from reaching the highest thresholds.

⁷⁸ Apart from Greece and Hungary. In Greece, no procedure for the field of public employment exists. In Hungary, there is no procedure for private employment.

⁷⁹ The possibility to impose a fine on an employer and the possibility to admonish those who have committed a violation.

⁸⁰ In Poland, the State Labour Inspectorate, where competent, may impose fines and initiate court proceedings in relation to other fields than discrimination. However, in cases concerning discrimination it does not have the power to impose fines and can only initiate court proceedings.

⁸¹ In some countries, the possible levels of fines are specified for cases of violations of the principle of equal treatment. These types of fines are then much lower than the fines that can be imposed for violations of labour legislation generally.

It is less common for equality bodies to have the power to issue binding decisions than it is for labour inspectorates. On the other hand, some innovative approaches can be found in the decision-making powers of equality bodies. For example, the Romanian equality body can oblige the perpetrator to publish the decision. In the UK, the equality body can issue an unlawful act notice requiring the employer to prepare an action plan.

The possibility to grant, through *ex officio* procedures existing in the Member States, compensation to individuals damaged by discrimination exists only in a negligible number of cases and basically involves only the possibility to compensate for material loss (such as loss of income – Poland, Portugal), and not for injury to feelings.

In many cases of the *ex officio* procedures (no matter what body) the respective bodies can refer the case to another body, most frequently to the prosecutor or to a court. It is also very frequent that bodies conducting *ex officio* procedures into violations of the principle of equal treatment inform the public about them – usually through the media or through their reports.

Many of the bodies conducting *ex officio* investigations can also recommend measures to those who are in violation of the principle of equal treatment.

Some procedural aspects of ex officio procedures concerning violations of the principle of equal treatment

Although the Directives in practice provide an unconditional requirement for a shift in the burden of proof in judicial procedures only,⁸² the number of *ex officio* procedures where a shift in the burden of proof applies prevails over the number of procedures where the burden of proving the violations rests upon the investigating body (or in practice upon the complainant). A shift in the burden of proof applies in *ex officio* procedures conducted by all types of bodies (i.e. labour inspectorates, equality bodies, ombudspersons and other bodies).

In all instances, the costs of the *ex officio* procedures in all the Member States are in general borne by the respective bodies, financed from the state budgets. If, however, individuals affected by discrimination initiate the proceedings, they pay their personal costs such as travel expenses or legal representation fees. The same can be said about the respondent employers. An interesting situation can be found in Hungary where, once discrimination has been established, the costs of the complainant and of the equality body conducting the procedure are borne by the respondent.

Effectiveness of ex officio procedures

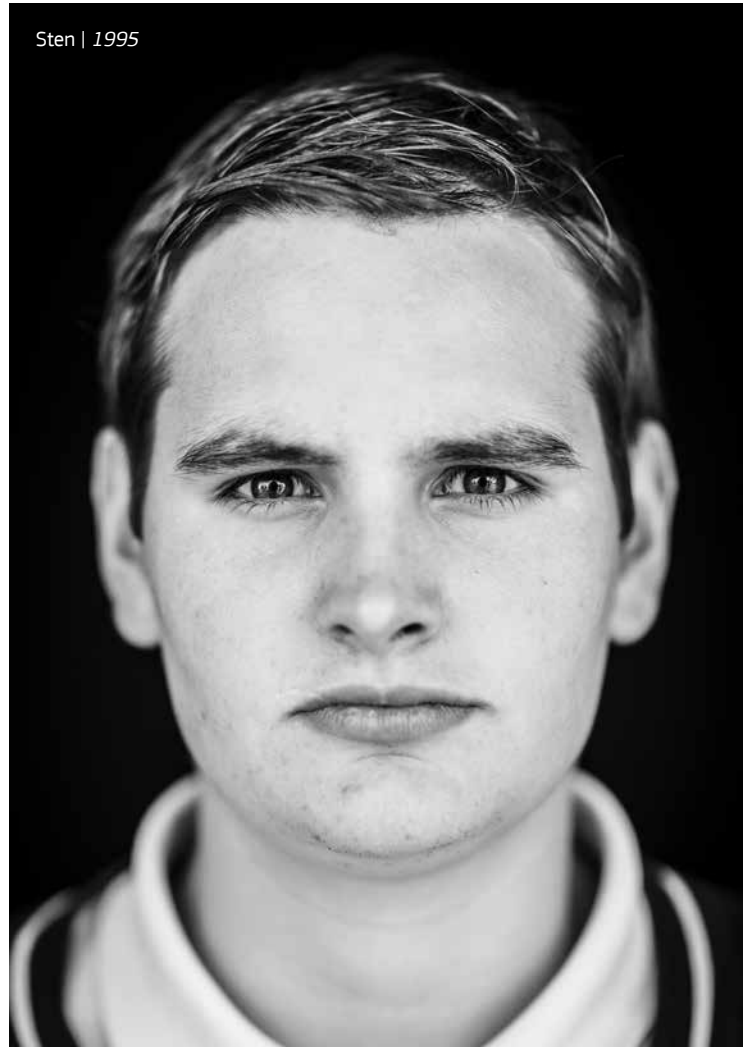
In a majority of *ex officio* procedures available across the EU, their effectiveness is very questionable. The lack of investigatory powers, the inability of the bodies in question to issue binding decisions, and the inappropriateness of the types of decisions that the respective bodies can issue, are just a few of the problems that the national experts named when asked about effectiveness of the *ex officio* procedures in their respective countries. There were actually only a very low number of cases in which the national experts expressed at least partial satisfaction with the existing bodies in terms of the *ex officio* investigations which they conduct.

⁸² This does not apply to judicial procedures in the field of criminal law, since all the Directives also contain a special provision stipulating that the rules on the burden of proof contained in the Directives shall not apply to criminal procedures. See Article 8(3) of the Racial Equality Directive, Article 10(3) of the Employment Equality Directive, and Article 19(5) of the Recast Directive.

Lily | 2011



Sten | 1995



Mirjam | 1971



Labour inspectorates were very often criticised by the national experts for conducting hardly any or no investigations criticised by the national experts for conducting hardly any or no investigations into cases of discrimination and for not even considering that violations of the principle of equal treatment may fall under the material scope of labour inspection. Labour inspectorates were also criticised for referring persons affected by discrimination to equality bodies and ombudspersons instead of conducting proper investigations. There was also a high degree of dissatisfaction with financial penalties imposed by labour inspectorates – if these are imposed at all (which is rather rare), the amounts are often symbolic only. Lack of expertise in the field of non-discrimination and of human and of financial resources also featured among the problems listed by the national experts.

The main problems reported by the national experts with regard to equality bodies and ombudspersons in relation to *ex officio* procedures conducted by them in the field of employment-related discrimination were their lack of investigatory and remedial powers and lack of human and financial resources. The problem of not conducting *ex officio* proceedings, or conducting them in a marginal number of cases only, was also mentioned. In some instances, the informal authority of ombudspersons was appreciated.

With regard to all types of procedures, the problem of proving discrimination was emphasised – especially where the shift in the burden of proof does not apply.

Conclusion

There are many systemic obstacles to compliance with the duty of EU Member States to eliminate violations of the principle of equal treatment and to provide a functioning framework for remedies and sanctions that would be truly effective, proportionate and dissuasive. With regard to procedures, there appears to be a ‘grey area’ in which the so much needed *ex officio* investigations either do not exist or are very inefficient. The potential of labour inspectorates as bodies firmly established in the legal and institutional orders of individual Member States is largely unused or underused. Although they make up a system with a relatively good infrastructure in terms of their broad investigatory powers over many aspects of employment, territorial coverage and the availability of human resources, the right to equality is still perceived by them as an ‘unnecessary add-on’ instead of a fundamental value that must be taken seriously and mainstreamed. Individual Member States and their inhabitants would benefit greatly from taking advantage of having a system in place that, after some systemic improvements, would serve as an efficient tool for combating discrimination. At the same time, equality bodies and ombudspersons entrusted or to be entrusted with powers of an investigatory character in the field of equal treatment would undoubtedly benefit by taking inspiration from some of the labour inspectorates’ institutional and procedural features.

Annex 1 - Overview of ratifications of international conventions by EU Member States

Convention/ EU Member State	Labour Inspection Convention, 1947 (No 81)	Protocol of 1995 to the Labour Inspection Convention, 1947	Labour Inspection (Agriculture) Convention, 1969 (No 129)	Discrimination (Employment and Occupation) Convention, 1958 (No 111)	Equal Remuneration Convention, 1951 (No 100)	Maternity Protection Convention (Revised), 1952 (No 103)	Maternity Protection Convention, 2000 (No 183)	Workers with Family Responsibilities Convention, 1981 (No 156)	Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No 159)	Termination of Employment Convention, 1982 (No 158)	Domestic Workers Convention, 2011 (No 189)	International Covenant on Economic, Social and Cultural Rights, 1966	International Convention on the Elimination of All Forms of Racial Discrimination, 1965	Convention on the Elimination of All Forms of Discrimination against Women, 1979	Convention on the Rights of Persons with Disabilities, 2006
	ILO	ILO	ILO	ILO	ILO	ILO	ILO	ILO	ILO	ILO	ILO	UN	UN	UN	UN
Austria	X			X	X		X					X	X	X	X
Belgium	X		X	X	X							X	X	X	X
Bulgaria	X			X	X		X	X				X	X	X	X
Croatia	X		X	X	X	X		X	X			X	X	X	X
Cyprus	X	X		X	X		X		X	X		X	X	X	X
Czech Rep.	X		X1	X	X				X			X	X	X	X
Denmark	X		X	X	X				X			X	X	X	X
Estonia	X		X	X	X							X	X	X	X
Finland	X	X	X	X	X			X	X	X		X	X	X	
France	X		X	X	X			X	X	X		X	X	X	X
Germany	X		X	X	X				X			X	X	X	X
Greece	X			X	X	X		X	X			X	X	X	X
Hungary	X		X	X	X		X		X			X	X	X	X
Ireland	X	X		X	X				X			X	X	X	
Italy	X		X	X	X		X		X			X	X	X	X
Latvia	X		X2	X	X		X			X		X	X	X	X
Lithuania	X			X	X		X	X	X			X	X	X	X
Luxembourg	X		X	X	X		X		X	X		X	X	X	X
Malta	X3		X	X	X				X			X	X	X	X
Netherlands	X		X	X	X		X	X	X			X	X	X	
Poland	X		X	X	X	X			X			X	X	X	X
Portugal	X		X	X	X	X		X	X	X		X	X	X	X
Romania	X		X	X	X		X					X	X	X	X
Slovakia	X		X4	X	X		X	X	X	X		X	X	X	X
Slovenia	X		X	X	X		X	X	X	X		X	X	X	X
Spain	X		X	X	X	X6		X	X	X		X	X	X	X
Sweden	X	X	X	X	X			X	X	X		X	X	X	X
UK	X5			X	X							X	X	X	X

X1, 4 - Has accepted Article 5, paragraph 1(a), (b) and (c)

X2 - Has accepted Article 5, paragraph 1(b)

X3, 5 - Excluding Part II

X6 - With the exception of persons specified in Art. 7, paragraph 1 (d)

Annex 2 - Overview of ex officio procedures available in EU Member States for investigating violations of the principle of equal treatment in employment

	Labour Inspectorate						Equality Body						Ombudsperson						Other					
Feature of the procedure / EU Member State	Field of employment	Grounds of discrimination	Shift in burden of proof	Ability to make binding decisions	Ability to recommend measures	Ability to forward to another body	Field of employment	Grounds of discrimination	Shift in burden of proof	Ability to make binding decisions	Ability to recommend measures	Ability to forward to another body	Field of employment	Grounds of discrimination	Shift in burden of proof	Ability to make binding decisions	Ability to recommend measures	Ability to forward to another body	Field of employment	Grounds of discrimination	Shift in burden of proof	Ability to make binding decisions	Ability to recommend measures	Ability to forward to another body
Austria ⁸³							○	D-	no	No	no	no												
Austria ⁸⁴							○	D-	?	No	X	no												
Austria ⁸⁵							●	D-	X	No	X	no												
Belgium	☐	D+	?	no	X	X																		
Bulgaria	☐	D+	no	X	X	X	☐	D+	X	X	X	X												
Croatia	○	D+	no	no	no	X							☐	D+	X	no	X	X						
Cyprus																			☐	D-	X ¹	no	X	X
Czech Rep.	☐	D?	no	X	X	no																		
Denmark																								
Estonia							☐	D-	no	No	no	no												
Finland	☐	D-	X	no	X	X							☐	D-	X	no	X	X						
France	○	D+	X	no	X	X	☐	D+	X-	No	X	X												
Germany																								
Greece	○	D-	X	X	X	X																		
Hungary							●	D+	X	X	no	no												
Ireland																								
Italy	☐	D?	X	X	no	no																		
Latvia	☐	D+	X	X	X	X							☐	D+	X	no	X	X						
Lithuania	☐	D+	X	X	X	X							☐	D+	X	X	X	X						
Luxembourg	○	D	no	X	X	X	☐	D	no	No	no	no												
Malta	☐	D?	X	no	no	X	☐	D-	X	No	X	X							☐	D-	X	no	no	X
Netherlands	☐	D+	no	X	X	no	☐	D+	X	No	X	no	●	D+	no	no	no	X						
Poland	☐	D+	no	X	X	X							●	D+	?	no	X	X						
Portugal	☐	D+	X	X	X	X																		
Romania	☐	D+	?	X	X	X	☐	D+	X	X	X	no												
Slovakia	☐	D+	no	X	X	X																		
Slovenia	☐	D+	X	X	no	X																		
Spain	☐	D+	X	X	X	X																		
Sweden																								
UK							☐	D+	no	X	X	X												

⁸³ National Equality Body (Anwaltschaft für Gleichbehandlung).

⁸⁴ Equal Treatment Commission (Gleichbehandlungskommission).

⁸⁵ Federal Equal Treatment Commission (Gleichbehandlungskommission des Bundes, Bunds-Gleichbehandlungskommission).

- - private employment only
- - public employment only
- - both public and private employment
- D - grounds identical to the grounds covered by the EU equality directives (Racial Equality Directive, Employment Equality Directive, Recast Directive)
- D- - only some of the grounds that covered by the EU equality directives
- D+ - the scope of grounds exceeding the grounds covered by the EU equality directives
- D? - grounds of discrimination unclear/not specifically provided
- X - yes
- ? - no clear rules on the burden of proof (e. g. because the law is not regulating the issue)
- X¹ - shift in burden of proof only applies in cases of discrimination due to pregnancy
- X- - shift in burden of proof applies except for criminal cases

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FRA publishes a survey on LGBT hate crime and discrimination

On the International Day Against Homophobia and Transphobia (17 May 2013), the European Union Agency for Fundamental Rights (FRA) published the results of its survey into experiences of hate crime and discrimination by lesbian, gay, bisexual and transgender people in the EU and Croatia. The survey was completed by 93,000 people, nearly half of whom indicated that they had felt discriminated against during the previous year, in different areas of life such as employment, education, health care, housing and other services. In addition to the report presenting an overview of the survey results,⁸⁷ these results can be accessed and examined through a 'data explorer' on FRA's website, which provides detailed and disaggregated information on participants' responses to each question.

Internet source:

<http://fra.europa.eu/en/event/2013/presenting-findings-largest-ever-lgbt-hate-crime-and-discrimination-survey>

European Commission publishes Access City Award 2013 good practices

The European Commission published a brochure in March 2013, presenting the outcome and the winning cities of the Access City Awards 2013 and providing inspiration and ideas on useful policies and projects for making cities more accessible to persons with disabilities and older people. In addition to the winning and finalist cities, specific mention is also made of some cities where one particular aspect of accessibility is underlined as being an especially good example.

Internet source:

http://ec.europa.eu/justice/events/access-city-award-2014/files/access-city-award-2013-brochure_en.pdf

European Parliament resolution on strengthening the fight against racism, xenophobia and hate crime

On 14 March 2013, the European Parliament adopted a resolution calling on the European Commission, the Council and the Member States to strengthen the fight against hate crime and discriminatory attitudes and behaviour and calling for the adoption of a comprehensive strategy for fighting hate crime, bias violence and discrimination. The resolution underlines the importance of raising awareness of rights and of collecting broader, reliable data on hate crime, and calls for the adoption of the horizontal Directive, 'which represents one of the main EU instruments to promote and guarantee genuine equality in the EU and to combat bias and discrimination'.

Internet source:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0090+0+DOC+XML+VO//EN&language=EN>

⁸⁶ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January 2013 to 15 June 2013.

⁸⁷ EU Agency for Fundamental Rights (2013), *EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey – Results at a glance*.

Court of Justice of the European Union Case Law Update⁸⁸

References for preliminary rulings – Advocate General Opinions

Case C-546/11, Opinion of Advocate General Ms Kokott in the case Dansk Jurist- og Økonomforbund (DJØF – Danish Union of Jurists and Economists) acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet, delivered on 7 February 2013

A case has been referred for a preliminary ruling to the Court of Justice of the European Union by the Højesteret (Danish Supreme Court), concerning age limits for admission to an occupational social security scheme. The scheme concerned provides for an ‘availability salary’, allowing public servants to keep receiving their salary for three years after the termination of their contracts where their positions were abolished due to redundancy. This scheme is, however, not available to public servants who have reached the age of 65 (and who, therefore, have the possibility but not the obligation to start receiving pension benefits), and the national court requires guidance as to whether such an age limit can be justified under the Employment Equality Directive.⁸⁹

Based on the case law of the Court and in particular on the maintained legal relationship between the former employee and the employer during the three years of payments, the Advocate General first determines that the ‘availability salary’ should be interpreted as ‘pay’ within the meaning of the Directive, and therefore concludes that it falls under the scope of the Directive. Having noted that former public servants aged above 65 lose the right to the ‘availability salary’ and only receive retirement benefits instead, the Advocate General then examines whether this difference in treatment can be justified.

With regard to the exception provided at Article 6(2) of the Employment Equality Directive, it could be held due to a slight difference between the Danish and other linguistic versions of this provision that this exception covers all types of occupational pension schemes and not only retirement and invalidity benefits. The Advocate General, however, excludes such an interpretation based on the principles of restrictive interpretation of exceptions and of uniform interpretation and application of EU law across the Member States. She therefore finds that the ‘availability salary’ under review does not fall under the scope of Article 6(2) of the Directive.

Finally, the Advocate General examines the ‘availability salary’ scheme under the general exception provided at Article 6(1) of the Directive. Having determined that the aim of ensuring the independence of public servants pursued by the national provision is legitimate and that the measure is appropriate to reach that aim, the Advocate General finds that the exclusion of all public servants having attained the age of 65 from the possibility to benefit from the ‘availability salary’ is not necessary and therefore not proportionate to the aim pursued. Considering that the age of 65 does not constitute a mandatory retirement age but simply the age at which public servants can choose to draw their retirement benefits, a less discriminatory measure would have been to provide the ‘availability salary’ to those public servants aged over 65 who wish to remain ‘available’ and possibly obtain a new position.

⁸⁸ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January 2013 to 15 June 2013.

⁸⁹ See *European Anti-Discrimination Law Review* (EADLR), issue 14, p. 38.

References for preliminary rulings – Judgments

Case C-394/11, Valeri Hariev Belov, Judgment of 31 January 2013

Following the reference for a preliminary ruling made by the Bulgarian specialised equality body designated under Directive 2000/43/EC (the Commission for Protection against Discrimination), the Court of Justice has adopted a judgment whereby it rules that it does not have jurisdiction to answer the questions referred by the national body as the latter is not a ‘court or tribunal’ within the meaning of Article 267 TFEU. In her Opinion, Advocate General Kokott⁹⁰ had examined the question of the jurisdiction of the Court and had come to the conclusion that the national quasi-judicial equality body could constitute a ‘court or tribunal’ according to the standing case law of the Court. In its judgment, the Court examines, as did the Advocate General, the procedural and structural aspects of the referring body as well as its powers and the type of decisions it can adopt. In the view of the Court, the decision that the equality body is called upon to give at the end of proceedings brought before it is ‘similar in substance to an administrative decision’ and does not have a ‘judicial nature’ within the meaning of the case law of the Court.

Joined cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, Judgment of 11 April 2013

The questions referred to the Court of Justice in both cases concern the material scope of Directive 2000/78/EC and the concepts of ‘disability’ and ‘reasonable accommodation’. Ms Ring and Ms Skouboe Werge were both dismissed by their respective employers, pursuant to a Danish employment law providing for expedited termination of an employment contract where the employee has been absent because of illness for a certain amount of time. A Danish trade union brought two actions for compensation on behalf of the workers, arguing that because they suffered from a disability their employers were under a duty to provide reasonable accommodation. The Sø- og Handelsret (Maritime and Commercial Court) referred the case to the CJEU, asking in particular for guidance on the concepts of disability and reasonable accommodation.

The details of these joined cases are explored in the article ‘HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities’ by Lisa Waddington, on page 11 of this publication.

Case C-81/12, Asociația Accept v Consiliul Național pentru Combaterea Discriminării, Judgment of 25 April 2013

The case referred concerns a shareholder of a football club who presents himself as the ‘patron’ of that club, and who made a statement in the media criticising the recruitment by the club of homosexual players. The association Accept lodged a complaint before the national quasi-judicial equality body (National Council for Combating Discrimination, NCCD), claiming discrimination in recruitment matters on the ground of sexual orientation. The NCCD found that as the statements did not emanate from an employer or a person responsible for recruitment, they did not fall within the sphere of employment although they were found to constitute harassment. The claimant association brought an action against that decision, and the Curtea de Apel București (Bucharest Court of Appeal) subsequently referred questions to the CJEU for a preliminary ruling.⁹¹

⁹⁰ See *European Anti-Discrimination Law Review* (EADLR), issue 16, p. 38.

⁹¹ See *European Anti-Discrimination Law Review*, Issue 15, p. 36.



In its judgment, the Court observes that Directive 2000/78 applies to situations such as the present one, which involve statements concerning the conditions for access to employment, including recruitment conditions. The specificities of the recruitment of professional football players are found to be irrelevant in this regard, as is the fact that the statements were made by a person who is not legally capable of binding the employer in recruitment matters. Thus, statements made in relation to recruitment matters by a person who claims to play an important role in the management of an employer and who appears to do so, can constitute 'facts from which it may be presumed that there has been discrimination' in the sense of the Directive. With regard to the shift in the burden of proof, the Court also states that the defendant is not required to provide evidence which is impossible to adduce without interfering with the right to privacy. A body of consistent evidence can be built to refute an appearance of discrimination on the grounds of sexual orientation without the defendant having to prove that persons with a specific sexual orientation have been recruited in the past.

Finally, with regard to the application of sanctions in cases of discrimination, the Court finds that the Directive precludes a national regulation which provides that the only sanction available after the expiry of six months from the date on which the facts occurred is a 'warning', unless such a penalty can be considered to be effective, proportionate and dissuasive. In the present case the Court does not provide the national court with any guidance on whether or not this is the case.

European Committee of Social Rights Update⁹²

Complaint No 100/2013, European Roma Rights Centre (ERRC) v Ireland

The complaint was registered on 16 April 2013. The complaint concerns Article 16 (right of the family to social, legal and economic protection), Article 17 (right of children and young persons to social, legal and economic protection) and Article 30 (right to protection against poverty and social exclusion) of the Revised European Social Charter, read alone or in conjunction with the non-discrimination clause set forth in Article E. The complaint alleges that the Government of Ireland has not ensured the satisfactory application of the above-mentioned articles, particularly with respect to housing conditions and evictions of Travellers and, as regards Traveller children, also with respect to social, legal and economic protection.

Decision on the merits of Complaint No 67/2011, Médecins du Monde - International v France

The complaint, registered on 19 April 2011, alleged infringements of the rights of the Roma population with regard to housing, education, social protection and health care, in violation of Articles 11 (right to health), 13 (right to social and medical assistance), 16 (right to appropriate social, legal and economic protection for the family), 17 (right of children and young persons to appropriate social, legal and economic protection), 19§8 (guarantees concerning expulsion), 30 (right to protection against poverty and social exclusion) and 31 (right to housing) of the Revised European Social Charter, read alone or in conjunction with Article E (non-discrimination clause).

The organisation Médecins du Monde (Doctors of the World) considered that the housing, educational, social protection and health care situations of Roma migrants, mainly of East European origin, as well as their employment prospects, amount to extreme social exclusion. According to the organisation, these conditions are the consequence of France's manifest failure to comply with several provisions of the revised Charter. In addition, the conditions of enforced evictions from Roma camps and mass expulsions since the announcement in July 2010 by the French President of a more repressive policy towards Roma are also challenged.

The Committee of Social Rights unanimously found 12 violations of the revised Charter, out of which all but one were in conjunction with Article E. In particular, three violations of Article 31 (right to housing) were found, by reason of (1) non-access to housing of an adequate standard and degrading housing conditions of the Roma who are not living in 'integration villages'; (2) the eviction procedure of migrant Roma from the sites where they are installed which in particular does not respect the dignity of the evicted persons; and (3) a lack of sufficient measures to provide emergency accommodation and reduce homelessness. These last two violations had already been established in the decision on the merits in complaint *European Roma and Travellers Forum (ERTF) v France* in January 2012, and seeing as the situation has not improved, the Committee determined that the violations persist. In addition, the Committee found a violation of Article 30 (right to protection against poverty and social exclusion) based on the lack of any coordinated approach to promoting effective access to housing for these persons who live or risk living in a situation of social exclusion, and of any specific measures towards the migrant Roma population.

Three violations were also established of Article 11 (right to health), by reason of (1) difficulties of access to health care due in particular to the failure of the State to take reasonable steps to address the specific

⁹² This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January 2013 to 15 June 2013.

problems faced by Roma communities; (2) a lack of targeted information and awareness-raising for the migrant Roma and of effective access to counselling and screening on health issues; and (3) a lack of prevention of diseases and accidents, in particular with regard to vaccinations.

European Court of Human Rights Case Law Update⁹³

Horváth and Kiss v Hungary (No 11146/11), Second Section judgment of 29 January 2013

The applicants were two young Roma men who challenged their diagnosis of mild mental disability and their subsequent placement in segregated 'special' schools. Both applicants had been diagnosed following the evaluation of 'expert and rehabilitation panels' based upon the results of different IQ tests, and had been placed in 'remedial schools' where the curriculum was more limited than that followed in mainstream schools. The Court noted that although the diagnoses were made by expert panels based on complex IQ tests, statistics still showed that Roma children were considerably overrepresented in these schools. The applicants argued that their placement in remedial schools constituted discrimination on grounds of ethnic origin, in violation of Article 14 ECHR. The Court reiterated its findings in *D.H. v Czech Republic* regarding the admissibility of statistical evidence for the establishment of *prima facie* ethnic discrimination and the absence of a requirement to prove a discriminatory intent of indirect discrimination. Most importantly, the Court observed that with regard to education of minority groups which have suffered past discrimination in education with continuing effects, 'structural deficiencies call for the implementation of positive measures'. It also observed that this positive obligation is 'particularly stringent' in cases where there is an actual history of direct discrimination. (para. 104). Having found that a general policy or measure had a disproportionately prejudicial effect on the Roma, and that the Government could not provide an objective justification for this disparity, the Court noted a *prima facie* case of discrimination that shifted the burden of proof to the Government. Finally, the Court refuted the Government's argument that the IQ tests applied in the placement of children into special schools were neutral and resulted in different treatment of different persons. According to the Court, the 'neutrality' of these tests was not sufficient to declare that Hungary had fulfilled its positive obligation to provide adequate safeguards against misdiagnosis and misplacement of the applicants. Thus, there was no justification for the difference in treatment, and the Court found a breach of Article 14 ECHR in conjunction with Article 2 of Protocol No 1. As the applicants had made no claims for damages, Hungary was ordered to pay €4,500 jointly to both applicants as costs and expenses.

Lavida and others v Greece (No 7973/10), First Section judgment of 30 May 2013

Twenty-three Greek nationals of Roma origin challenged the placement of Roma children in a primary school attended exclusively by Roma children, alleging that this placement was based exclusively on the children's ethnic origin and had deprived them of a proper education, in violation of Article 14 ECHR.⁹⁴ The applicants lived in a city where half of the population was of Roma origin, and where the children were allocated to four different schools according to the school catchment map. The Court observed that school no. 4 was attended exclusively by Roma children, although school no. 1 was located closer to the homes of some of them, and despite the fact that non-Roma children living in the area officially allocated to school no. 4 were in fact registered in school no.1. The Court also noted that the Ministry of Education had been informed about the existence of ethnic segregation in the concerned school district, and about the unsatisfactory education conditions in school no. 4 given the large number of pupils and lack of infrastructure. The Court reiterated its finding from previous cases of school segregation that even in the absence of a discriminatory intent, the continued state of segregation of Roma children in public education and the lack of any anti-segregation measures could not be objectively justified by a legitimate aim. Thus,

⁹³ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January 2013 to 15 June 2013.

⁹⁴ Fifteen of the applicants were children; the remaining applicants were their parents/legal guardians.

a violation of Article 14 ECHR in conjunction with Article 2 of Protocol No 1 was found, and Greece was ordered to pay €1,000 to each applicant in respect of non-pecuniary damages and €2,000 in respect of costs and expenses.



News from the EU Member States, Croatia, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey⁹⁵

More information can be found at <http://www.non-discrimination.net>

⁹⁵ This section provides as far as possible a selection of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 January 2013 to 15 June 2013.

*Case law***Prohibition on school teachers wearing religious symbols upheld by the Council of State (Conseil d'Etat)**

By a judgment of 27 March 2013, the Council of State sitting as a full court (*siégeant en banc*)⁹⁶ rejected an action for annulment against an internal regulation of the City Council of Charleroi. This regulation concerned municipal secondary schools prohibiting teachers from wearing any conspicuous signs of a religious, political or philosophical character while on school premises.⁹⁷

The action was brought by a mathematics teacher who had claimed a violation of her fundamental rights to freedom of religion and to equality and non-discrimination. The Council of State, as the court of last resort on the national level, found that the contested regulation created an indirect distinction on grounds of religion, but that this distinction did not constitute prohibited discrimination as the regulation was justified by legitimate aims and the means of achieving these aims were appropriate and necessary.⁹⁸

In addition, the claimant demanded that a request for a preliminary ruling be made, on the one hand to the Constitutional Court regarding the compatibility of the internal regulation with Article 19 of the Constitution guaranteeing religious freedom, and on the other hand to the Court of Justice of the European Union regarding the interpretation of Directive 2000/78/EC. However, the Council of State refused to refer to either of these Courts, considering that the questions raised by the claimant were neither relevant nor necessary to resolve the case.

Internet source:

<http://www.raadvst-consetat.be/arr.php?nr=223042&l=fr>

Police officer sentenced to eight months in prison for racist violence

A chief inspector of police working within the Brussels-South police area was sentenced by the First Instance Criminal Court of Brussels on 22 April 2013 to eight months in prison and a four-year suspension for assault and battery with racial intent as an aggravating circumstance.⁹⁹ The conviction was in relation to two different incidents where the police officer had, while in service, physically assaulted a subordinate in one instance and a man taking part in a prohibited demonstration in the other instance. Both victims were of North African descent and in both cases the assaults were accompanied by racial insults. The aggravating circumstance of racial motive was evidenced by the testimony of a colleague of the convicted police officer.

⁹⁶ Sitting in full bench signifies a decision by the full court of all the appeal judges.

⁹⁷ Council of State, Decision No 223.042 of 27 March 2013.

⁹⁸ It is noteworthy that in 2010 the Council of State had already ruled on an action for the suspension of the internal regulation brought by the same claimant, but had in that decision considered that the distinction was directly based on religion rather than indirectly (Council of State, Ruling No 210.000 of 21 December 2010). The reasoning of the Court in that instance had been based on the exemption provided for employers with an ethos based on a philosophical belief, considering that neutrality in education constitutes such a belief. This reasoning had been severely criticised.

⁹⁹ First instance criminal court of Brussels (Tribunal correctionnel de Bruxelles), 22 April 2013, No 43.IN.102527/09.

The Centre for Equal Opportunities and Opposition to Racism welcomed the verdict, which, according to its Deputy Director, sent a strong signal regarding the unacceptable nature of such racially motivated violence, in particular by the police.

Internet source:

http://www.rtbfb.be/info/regions/detail_bruxelles-midi-un-inspecteur-principal-condamne-pour-violences-et-racisme?id=7978329

Bulgaria

BG

Case law

Construction of inaccessible metro stations constitutes discrimination

On 8 January 2013, the Supreme Administrative Court held that Sofia Municipal Council and the state construction oversight agency were liable for allowing (by omission) the construction of metro stations which were architecturally inaccessible to people with disabilities. Both the Protection Against Discrimination Commission (PADC) and the first-instance court exercising judicial review had found direct discrimination, and ordered the responding bodies to pay a fine of €1,250 each. In addition the respondent bodies were ordered to present an action plan to redress the situation, within two months.



The Supreme Administrative Court upheld the judgment of the PADC and of the first-instance court on all points, referring to very specific provisions of national law imposing obligations on both bodies as regards the accessibility of public places.¹⁰⁰ In addition, the Court refuted the argument presented by Sofia Municipal Council according to which the deadline to present an action plan was too short to be enforceable. The Court found that given the duration of the infringement (lasting since 2009), the deadline of two months was appropriate, as was the amount of the fines.

Internet source:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/cfcd016b996b63fdc2257ae90043dafb?OpenDocument>

Croatia

HR

Case law

Inconsistent findings by Supreme Court regarding homophobic statements

The presidents of the Croatian Football Association and of the most popular national football club both made public homophobic statements regarding the (im)possibility of homosexual football players being recruited. Four human rights organisations brought actions against each of them, claiming that the statements constituted discrimination and/or harassment in the field of employment on the ground of sexual orientation. In both cases, the first instance court found no discrimination and no harassment.



Regarding the statements made by the president of the Croatian Football Association, the first instance court found that the respondent had simply been explaining existing selection criteria rather than es-

¹⁰⁰ Supreme Administrative Court, Seventh Chamber, Decision No 193 of 8 January 2013 in case No 10509/2012.

tablishing them himself, and that he could therefore not be held liable for the statements.¹⁰¹ In addition, the statements did not constitute harassment, as they were not proven to have created an intimidating, hostile, degrading or offensive environment. However, the Supreme Court in its decision overruled the lower court's decision on both points, finding that both discrimination and harassment had been established.¹⁰² Nevertheless, the fact that the action was brought by organisations rather than victims prevented the Court from imposing any penalties other than a prohibition from repeating the same kind of statement and an order to publicly apologise.

Regarding the statements made by the president of the football team, the Supreme Court upheld the judgment of the first instance court, ruling that such statements could not keep anyone from playing in the team as the selection was objectively based on the abilities of each player.¹⁰³

Despite the very similar factual circumstances of the two cases, the Supreme Court made opposite findings regarding both the main question of whether statements implying that persons with a specific sexual orientation cannot perform certain professions constitute discrimination or not, and the additional question of liability.

CY

Cyprus

Political developments

Report on incidents of racially motivated violence in schools presented to the Ministry of Education by the equality body



After two outbreaks of racially motivated violence in a school, the Anti-discrimination Authority initiated *ex officio* investigations into how the Ministry of Education and the school had handled these incidents. The victims had brought claims to the equality body but had subsequently withdrawn them.

The equality body found that the Ministry had been reluctant to recognise a racial motive partly due to an effort not to label and amplify the problem and partly due to ignorance as to how racial violence is to be distinguished from other types of violence.¹⁰⁴ Based on the international legal framework providing for the right to an education free from discrimination, but without explicitly referring to the Employment Equality Directive or other EU law, the report of the equality body concludes that schools have a legal duty to ensure that students do not face any form of discrimination. The report also calls on the Ministry of Education to adopt proactive measures such as a school anti-racism code to be developed in cooperation with the equality body.

Internet source:

<http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/B1B5189FA5761C95C2257B2E003B9ED1?OpenDocument>

¹⁰¹ County Court of Zagreb, Judgment Pnz-7/10 of 2 May 2011.

¹⁰² Supreme Court, Judgment Gž.25/11 of 28 February 2012 (delivered to the parties in October 2012).

¹⁰³ County Court of Zagreb, Judgment Pnz-6/10 of 24 March 2011 and Supreme Court, Judgment Gž.12/11 of 18 April 2012 (delivered to the parties in October 2012).

¹⁰⁴ Equality Body Self-initiated Intervention Ref. Akr/Ayt. 3/2011 & Akr/Ayt. 1/2012, dated 11 March 2013.

Procedure for exemption from religious instruction lessons in school challenged

The complainants brought an action against the Ministry of Education to the equality body, claiming that their daughter had been subjected to discrimination on grounds of religion or belief as she had been denied the right to leave the classroom during religious instruction lessons, although she had secured permission to be exempted from this class due to her religious beliefs. The school handled the situation on the basis of a recent circular issued by the Ministry of Education which stated that exemption from the class does not imply authorised absence from the classroom, and suspended the pupil from school for two days each time she was absent from the class.



The equality body published a report in which it found that the circular violated the pupil's right to religious freedom, and that it had been issued in spite of the equality body's previous report on the same issue.¹⁰⁵ The report also found that the school had inflicted an unjustifiably heavy punishment on the pupil, which had caused stigmatisation within the school. The equality body issued a formal warning, giving the Ministry of Education 15 days to revoke the circular and adopt certain other measures to remedy the situation. Following this warning, the Minister of Education agreed in a meeting with the equality body to issue a new circular, reinstating the previous system where exemption from the class implied exemption from presence in the classroom during religious lessons, during which alternative activities should be organised. At the moment of writing, no such new circular has been issued.

Czech Republic

CZ

Political development

Council of Europe Commissioner for Human Rights urges the Government to end segregation of Roma in schools

Based on the findings of his visit to the Czech Republic in November 2012, the Commissioner for Human Rights published his report focusing on Roma and persons with disabilities. The main findings of the report relate to the on-going practice of segregating Roma children, either in schools for children with mild mental disabilities or in mainstream Roma-only schools or classes. The report condemns this practice and notes that the situation has not improved five years after the ruling of the ECtHR in the *D.H. and others*¹⁰⁶ judgment.



The report points to national studies conducted by the Ombudsman and by the School Inspectorate which indicate that the 'special schools' formally abolished since 2005 continue to function under other names such as 'elementary schools' or 'practical elementary schools', and disproportionate numbers of Roma children continue to be placed in these establishments. It urges the Government to commit itself to the phasing out of these schools and to the implementation of the National Action Plan for Inclusive Education adopted in 2010. However, following strong public opinion *in favour* of the 'practical' schools and *against* the 2010 Action Plan, during a debate held in the Senate in February 2013 both the Deputy of the Government for Human Rights and the representative of the Ministry of Education stated that the 2010 Action Plan will be amended, so as to preserve the system of practical elementary schools and render the

¹⁰⁵ Equality body decision Report Ref. A.K.R. 93/2012, of 03.12.2012. See also decision Report Ref. A.K.R. 135/2009 of 07.10.2010.

¹⁰⁶ *D.H. and others v Czech Republic* (No 57325/00), Grand Chamber Judgment of 13 November 2007.

fulfilment of the Action Plan more 'realistic'. These developments seem to indicate a lack of political will within the Government to follow the Human Rights Commissioner's recommendations regarding inclusive education.

Internet source:

<https://wcd.coe.int/ViewDoc.jsp?id=2030637&Site=COE&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>

DK

Denmark

Case law

Duty of the employer to provide reasonable accommodation – independently of a request by the employee

disability

The complainant was dismissed from her employment as a healthcare assistant in a psychiatric hospital. As the result of a broken hand, she had been diagnosed with a malposition of her right hand little finger, which, among other things made handwriting painful and slow.

The reason for the dismissal appeared to be a combination of disability and sickness absences as well as problematic collaboration with colleagues due to their sense of insecurity and mistrust. This insecurity was primarily due to the fact that the complainant arguably could not use her hand fully, for example in situations where patients needed to be controlled and restrained.

The Board of Equal Treatment stated that the employer had neither conducted a thorough investigation of the possibility of transferring the complainant to another department, nor considered the possibility of providing her with electronic aids for the performance of her documentation tasks.¹⁰⁷ The Board found that the employer had not fulfilled its obligation to provide reasonable and appropriate accommodation with regard to the complainant's specific needs. The Board underlined that this obligation remained although the employee had not made any request for any special accommodation, emphasising the independent obligation of the employer to provide reasonable accommodation. The complainant was hence awarded compensation of DKK 245,000 (€33,000).

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1141&type=Afgoerelse>

Compensation lowered for indirectly discriminatory requirement to taste pork

religion
or belief

A Muslim woman studying to become a nutrition assistant was forced to quit a vocational training programme due to the school's refusal to exempt her from the requirement to taste pork.¹⁰⁸ Finding that the requirement was incompatible with plaintiff's religious beliefs, that it was not a necessary requirement to complete the training, and that the plaintiff was kept from completing her education due to this requirement, the Board of Equal Treatment had concluded that the requirement constituted indirect discrimination on grounds of religion and awarded compensation of DKK 75,000 (€10,000).¹⁰⁹ The vocational school challenged the decision of the Board before the local city court of Holstebro.

¹⁰⁷ Board of Equal Treatment Decision No 67/2013 of 20 March 2013.

¹⁰⁸ See *European Anti-Discrimination Law Review*, Issue 15 (2012), p.53.

¹⁰⁹ Board of Equal Treatment Decision No 213/2012 of 8 February 2012.

The Court upheld the decision of the Board of Equal Treatment on all points, ruling that indirect discrimination had been established on the ground of religion. However, without providing any guidance on its reasoning, the Court lowered the awarded compensation to DKK 40,000 (€5,400). The plaintiff has appealed the part of the judgment setting the amount of compensation, demanding DKK 75,000. The date of the hearing has not been decided.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=829&type=Afgoerelse>

First judgment of Supreme Court on disability discrimination qualifies dismissal because of the employee's ADHD as direct discrimination

A newly recruited secretary at a law firm was dismissed only four days after she had started working when the employer realised that she had been diagnosed with attention deficit hyperactivity disorder (ADHD). The employer invoked the 'special conditions' of the employee to dismiss her, although the claimant argued that because of her medicine and various strategies and tools she had acquired, she did not need her employer or colleagues to show any special consideration because of her ADHD.



The first instance court found in 2011 that the claimant had a disability encompassed by the Act on Prohibition of Discrimination on the Labour Market etc., and that the employer had referred to the reduced ability of the woman to perform her job as a secretary in violation of the prohibition of discrimination. At first instance, the claimant was awarded four months of salary in compensation.

The Supreme Court referred to the recent cases *Ring* and *Skouboe Werge* judged by the CJEU¹¹⁰ and adopted a dual vision of the concept of 'disability' in the Act on Prohibition of Discrimination on the Labour Market etc. The Court held that this concept must be interpreted as including a condition caused by a curable or incurable illness which entails a long-term limitation resulting in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. In addition, the nature of the measures to be taken by the employer is not decisive for considering whether a person's state of health is covered by the concept of disability.¹¹¹

The Supreme Court upheld the decision of the first instance court regarding both the applicability of the national anti-discrimination law to the case at hand and the finding of direct discrimination on the ground of disability. The Supreme Court awarded DKK 84,000 (€11,260) in compensation to the complainant (six months of salary). When setting the compensation, the Supreme Court referred to existing case law on gender discrimination and stated that in the present case, there was no reason to depart from this compensation practice.

Internet source:

<http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Pages/BortvisningafadvokatsekretaerpaagrundafADHDvaruberettigetogudgjordeforskelsbehandling.aspx>

¹¹⁰ The details of these joined cases are explored in the article '*HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities*' by Lisa Waddington, on page 11 of this publication.

¹¹¹ Supreme Court Decision of 13 June 2013.



*Legislative development***Adoption by the National Assembly of a bill removing the word 'race' from all legislation**

On 16 May 2013 a legislative bill deleting all references to 'race' in national legislation was adopted at first reading, and has now been transferred to the Senate.



The proposed legislative bill states that 'The French Republic condemns racism, anti-Semitism and xenophobia. It does not recognise the existence of any alleged race'. It provides for the eradication of the terms 'race' and 'racial' from all parts of national legislation, including both the criminal and employment law provisions which constitute the main acts transposing the Racial Equality Directive. In all the concerned pieces of legislation, the words 'race' and 'racial' are replaced by the terms 'racist', 'for racist reasons' or 'alleged race' and 'allegedly racist'.

In France the use of the term 'race' in legislative texts and governmental publications has systematically led to polemics on the illegitimacy of the concept of race as a legal category.

Internet source:

<http://www.assemblee-nationale.fr/14/ta/ta0139.asp>

*Case law***Two rulings by the Supreme Court (*Cour de Cassation*) on employers' power to impose religious neutrality at work**

On 19 March 2013, the Supreme Court (*Cour de Cassation*) adopted two decisions in two different cases concerning the right of employees to religious freedom, and thereby to wear the Islamic veil at work, conflicting with the power of employers to impose religious neutrality at work, and thereby to prohibit such conspicuous signs of religious beliefs. In both cases, employees who had been working for their respective employers for several years were dismissed due to their failure to respect in-house regulations prohibiting the staff from wearing (*inter alia*) the Islamic veil to work. In the *Baby Loup* case, the claimant was working at a day care centre for underprivileged children and was dismissed when she started wearing the veil upon her return from maternity and parental leave. In the *CPAM* case¹¹² the claimant was working for the local public medical insurance fund and had always worn the Islamic veil to work but was dismissed following the adoption of new in-house regulations. The two employees both brought actions before Labour Courts, claiming that their dismissals were null and void due to a violation of the prohibition of discrimination on the ground of religious belief. Both claims were dismissed by the respective Labour Courts and Courts of Appeal, and both claimants appealed to the Supreme Court.



In the *Baby Loup* case, the lower courts had found that the association managing the day care centre was pursuing the legitimate aim of offering a neutral environment for children who are to be protected from exposure to affirmations of the staff's religion, and that the in-house regulations enforcing the principle of secularity and neutrality were proportionate. However, the Supreme Court decided that the principle of secularity guaranteed in Article 1 of the Constitution cannot be invoked by a private employer to hinder the protection against discrimination on the ground of religion afforded to employees of the private sector who are not in the position of managing a public service. Restrictions to freedom of religion must be justified by the nature of the particular occupational

¹¹² Caisse primaire d'assurance maladie (Public Medical Insurance Fund) – a private body executing a public service.

activities concerned or of the context in which they are carried out, and must constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The general and imprecise restriction provided by the in-house regulation did not comply with these requirements, and therefore the dismissal decided on discriminatory grounds was null and void.¹¹³

In the *CPAM* case, the lower courts had dismissed the employee's claim on the ground that the CPAM's objective was to provide a public service and the claimant's capacity as an employee corresponded to that of an agent agreeing to execute a public service. The Supreme Court upheld the judgment of the lower courts in this case, ruling that private employees protected by the provisions of the Labour Code prohibiting discrimination on the ground of religion are subject to the specific constraints of neutrality and respect for the principle of secularity when their employment consists in executing a public service.¹¹⁴

Internet sources:

http://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html

http://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/537_19_25763.html

Obligation of air transport carriers to provide access to persons with reduced mobility and scope of opposable security requirements



EU law concerning the rights of disabled persons and persons with reduced mobility when travelling by air¹¹⁵ forbids air transport carriers from refusing to allow a disabled person to embark on the ground of disability or reduced mobility, unless this is necessary 'to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned'.¹¹⁶

In the absence of precise regulations defining 'applicable safety requirements' some air transport carriers have implemented restrictive policies resulting in a systematic requirement that disabled persons with reduced mobility be accompanied.

The respondent air transport carrier adopted such a policy, formally instructing its subcontractor operating boarding in Paris Charles De Gaulle Airport to systematically refuse embarkation to unaccompanied disabled travellers because flight personnel 'are not trained to manage and assist disabled persons'. Three persons who were denied the right to embark as they were unaccompanied filed penal complaints against the respondent.

The first instance court found that the systematic refusal of the company to allow unaccompanied disabled persons to board a plane without verifying their actual capacity to travel alone, in consideration of safety requirements, constituted discrimination on the ground of disability. This decision was appealed by the respondent, but the Court of Appeal of Paris upheld the judgment of the first instance court and ordered the respondent to pay a fine of €70,000 and to publish the judgment in the French newspaper *Le Monde*.¹¹⁷ The subcontracting operating company was sentenced to a fine of €25,000. Both companies were also jointly ordered to compensate the claimants to the amount of €2,000 each in damages and 1 symbolic euro to the NGO Association des Paralysés de France.

The respondent air transport carrier has lodged an appeal before the Supreme Court.

¹¹³ Cour de Cassation, *Association Baby Loup*, No 536, case no 11-28.845 of 19 March 2013.

¹¹⁴ Cour de Cassation, *Caisse primaire d'assurance maladie de Seine-Saint-Denis (CPAM)*, No 537, case no 12-11.690 of 19 March 2013.

¹¹⁵ Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006.

¹¹⁶ *Ibid.*, Article 4.

¹¹⁷ Paris Court of Appeal, Decision p 12/01781 of 5 February 2013, *Easy Jet v Gianmartini et al.*

*Political development***President of the national equality body draws attention to situation testing as a method to prove discrimination against Roma**

The President of the equality body (the Commission for Protection against Discrimination, CPAD), spoke at a public event which discussed discrimination against Roma people, where numerous examples of discrimination against Roma in various fields were presented and discussed.



During his statement to the media, the president commented on those cases and on the difficulty of proving that discrimination had occurred, adding that the timeframe did not allow for the use of situation testing in those cases. He briefly explained the method, and stated that there was room under the Law on Protection against Discrimination to use situation testing.

Thus far situation testing has been tried as a method by civil society organisations, but the outcomes of this testing had rarely been publically reported. However, situation testing has not been used in court proceedings in discrimination cases, nor before the CPAD. Judging from this statement, it appears the Commission has discussed and considered the use of situation testing in its work.

The fact that using situation testing was considered as a possible method by the CAPD, as well as the readiness expressed publicly by the president for the CPAD to use this method, is a positive development.

Two studies published by national think tanks on the legal grounds and functioning of the national equality body

The study *National Human Rights Institutions in Macedonia: Normative Models and Challenges*¹¹⁸ analyses the legal and policy frameworks of the Commission for Protection against Discrimination (CPAD) and of the Ombudsperson, the two existing national human rights institutions (NHRIs). Both are vested with competences in relation to protection against discrimination. The report identifies a need for reform, as it highlights shortcomings in relation to the formal establishment, functions, competences and responsibilities, membership and operating principles as well as resources of these institutions. It shows that the mandates of both NHRIs would benefit from their alignment with international standards, and how the overlaps in their mandates could be resolved in a manner that would enhance legal certainty. As regards specifically the CPAD, several concrete recommendations are provided for improvements both in the legal framework and the practice of the equality body.

The *Shadow Report on Anti-discrimination*¹¹⁹ analyses the CPAD solely, and points to problems related to the CPAD's exercise of its mandate, due to overlaps and ambiguity regarding the legal grounds for the relations between the equality body, other relevant bodies and the courts. In addition, the selection criteria for the commissioners are highlighted as being problematic, and the need for a secretariat as well as increased financial independence is underlined. This report includes a number of recommendations targeting specific actors, including the Government, local self-government units, Parliament, the private sector and employers' unions, donors, etc.

¹¹⁸ CRPRC Studiorum, *National Human Rights Institutions in Macedonia: Normative Models and Challenges*: http://studiorum.org.mk/en/wp-content/uploads/2013/03/NHRI_Study_MKD-2012for_web.pdf.

¹¹⁹ CRPM and CED, *Shadow Report on Anti-discrimination*: http://www.ced.bg/uploads/publication/Shadow_Report_Final_ENG.pdf.

Publication by the national equality body and the Ombudsman of their annual reports

The Commission for Protection against Discrimination (CPAD) and the Ombudsman – the two national human rights institutions vested with competences related to protection against discrimination – published their annual reports for 2012.

The Ombudsman's annual report shows that in 2012, as in previous years, the number of cases of alleged discrimination filed was lower than for all other breaches of rights for which the Ombudsman has a mandate. Thirty-two discrimination cases were filed (which represents 0.74% of the total number of cases), and discrimination was found in nine cases, out of which all were in the area of labour law and on grounds of ethnicity.¹²⁰

According to the CPAD's annual report, there was an increase in the number of complaints received (77 complaints in 2012 compared to 60 in 2011). The main grounds of discrimination covered by the complaints were ethnicity, disability, 'belonging to a marginalised group' and 'personal or social status', and a majority of the complaints were related to the field of employment. The data provided do not include the numbers of cases processed and/or closed in 2012.¹²¹

Both institutions highlight the need for additional funding in subsequent years in order to be able to fully exercise their mandate; however, no increase in funding has been provided for in the state budget for 2013.

GR

Greece

Legislative development

Amendment to the penal code, increasing penalties for racially motivated crimes



Since 2008 the Greek Criminal Code has contained the aggravating circumstances of 'national, racial, religious hatred' as well as 'hatred due to different sexual orientation' to be taken into consideration in the sentencing of criminal acts. This provision was amended by the adoption of a new law in March 2013, and now also forbids the suspension of the sentence for a crime aggravated by bias motivation.¹²² Moreover, after consultations with LGBT organisations, the new law added, for the first time in the Greek legal order, the notion of 'gender identity' in order to protect in a more specific way transgender persons, who often tend to fall victim to violence.

Although racial motivation has been specifically punished since 2008, this provision has not once been applied by the courts since its introduction. A critical problem is the fact that racist motivation may only be addressed in the sentencing phase, rather than during the trial for the determination of guilt. This means that the police and prosecutors are less likely to investigate potential bias elements of a crime from the outset, making it more difficult to prove racist motivation beyond reasonable doubt.

¹²⁰ Ombudsman Annual Report 2012: <http://www.ombudsman.mk/ombudsman/upload/documents/2013/GI-2012.pdf>.

¹²¹ Commission for Protection against Discrimination Annual Report 2012, Parliament of the Republic of Macedonia website: <http://www.sobranie.mk/ext/exporteddocumentdownloadwindow.aspx?id=45716f8a-63c5-441a-bd6e-b56e252426b4&t=pdf>.

¹²² Law 4139 /2013 'Narcotic Acts and other provisions' (Article 66), published in Official Journal No 74 (20.03.2013), amending Article 79(3) of the Criminal Code.

Internet source:

<http://www.e-forologia.gr/lawbank/document.aspx?digest=6417933335657B00.1D031AEA53&version=2013/03/20>

Political development

Implementation of a project on accessibility of recreational and other activities for persons with disabilities

A project entitled 'Gradual re-inclusion of persons with disabilities in socio-economic life and promotion of autonomous living' was implemented between November 2008 and December 2012 by the Ministry of Health & Social Solidarity together with the National Confederation of Persons with Disabilities as the main coordinator. The project was co-financed by the European Social Fund and national funds, and involved the organisation of various activities to promote self-expression and recreation (e.g. theatre performances, sports, music, dance, involvement in various forms of arts, etc.), psychological development and physical exercise for persons with disabilities who live in special units/institutions or with their families.



The aim of the project consisted not only in developing the capacity of disabled people to take part in individual or group activities and in improving their quality of life, but also in teaching people with disabilities how to take advantage of their free time and, finally, in supporting their families to effectively address social exclusion. Moreover, the project included the publication of a *Guide to Accessible Recreational Activities*, which compiled information on all accessible infrastructure (hotels, transport, sports facilities, restaurants, theatres, cinemas and shopping centres, as well as public services such as municipalities, hospitals and local medical facilities) in the main cities of the country.

Follow-up has not been ensured after the end of the project implementation period.

Internet source:

http://www.esaea.gr/index.php?module=announce&ANN_user_op=view&ANN_id=2103&MMN_position=12:12&thms=3&ns_proj=1

Publication by the Ombudsman of its special annual report on discrimination for 2012

In its special annual report on discrimination for 2012 published in April 2013, the Greek Ombudsman expressed its strong concern regarding Greek society's apparent regression in terms of the vigilance required in the fight against discrimination. The Ombudsman was particularly concerned about the increase in the number and intensity of incidents of racist violence as well as the stance of state authorities on efficiently dealing with the phenomenon and protecting the social groups targeted. The Ombudsman stressed the need for combined measures and coordinated actions in order to deal with the phenomenon of racist violence, as well as its causes. In this context, not only legal initiatives are required, but also specific planning on the part of public authorities.

The report also contains data on the number of discrimination cases examined in 2012. Out of 112 examined cases of allegedly discriminatory behaviour, six were archived because they were found to be beyond the Ombudsman's jurisdiction or unfounded, or due to lack of evidence. The Ombudsman completed the examination of only 26 cases, out of which the outcome was positive for the claimant in 19 cases, whereas in five cases the authorities refused to comply and in two cases it was deemed that the authorities had acted within the law. The remaining 80 cases will continue to be examined. Thirty-two cases concerning mostly housing for Roma communities are pending. This is due to the structural-systemic character of discrimination in this field and to the Ombudsman's choice to keep his intervention active throughout the course of these cases until they have been dealt with conclusively.



Internet source:

<http://www.synigoros.gr/?i=metaxeirisi.el.news.95141>

Action for annulment brought against ministerial decision opening military schools to persons of Greek nationality but who are not of Greek 'ethnic descent'

After the submission of a complaint by six former military officers and one civilian on 23 May 2013, the Council of State (the Supreme Administrative Court of Greece), was called to decide if military schools can accept candidates who have Greek citizenship but are not of Greek ethnic descent.



The claimants demanded the annulment of the 2011 decisions issued by the Minister of Defence, which allowed candidates who had Greek citizenship but were not of Greek ethnic descent to take part in the military schools' entry exams, alleging them to be anti-constitutional and illegal. The military officers claimed that Articles 4 and 110 of the Constitution exclude attendance of military schools by those who have Greek citizenship without being of Greek ethnic descent.

On 25 February 2013 a group of 84 Members of Parliament of the New Democracy party submitted an amendment to a draft bill, according to which only those of Greek ethnic descent and not only of Greek citizenship would be admitted to military, police, and coastguard schools. After strong reactions not only from the major opposition party (Syriza) but also from the other two parties in the coalition government (Pasok and Dimar), this amendment was withdrawn. The justification report for this amendment stated among other things: 'Due to the particularity of our national defence issues, in comparison to other European countries, and also due to the grave problem of irregular migration that the country is facing, and in connection with the law regarding citizenship and its consequences, it would be appropriate to reinstate the condition of Greek ethnic descent as an eligibility criterion for all military and police schools'.

It is noteworthy that the abolition of the supplementary condition of Greek ethnic descent and not only of Greek citizenship for admission to armed forces schools had occurred after the insistent written critical remarks of the Greek Ombudsman that the then-existing legislative framework was grossly anti-constitutional.

Internet source:

<http://www.crimenet.gr/en/%CE%B5%CE%BB%CE%BB%CE%AC%CE%B4%CE%B1/22-%CF%80%CF%81%CF%89%CF%84%CE%BF%CF%83%CE%AD%CE%BB%CE%B9%CE%B4%CE%BF/9481-%CE%B7-%CF%80%CF%81%CE%BF%CF%83%CF%86%CF%85%CE%B3%CE%AE-%CF%84%CF%89%CE%BD-7>

Hungary

HU

Legislative development

Amendment of national legislation on retirement age of judges, following the CJEU ruling in *Commission v Hungary*

On 11 March 2013 Parliament adopted Law XX of 2013, amending the national legislation on the retirement ages of judges and notaries, following the ruling of the CJEU in *Commission v Hungary* where



national law was found to be in breach of Directive 2000/78/EC.¹²³ On 25 March, after signature by the President of the Republic and promulgation in the Official Journal, the law entered into force.¹²⁴

The law brings the mandatory retirement age gradually down to 65 years by 31 December 2022 for all legal professions, and provides the judges and notaries concerned with the possibility of continuing working with a suspension of payment of their retirement pension. Specific measures are also provided to regulate the situation of the judges who had been dismissed on the basis of the regulation found to be in breach of the Directive by the CJEU, who have the right to be reinstated in their previous functions. The final version of the law brought in improvements compared to the initial draft as regards the practical implications of the reinstatement of the unlawfully dismissed judges and notaries, although it is still not guaranteed that all those who wish to be reinstated will be able to resume their previous positions.

Internet source:

<http://www.parlament.hu/irom39/09598/09598-0012.pdf>

Case law

Committee on the Rights of Persons with Disabilities finds Hungary to be in breach of the UN CRPD due to inaccessibility of banking services



The claimants were two blind persons who had concluded contracts for private banking services with a Hungarian bank, including the use of bank cards. As the bank's ATM machines were not equipped with either Braille fonts or voice assistance for bank card operations, the claimants challenged the application of the same fees for bank card usage and transactions as applied to all other customers, regardless of the fact that they were unable to use these services on a 24-hour basis unlike other, sighted customers. They brought a civil action, claiming that the provision by the bank of inferior quality services at the same price was discriminatory.

The claimants brought a civil action to the Metropolitan Court, asking that the violation of their right to equal treatment be recognised, and that the bank be ordered to bring this infringement to an end by retrofitting its ATMs. They also sought non-pecuniary damages of HUF 300,000 (EUR 1,000). The Metropolitan Court found in favour of the claimants, and ordered the bank to retrofit within 120 days at least one of its ATMs in the capital towns of each county, one in each district of Budapest, and four further ATMs in the districts of residence of the claimants. The Metropolitan Court also granted pecuniary damages in the amount of HUF 200,000 (€670) to each of the claimants.¹²⁵

However, upon appeal, the Metropolitan Court of Appeal quashed the first instance decision and entirely rejected the claim, holding that the mere fact that the claimants needed or might need assistance from other members of the society due to their disability did not violate their human dignity.¹²⁶ The Court further established that freedom of contract must be respected and that the Court may not, upon request by one party to a contract, oblige the other party to fulfil an obligation which was not part of the contractual agreement.

¹²³ Case C-286/12 *Commission v Hungary*, Judgment of 6 November 2012, not yet reported in the Official Journal (also see *European Anti-Discrimination Law Review* issue 16, page 40).

¹²⁴ *Magyar Közlöny*, 49/2013 (Official Journal, published on 25 March 2013).

¹²⁵ Metropolitan Court (Fővárosi Bíróság) 27.P.29.062/2005./35.

¹²⁶ Metropolitan Regional Court (appeal) (Fővárosi Ítéltábla) 2.Pf.21.073/2007/4.

Acting upon the claimants' request for extraordinary judicial review, the Supreme Court¹²⁷ upheld the second instance decision, bringing the claimants to submit a complaint in March 2010 to the Committee on the Rights of Persons with Disabilities (CRPD).

In its decision published on 23 April 2013¹²⁸ the CRPD established that Hungary had failed to fulfil its obligation stipulated in Article 9 of the Convention on the Rights of Persons with Disabilities by not ensuring accessibility of banking card services for persons living with visual impairments on an equal basis with others. The CRPD therefore made numerous recommendations to Hungary including *inter alia* the following: (i) providing remedy for the authors of the complaint; (ii) establishing minimum standards of banking services; (iii) creating a legislative framework with concrete, enforceable and time bound benchmarks; (iv) providing regular training on the scope of the Convention to judges. Hungary is to submit a written response to the Committee within six months.

The CRPD underlined that the Hungarian Government's view expressed during the proceedings that the higher courts' decisions were 'sound' implies that under the existing legal framework, the obligation to provide for accessibility of information, communications and other services for persons with visual impairments on an equal basis with others does not apply to private entities. This in turn means that the State party has not fulfilled its obligation to put in place an adequate legal framework.

Internet source:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx>

Settlement reached after dismissal of teacher from a religious school following the entry into force of new education legislation

After ten years of employment with excellent performance at a denominational school, a teacher was dismissed immediately after the entry into force of Article 32 of the National Public Education Act on 1 September 2012.¹²⁹ This provision authorises denominational schools to – among other things – (i) in relation to employing teachers and other employees attach weight to considerations related to religion and belief, and also define them as criteria of recruitment, and (ii) prescribe regulations concerning appearance and behaviour, rights and obligations, and religious activities. Disciplinary proceedings may be launched against any child, pupil or teacher who breaches these latter obligations.



Based on this provision, the school held that the teacher's world view was not in line with the school's religious values. The teacher launched a labour lawsuit against the school, which led the school to admit that the dismissal had been unlawful without providing the exact reason behind this unlawfulness. This admission brought the parties to conclude a settlement comprising the payment of damages to the plaintiff.

With the settlement of the case, the request for a preliminary ruling regarding the compliance of these provisions with the Directive sought by the claimant will not be made, although such a request would have been useful.

¹²⁷ Supreme Court (Legfelsőbb Bíróság) Pfv.IV.21.144/2008/7.szám.

¹²⁸ Committee on the Rights of Persons with Disabilities, Communication No 1/2010, 23 April 2013.

¹²⁹ Act CXCV of 2011 on National Public Education.

*Political development***Publication of a report on the impact of austerity measures on the Traveller community**

Membership of the Traveller community is one of the protected grounds under Irish non-discrimination legislation. A report entitled *Travelling with Austerity: Impacts of Cuts on Travellers, Traveller Projects and Services* (April 2013) was commissioned by Pavee Point, a national Travellers' organisation.¹³⁰ This report finds that since the beginning of the economic and social crisis in 2008 there has been a dramatic disinvestment by the State in the Traveller community, which it finds is bearing the brunt of public spending cuts imposed under the country's international bailout.

The report finds that Irish Travellers, a 30,000-strong ethnic group which is among the most marginalised in society, have experienced cuts of 85% to spending on housing and education schemes since 2008. Important cutbacks in public expenditure on equality projects have also taken place, while other programmes have been cancelled altogether. These cuts are accompanied by the failure of the State to spend even the limited resources that it has made available. The report also shows particularly high poverty rates as well as extremely low rates of completion of secondary school and of employment among Irish Travellers.

The report concludes that there is a need to challenge and reverse the effects of the decisions taken, which have disproportionately affected the Traveller community, and address those areas from which the State has retreated, such as anti-racism and inter-culturalism and the prevention of discrimination. It emphasises that the State continues to take decisions without consulting Travelling people, with Travellers unrepresented on high-level groups at national level and local level, contrary to European principles.

*Case law***Labour Court overturns decision of the Equality Tribunal, declaring that a 'cap' on redundancy payments does not constitute age discrimination**

The complainants in the case had been employed by the respondent company for periods ranging from 16-25 years when their employment contracts were terminated following the respondent's decision to close the plant in which they worked. The respondent and the trade union agreed on general redundancy terms for all employees which provided for a payment of five weeks' pay per year of service in addition to statutory redundancy payments. However, in the case of employees who were close to retirement age it was agreed that they would receive whichever amount was the lowest: the normal redundancy package or the amount of salary that they would have earned had they remained in employment until the normal retirement age of 65. Each of the complainants fell under this exception, and complained to the Equality Tribunal, claiming that they had been discriminated against on grounds of their age.

The Equality Tribunal found that the method of calculating the redundancy package, resulting in a 'cap' on the complainants' payment, constituted age discrimination. The employer's argument that the Employment Equality Acts expressly permitted the respondent to calculate severance payments with regard to the employee's proximity to retirement was rejected. As the employer was unable to objectively justify the discrimination, the complaint was upheld.

¹³⁰ The report is available at: <http://paveepoint.ie/sitenua/wp-content/uploads/2013/04/Pavee-Point-Austerity-PDF-1.pdf>.

Upon an appeal by the respondent, the Labour Court found that the Oireachtas (Parliament) had made express provision for differences in treatment based on age in respect of severance payments, and held that workers close to retirement are in a substantially different position from other workers which justifies a difference in treatment as regards the construction of redundancy packages.¹³¹ Thus, the Court found that the respondent's method of calculating the redundancy packages was permitted by national law in application of Article 6(1) of the Employment Equality Directive, and overturned the decision of the Equality Tribunal.

This decision is a significant break in a recent line of authorities on the requirement for objective justification in age discrimination cases and will have implications for employers not only in relation to the calculation of severance payments, but also in the context of compulsory retirement.

Internet source:

<http://www.labourcourt.ie/en/Cases/2013/April/EDA1315.html>

Equality Tribunal decision on discriminatory dismissal caused by the failure of the employer to provide reasonable accommodation

The complainant, who was suffering from benign intracranial hypertension, was employed by the respondent, a large chain of merchandise retail. She informed her supervisor of her condition about six months after her employment began, and later attracted complications requiring surgery and time off work.



When she had been absent for 10 months her employer contacted her and a meeting was arranged. In the meantime the complainant developed a new, separate condition requiring surgery that was scheduled to take place shortly after the meeting. Shortly after the meeting, where the complainant discussed both her pre-existing and her more recent condition, the respondent wrote to the complainant requesting her to provide a return to work date which should be no later than 14 June 2010. She responded stating that she could not return to work by 14 June but that her doctor had advised that she could return shortly after that. The complainant was dismissed and brought a claim to the Equality Tribunal.

The Tribunal found that the complainant's initial condition was a disability for the purposes of the Acts. The respondent accepted that the complainant had indeed mentioned her condition during the meeting but that it was not clear that this was a disability. The Equality Officer found that the respondent was aware of the complainant's condition at least from the date of the meeting. It also found that the complainant's inability to return to work was due to her disability and that the dismissal was influenced by the complainant's absence and her inability to return to work.¹³² Finally, it was apparent that very simple reasonable accommodation in the form of some extra time to recover from the operation would have enabled the employer to refrain from dismissing the complainant.

The complainant was awarded re-engagement from the date of dismissal with remuneration starting six weeks after that date, meaning that the employer was required to pay almost three years' pay, in addition to the award of €14,000 of compensation for moral damages for the effects of the discrimination. In addition the Equality Tribunal recommended that the respondent ensure that all staff, in particular those employed in human resource functions, receive relevant training in equality matters.

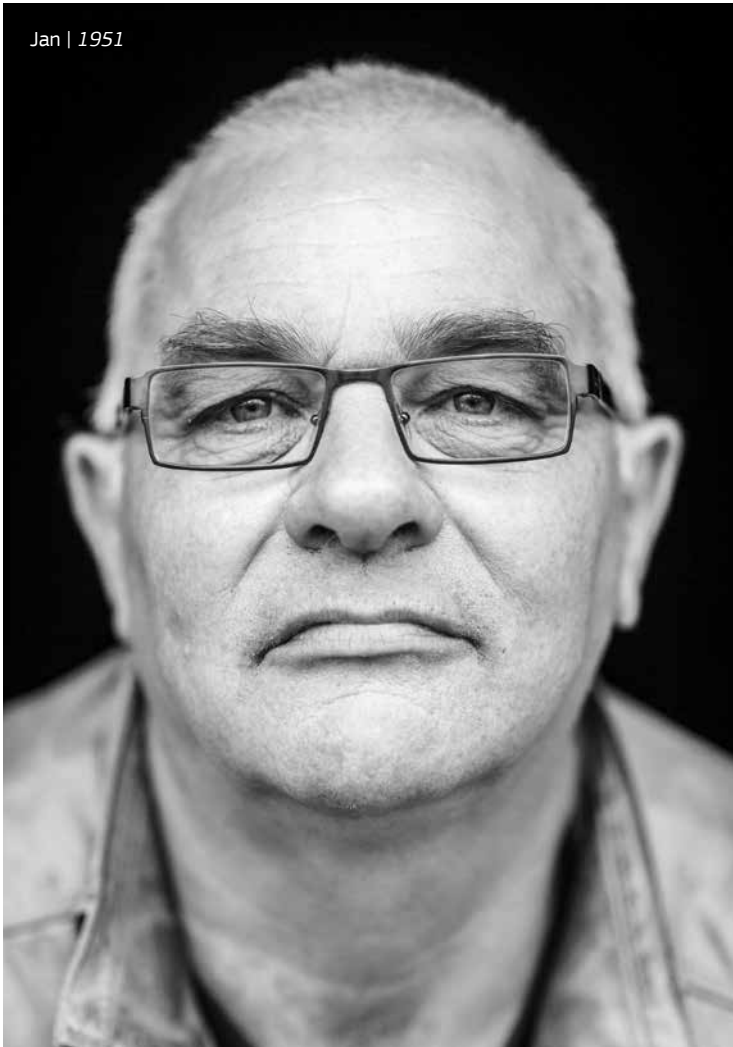
Internet source:

<http://www.labourcourt.ie/en/Cases/2013/April/DEC-E2013-032-Full-Case-Report.html>

¹³¹ *Hospira and Roper*, Labour Court ADE/11/25, Determination No EDA1315, of 29 April 2013.

¹³² Equality Tribunal Decision DEC-E2013-032 *Donaldson v Marks & Spencer (Ireland) Ltd*, of 26 April 2013.

Jan | 1951



Sandy | 1968



Marije | 1978



Els | 1974



*Legislative developments***Update of the list of organisations granted legal standing in cases of discrimination**

For the third time since 2005, the list naming the associations and bodies granted legal standing to litigate in support or on behalf of victims in anti-discrimination cases was updated in March 2013 by Legislative Decree No 215/2003 implementing Directive 2000/43/EC.¹³³ The decree was adopted jointly by the Ministries of Labour and Welfare and of Equal Opportunities, and grants legal standing to more than 550 bodies.

Internet source:

http://www.asgi.it/public/parser_download/save/decreto_min_lavoro_13032013.pdf

*Case law***Practice of identification through fingerprinting of inhabitants of Roma camps declared discriminatory**

The complainant was a Roma Italian citizen whose data had been collected and fingerprints taken in accordance with a governmental decree of 2008 which was in 2011 found to be illegal and annulled by the Council of State (the supreme administrative court).¹³⁴ The decree had introduced a state of emergency in three regions (Lombardy, Lazio and Campania) in order to react to an alleged crisis within settlements known as *campi nomadi*, and implied primarily the identification of the inhabitants of the camps. The complainant brought a civil action, requesting that the Government be ordered to delete his data and asking for compensation for moral damage. His action was supported by three NGOs that took part in the proceedings as additional claimants.

racial
or ethnic
origin

In its decision of 27 May 2013, the Court of Rome found the identification, fingerprinting and storage of the data of the claimant to constitute discrimination on the ground of race and ethnic origin.¹³⁵ The apparently neutral criterion of inhabiting the concerned camps was found to be indirectly discriminatory as the large majority of its inhabitants were Roma. The Government was ordered to pay compensation of €8,000 in moral damages together with the publication of the judgment in the *Corriere della sera* newspaper. In addition, the Court ordered the Government to delete the claimant's data stored through the illegal procedure, but rejected the request made by the intervening NGOs to delete the whole data base due to a procedural error in the filing of this request.

Internet source:

http://www.asgi.it/public/parser_download/save/trib_roma_ordinanza_27052012_impronte.pdf

Right-wing political activists convicted of racially motivated violence

In 2009 a national demonstration was organised by the far-right wing political party Lega Nord, during which two foreign waiters in a restaurant were assaulted by a number of political activists. One of the activists was sentenced through an accelerated procedure in 2010 to one year's imprisonment,¹³⁶ while the other two were prosecuted through the ordinary procedure.

racial
or ethnic
origin

¹³³ Legislative Decree No 215/2003 of 13 March 2013.

¹³⁴ Council of State (Consiglio di Stato) Decision No 6050 of 16 November 2011.

¹³⁵ Court of Rome, II Civil Section, 27 May 2013.

¹³⁶ Court of Venice, decision of the preliminary hearing judge No 10 of 12 January 2011.

In March 2013 the Court of Venice found the two political activists guilty of injuries aggravated by racial hatred.¹³⁷ Proof of the racist motive was found through the statements of several witnesses who reported that the assault was accompanied by racist insults. These two perpetrators were sentenced to two years and three months and to two years of detention respectively, and to the payment of moral and material damages to the civil parties in the criminal proceedings. These included the owner of the restaurant where the assault took place and who employed the victims (€1,700); ASGI, the association intervening in support of the victims (€500); and the victims (€4,000 and €5,000). The compensation awarded to the victims is provisional, with a referral to the civil judge's final decision on moral damages, taking into account every point raised by the victims.

Internet source:

http://www.asgi.it/public/parser_download/save/trib_venezia_22_2013.pdf

Lithuania

Legislative development

Parliament approves for deliberation two draft laws with homophobic content



Parliament (Seimas) approved a proposal to amend the Code of Administrative Violations by introducing administrative liability for 'public denigration of constitutional moral values and of constitutional fundamentals of family life, as well as organisation of public events contravening public morality'.¹³⁸ The draft law introduces a fine from €290 to €867 for such activities, and up to €1,735 in the case of repeated violations. The draft law initiative received substantial backing with 54 votes in favour out of 76 and has been forwarded to the Human Rights Committee for further deliberation. However, several initiatives of the same kind have been adopted previously and have always been blocked, making it highly unlikely that the draft law will pass.

Political development

Group of NGOs proposes amendments to the anti-discrimination legislation

In preparation for the end of term of the Ombudsperson for Equal Opportunities in April 2013, a group of seven non-governmental organisations working with different grounds of discrimination addressed the Chairperson of the Seimas (Parliament) as well as major political parties with an open letter, proposing amendments to the Law on Equal Treatment as well as proposing a candidate to replace the Ombudsperson for Equal Opportunities, who has been in place since the establishment of the institution in 1999.

The NGOs highlighted the main points where national anti-discrimination legislation is inconsistent or not effective enough, including the lack of an explicit provision on protection against discrimination in the fields of healthcare and social protection, and the weakness of the provisions both on reasonable accommodation and on sanctions available in discrimination cases. Specific weaknesses of the equality body were also highlighted, besides the recommendation that a new Ombudsperson be appointed at its head. In addition, since the Ombudsperson for Equal Opportunities had been assigned by the Government to control the implementation of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, the NGOs asked that this monitoring role of the Ombudsperson be enshrined in law.

¹³⁷ Court of Venice, No 22 of 19 March 2013.

¹³⁸ Draft law on amendment of the Code of Administrative Violations, available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=448188.

Although the previous term of the Ombudsperson ended at the end of April 2013, no new appointment has been made by Parliament at the time of writing and the current Ombudsperson thus remains in office, although the term has not officially been renewed.

Malta

MT

Political developments

Judicial application filed by the national equality body against the national football association for failure to ensure accessibility of the national football stadium

Following a number of complaints regarding the lack of adequate access for persons with disabilities to all seating stands of Malta's national football stadium, the National Commission Persons with Disability (KNPD) initiated an investigation as to whether or not the lack of accessibility was in violation of Article 12(1) of the Equal Opportunities (Persons with Disability) Act which in particular provides that it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person by not allowing access to or the use of any property, or of any facilities within such premises, that the public or a sector of the public is entitled or allowed to enter or use (whether on payment or not).



The KNPD held various meetings with the Malta Football Association (MFA), which is the body responsible for the stadium, where the parties sought to find a solution with the aim of restoring and guaranteeing the right to equal access by all persons. A site visit to the stadium, during which a KNPD member, an MFA member, the complainants, as well as an architect were present, also took place in October 2011. During the meeting it was agreed that the MFA should make plans to make the stadium more accessible, inclusive and welcoming. When more than 18 months had passed and the MFA had not yet fulfilled its part of the agreement, in spite of correspondence exchanged in the meantime, the KNPD filed a judicial application against the MFA. The case is now pending before the civil courts where it is scheduled to be heard on 22 October 2013.

Internet source:

http://www.knpd.org/pubs/pdf/20130522_Media%20_EOCU%20JP%20-%20MFA%20-%20prsrel_.pdf

The Netherlands

NL

Legislative developments

Abolition of prohibition of blasphemy

Discrimination on the ground of religion is not only prohibited in the General Equal Treatment Law, but also in some criminal law provisions, one of which contains the prohibition of blasphemy. Although criticising God and religion is not prohibited, 'scornful blasphemy' (*smalende godslastering*) has been prohibited since the 1930s in spite of very low numbers of convictions, with none at all for several decades. This situation led to calls for the provision to be revoked, in particular as it was seen as a threat to the freedom of speech.



In the aftermath of the national elections of 2012, in which the confessional parties sustained massive losses, it became clear that a majority in Parliament was in favour of abolition. Despite fierce opposition, a

decade of debate finally resulted in Parliament revoking the controversial blasphemy provision this year.¹³⁹ However, even after the repeal of this provision, the Criminal Code still protects individuals and groups against hate speech, on the basis *inter alia* of religion.

Political developments

Social agreement between trade unions and employers' organisations, fixing social policy for the coming years, including certain measures of relevance for anti-discrimination purposes

In response to a 'social agreement' between the country's biggest trade unions and employers' organisations, the Dutch Coalition Government has postponed and amended a number of austerity measures announced in November 2012 when it took office.

The social agreement provides insight into the country's social policy for the coming years and contains a great number of crucial measures, including two with an impact for anti-discrimination purposes. Firstly, a positive action measure providing for a 5% quota of jobs to be reserved for persons with disabilities which had been included in the coalition agreement has now been abandoned until 2017, when it will be reassessed whether more persons with disabilities are being employed. Secondly, the social agreement includes the intention to target 'undue flexibilisation', aiming at decreasing the number of fixed-term contracts and self-employed freelancers as these categories have experienced severe consequences of the economic downturn. Vulnerable groups such as younger people and migrants are often over-represented in these employment categories and are therefore particularly affected by these measures.

Internet source:

http://www.stvda.nl/~media/Files/Stvda/Convenanten_Verklaringen/2010_2019/2013/20130411-sociaal-akkoord.ashx

Case law

Discriminatory dismissal on grounds of political opinion fell under the exception for employers with an ethos based on religion or belief



Since the local elections of March 2010, the claimant in these proceedings before the NIHR has been a 'dual' city councillor ('*duogemeenteraadslid*') for a small local political party. This is not an elected position, but still gives the right to speak in certain municipal committees. Apart from that, the job entails activities which enable city council members to represent their electorate. At the national political level, the claimant belonged to the right-wing Party for Freedom (PVV), and in addition to his dual city councillorship he was a teacher of civil education in a Catholic high school providing education from a Catholic/interconfessional perspective.

In May 2012, the claimant posted a number of strongly worded messages on Twitter expressing Islamophobic opinions, in reaction to which the school board decided to suspend him as the tweets were considered incompatible with his position and not consistent with the school's mission. The claimant brought a complaint to the Netherlands Institute for Human Rights (NIHR), claiming to be discriminated against on the ground of political opinion.¹⁴⁰ The claimant argued that the messages he posted were part of his job as a politician, especially as these particular messages were part of a discussion with another politician. He also underlined that his Twitter account stated that he was a teacher but also that he was a dual city councillor, and that his employer was already aware of his political activities and his active use of social media when he was hired.

¹³⁹ Tweede Kamer 2012-2013, *Kamerstukken* 32 203, No 8, 5 December 2012.

¹⁴⁰ Political opinion is a protected ground in Dutch equal treatment legislation.

Although the school claimed that the suspension was based on the tone of the tweets (and not their content), the NIHR still concluded that there had been discrimination on the ground of political opinion.¹⁴¹ However, the NIHR found that the exception for institutions founded on religious or ideological principles was applicable, based on the school's consistent policy of maintaining its ideological principles. As the claimant could have known that his statements ran contrary to his employer's core principle of respect, the suspension fell under the exception provided for employers with an ethos based on religion or ideology and did not constitute prohibited discrimination.

Although the non-discrimination ground of 'political opinion' is not protected under the EU Directives, this case includes a number of interesting elements. It contains a clash between an employee's freedom of expression on the one hand and the right of religious/ideological institutions to demand compliance with their core principles on the other – as guaranteed under the Directives. Previous opinions of the equality body have strongly upheld employees' freedom of expression and protected them against discrimination on the ground of political opinion, while in this case the fact that the employer was founded on a strong religious/ideological principle made a difference as to the application of these protections.

Internet source:

<http://www.mensenrechten.nl/publicaties/oordelen/2013-9/detail>

No reasonable accommodation for religious reasons of individuals' obligation to carry identification documents

Partly because of an increasing fear of terrorist attacks in the aftermath of 11 September 2001, the Dutch Government reinstated in 2005 a legal requirement to be able to show an identity document upon request so as to identify oneself at all times.



The Jewish Sabbath is a weekly day of rest, whose observance entails refraining from a large number of (work) activities. Jewish law prohibits (*inter alia*) transporting any objects from private space into the public domain, or within the public domain, on this day. In the case at hand, an orthodox Jew interpreted this prohibition in such a way that he refused to carry any identification documents on the Sabbath.

In 2010, the claimant was stopped by the police and subsequently fined because he was not able to show any identity document. He thereupon objected to this decision before the Cantonal Court. The Cantonal Court decided to annul the fine, on the ground that the man's religious duty in this case outweighed his duty to comply with all legal requirements.¹⁴² This judicial decision caused a lot of criticism. The Public Prosecutor lodged an appeal at the District Court.

On appeal, the District Court ruled that no exception can be made to the legal requirement to carry an identity document for religious reasons.¹⁴³ The Court therefore re-imposed the fine. This decision was generally received positively by press, public opinion and Members of Parliament.

This case demonstrates the clash between religious duties on the one hand and legal requirements on the other.

Internet source:

<http://uitspraken.rechtspraak.nl/#ln/BZ2283>

¹⁴¹ Opinion 2013-9 of the NIHR (former ETC) of 31.1.2013.

¹⁴² See <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/Uitspraak-kantonrechter-in-zaak-over-identificatieplicht.aspx>.

¹⁴³ Verdict of the District Court of The Hague, 26 February 2013.



A job advertisement seeking applicants who are not receiving social benefits is indirectly discriminatory on grounds of racial/ethnic origin and disability

Complaints about discriminatory job advertisements can be brought before the Dutch equal treatment body the NIHR, as the four major equal treatment laws apply to the entire employment process (including advertising), from the moment of notice of a vacancy through to the commencement of the employment relationship or public appointment and until its termination.

In this case a company published an advertisement in a small local newspaper for the position of production worker, inviting only people who were not claiming welfare benefits to apply. In addition, the employer explicitly advertised for applicants aged 18-22. An independent NGO which has as its mission to promote non-discrimination filed a case before the NIHR.

Having established that the age requirement constitutes a case of direct discrimination on the ground of age, the NIHR finds that although the heavy physical labour involved in the position constitutes a legitimate goal, the discriminatory advertisement is neither necessary nor appropriate.¹⁴⁴ The NIHR thus concludes that the measure discriminates on the ground of age without objective justification.

Examining the requirement that applicants are not in receipt of welfare benefits, the NIHR finds that it is indirectly discriminatory on the grounds of race and disability, because statistical evidence shows that people who receive welfare benefits will more often be of non-Dutch origin or drawing disability benefits. The employer was not able to give an objective justification for the requirement.

Although the concept of multiple discrimination is not addressed in Dutch equal treatment legislation, the NIHR applies different grounds of discrimination at the same time, following an intersectional approach.

Internet source:

<http://www.mensenrechten.nl/publicaties/oordelen/2013-33>



Portugal

PT

Political development

Approval by Parliament of the first National strategy for the integration of Roma communities

The Portuguese Council of Ministers approved the first national strategy specifically designed for Roma communities: *Estratégia Nacional para a Integração das Comunidades Ciganas* (National Strategy for the Integration of Roma Communities) with a list of measures to be implemented before 2020.¹⁴⁵ The strategy was prepared by the High Commission for Immigration and Intercultural Dialogue (ACIDI) with the contribution of ministries, municipalities, NGOs and representatives of Roma communities. Over the next seven years, the National Strategy will invest around €347 million to meet several objectives, primarily in the area of housing but also as regards employment, education and health related issues. In addition to these priority areas, the issue of citizenship was added with the aim of raising awareness among Roma communities and Portuguese society in general about their rights and duties.



¹⁴⁴ Netherlands Institute for Human Rights, Opinion No 2013-33 of 15 March 2013.

¹⁴⁵ *National Strategy for the Integration of Roma Communities*, Council of Ministers Resolution 25/2013, published in the Official Journal on 17 April 2013, entered into force 18 April 2013.

Although this strategy has been welcomed as an important measure, some NGOs have underlined that a specific focus on Travellers is lacking, as are certain proactive measures which had been suggested during the strategy's development.¹⁴⁶ The consultative group will be coordinated by the ACIDI and by representatives of the ministries involved in this strategy as well as by representatives of civil society, including Roma communities.

Internet source:

http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf

Racist statement made by the leader of the General Confederation of Portuguese Workers



Following statements made by the leader of the General Confederation of Portuguese Workers – National Trades Union (CGTP) where he referred to a black man as being ‘the darker one’ out of the Three Kings, the Standing Committee of the Comissão para a Igualdade e Contra a Discriminação Racial (Commission for Equality and Against Racial Discrimination (CEARD)) issued resolutions regarding these statements on 29 January 2013. The CEARD considered that the statement was unfortunate, and mandated its President to contact the Secretary-General of CGTP to stress the need for public figures to pay special attention to the consequences of their statements in Portuguese society so as to avoid unfair stigmatisation of certain groups in public opinion.

Internet source:

http://www.acidi.gov.pt/noticias/visualizar-noticia/510a88f39899d/institucional_book.pdf

Case law

Supreme Court ruling on the legal standing of trade unions in discrimination cases and their exemption from legal costs and fees

On 14 March 2013 the Portuguese Supreme Court of Justice determined that when trade unions litigate with the aim of safeguarding collectively their members' individual rights, they should only be exempted from paying litigation costs/fees where the legal service is provided free of charge to the members and where the income of the member does not exceed UC 200 (approximately €20,000).¹⁴⁷

This case-law limitation of the exemption from litigation costs/fees has widened the scope of the duty of trade unions to pay these. The argument is that the full exemption in cases of protection of collective interests only applies to disputes to protect individual interests where the employees represented by the trade union are eligible for legal aid.

Internet source:

<http://dre.pt/pdf1sdip/2013/05/09500/0296202967.pdf>

¹⁴⁶ Bruno Gonçalves, Vice-President of the Centro de Estudos Ciganos (Centre for Roma Studies).

¹⁴⁷ *Diário da República* (Portuguese Official Journal), First Series No 95 of 17 May 2013, Judgment of the Supreme Court of Justice, Case No 1166/12 of 14 March 2013. ‘UC’ stands for *Unidade de Conta* (unit of account), which is a regularly updated value used for the calculation of legal costs.

*Legislative developments***Constitutional amendment introduces an open-ended list of protected grounds**

On 19 June the Joint Parliamentary Committee for Constitutional Revision adopted several constitutional amendments, including an amendment to Article 4 of the Constitution, which is the general anti-discrimination clause. After having been the most debated provision throughout the work of the joint committees, this clause is amended to include an open-ended list of explicitly protected grounds of discrimination, mentioning 'any other situation'. Thus, the grounds of sexual orientation, age and disability which were previously not covered by the constitutional framework will be implicitly covered. An initial proposal for an amendment, however, proposed to include explicitly these grounds in the general anti-discrimination clause, following the comprehensive list of protected grounds contained in the EU Charter of Fundamental Rights. The joint committees rejected this amendment after strong criticism had been expressed by religious groups and conservative politicians.

New wordings were also introduced in relation to the rights of national minorities and their political representation, as well as religious education. The word 'handicap' is also replaced by the word 'disability' throughout the Constitution.

The adopted amendments will now be assessed by the Legislative Council and the Constitutional Court and voted on by a plenary sitting of the Parliament before they can enter into force. A referendum is also envisaged for the autumn.

Internet source:

<http://www.juridice.ro/267121/propunerea-legislativa-de-revizuirea-a-constitutiei-aprobata.html>

Amendments to the anti-discrimination law, gradually bringing it in line with the EU Directives

On 21 March 2013, Parliament adopted Law 61/2013 modifying Government Ordinance 137/2000 (the Romanian anti-discrimination law). The text, initiated in 2010, modifies and improves the procedures for the appointment of new members to the Steering Board of the national equality body, the National Council for Combating Discrimination (NCCD), by initiating this process 60 days before the positions are vacated. Another amendment modifies the provisions on the burden of proof before the NCCD and the courts, adopting the same wording as the Directives: 'The interested person will present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred. Before the Steering Board (the courts) any means of proof can be brought, observing the constitutional regime of fundamental rights, including audio and video recordings and statistical data' (Articles 20(6) and (8), and 27(4)).

Additional amendments were made to Governmental Ordinance 137/2000 through the ratification by Parliament in June 2013 of Emergency Ordinance 19/2013. Some of the most important amendments brought into line with EU law existing national provisions allowing for justifications of direct discrimination on the grounds of racial or ethnic origin in the fields of access to goods and services including housing. These provisions were in breach of the Racial Equality Directive (2000/43/EC) and had been criticised repeatedly by local NGOs and highlighted for instance in the country report for Romania produced by the European Network of Legal Experts in the Non-discrimination Field. The text also increases the level of

finances that may be issued by the NCCD and introduces the possibility for the NCCD and for the courts to order the publication by the discriminator of a summary of the decision in media.

Notably, the largely criticised period of prescription of six months for applying a sanction was amended so that the term starts from the date when an NCCD decision is issued, rather than the date on which the facts occurred. This latter provision had been declared in breach of the Employment Equality Directive (2000/78/EC) by the Court of Justice of the European Union in its recent *Accept* case (C-81/12) where no sanction other than a warning had been applied to the discriminator due to this statutory limitation.¹⁴⁸

Internet source:

<http://www.cdep.ro/comisii/juridica/pdf/2013/rp123.pdf>

Political developments

Universal Periodic Review highlights serious concerns regarding multiple grounds

On 24 January, the UN adopted the draft report of the Working Group on the Universal Periodic Review (UPR) for Romania.¹⁴⁹ Based on the report submitted by the national authorities and the questions and recommendations filed, the UPR report focuses on the legislative framework on anti-discrimination and protection of national minorities and recognises that the situation of the Roma minority remains of specific concern.

While many of the participating States welcomed the progress achieved, inconsistencies in the national report were highlighted as well as other specific issues, particularly with regard to various vulnerable groups. Thus the recommendations acknowledged efforts to achieve progress with regard to the Roma minority but noted problems of implementation, taking note of reports that the Roma remain marginalised and excluded, and challenging the effectiveness of the National Roma Strategy 2012-2020.

The States welcomed Romania's ratification of the Convention on the Rights of Persons with Disabilities (CRPD), although many raised questions regarding its implementation. Questions and recommendations were also filed in relation with widespread LGBT discrimination.

Internet source:

http://www.upr-info.org/IMG/pdf/a_hrc_wg.6_15_l.3.pdf

Publication by the national equality body of its annual report

On 19 June 2013 the National Council for Combating Discrimination (NCCD) published its annual activity report.¹⁵⁰ The detailed statistics of the complaints lodged in 2012 with the NCCD and of the decisions issued, show an increase in the equality body's activity compared to previous years, including in the number of cases where discrimination was found and sanctioned. The report also contains interesting information on the number of complaints and decisions regarding the different grounds of discrimination protected by national law, and on the levels of sanctions applied where discrimination was found. Finally, data is available on the number of cases where the decisions of the NCCD were challenged in court and whether its decisions were upheld or not.

Internet source:

www.cncd.org.ro

¹⁴⁸ See Court of Justice of the European Union Case Law Update, on page 41 of this publication.

¹⁴⁹ United Nations, General Assembly, A/HRC/WG.6/15/L.3 filed as A/HRC/23/5 from 24 January 2013.

¹⁵⁰ *Raportul de activitate al institutiei pe anul 2012* (Activity report of the institution for 2012), available (in Romanian) at: <http://www.cncd.org.ro/noutati/Evenimente/Raportul-de-activitate-al-CNCD-pe-anul-2012-170/>.

Public Opinion Barometer published on attitudes and perceptions of vulnerable groups and discrimination

Commissioned by the newspaper *Adevărul*, the results of a survey conducted in May-June 2013 of 1,055 persons were published in June by the research institute INSCOP Research. This institute usually publishes a similar annual survey commissioned by the national equality body, but this year no such study has been commissioned.

The survey shows that discrimination is ranked as the lowest priority among important problems in Romanian society, below issues such as public order, for instance. However, 57% of respondents agreed that the State should take more serious measures to sanction discrimination.

Internet source:

<http://www.inscop.ro/wp-content/uploads/2013/06/INSCOP-Discriminare.pdf>

Case law

The National Authority for Qualifications sanctioned for discrimination against visually impaired persons

The national equality body established that the occupational standards for the profession of masseurs adopted by the National Authority for Qualifications was directly discriminatory on grounds of disability as they prohibited access by visually impaired persons to this profession.¹⁵¹ The NCCD ordered an administrative fine of RON 4,000 (approximately €900), in application of the raised levels of sanctions available to the equality body in cases where discrimination is found as foreseen by the emergency ordinance later ratified by Parliament in June.



Slovakia

SK

Case law

Discriminatory segregation of Roma in schools found in first ever *actio popularis* claim

The claimant, a civil society organisation actively involved in the fight against discrimination of Roma, Poradňa pre občianske a ľudské práva (the Centre for Civil and Human Rights), brought an *actio popularis*¹⁵² case in 2010 against the elementary school in Šarišské Michaľany, claiming long-term and systemic practices of segregation of Roma children. For several years, all the Roma children in the school were separated from the other children, placed in separate classes physically located in another part of the school building.



The arguments advanced by the school suggested that the Roma children were advantaged by the segregation, as the teachers had the opportunity to use a more 'individualised approach' when teaching the Roma children in accordance with their 'socially disadvantaged backgrounds'. The school also held that the Roma children should be kept from feeling 'handicapped' when their school results were compared to those of the other children. The fact that 50 non-Roma children had left the school when the classes were mixed was also invoked by the respondents.

¹⁵¹ National Council for Combating Discrimination Decision No 320 of 22 May 2013, File No 43/2013.

¹⁵² An *actio popularis* is an action where associations or organisations can act on their own behalf in the public interest, without supporting or representing a specific victim.



The district court¹⁵³ invoked both the national anti-discrimination act as well as certain international instruments such as the European Convention on Human Rights, but without referring either to EU law or to any specific ECtHR case law. The court found that the practices of the school had constituted an illegal and illegitimate breach of the principle of equality directly based on the ethnicity of the children, and held that they could not be justified by any of the reasons invoked by the school. The court ordered the publication of the judgment (without the names of the parties) in a professional teacher's periodical and ordered the school to mix the classes in future. After an appeal by the defendant, the decision was upheld in all material parts,¹⁵⁴ however, the Regional Court accepted the appeal regarding the publication of the judgment in the teachers' periodical. The case is important both as regards its procedural and material aspects, although it is unfortunate that no reference was made to the Racial Equality Directive.

Internet source:

<http://poradna-prava.sk/wp-content/uploads/2012/11/PDF-129-MB.pdf>

Spain

Case law

Supreme Court invalidates the municipal prohibition of access to municipal buildings for people wearing the full veil (*burka*)

In October 2010 the City Council of Lleida (Catalonia, Spain) approved an ordinance prohibiting people who wear the full veil (*burka* or *niqab*) from accessing or remaining in spaces for public use. This was the first Spanish ban of the full veil.



The Watari Immigrants Association for Freedom and Justice (Asociación de Inmigrantes Watari por la Libertad y la Justicia) appealed the decision of the City Council before the High Court of Justice of Catalonia where the decision was upheld.¹⁵⁵ Upon a second appeal brought by the association, on 14 February 2013 the Supreme Court cancelled the Ordinance of the City Council.¹⁵⁶

The fundamental argument in the judgment was that the use of the veil by some women is part of their religious freedom. Religious freedom is a fundamental right recognised in the Spanish Constitution (Art. 16) that can only be further regulated by a law passed in Parliament. Thus, the City Council did not have the power to limit the freedom of religion by imposing a ban on wearing the full veil. In addition, the Supreme Court found that 'instead of serving the elimination of discrimination, [a ban on wearing the full veil in public spaces] could contribute to increasing it if public spaces are closed to [women wearing the full veil]'. However, the Court's ruling did not preclude the possibility that the legislator (the Spanish Parliament) considers as appropriate a regulation on the wearing of the full veil.

Internet source:

http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Tribunal_Supremo/Sala_de_prensa/El_Tribunal_Supremo_anula_la_prohibicion_del_velo_integral_en_Lleida__los_ayuntamientos_carecen_de_competencias_para_limitar_un_derecho_fundamental

¹⁵³ Decision of the District Court of Prešov of 5 December 2011 (No 25C 133/10-229).

¹⁵⁴ Decision of the Regional Court of Prešov of 30 October 2012 (No 20Co 125/2012, 20Co 126/2012).

¹⁵⁵ High Court of Justice of Catalonia, Judgment 489/2011 of 7 June 2011.

¹⁵⁶ Supreme Court, Judgment 4118/2011 of 14 February 2013.

Public employment service convicted of discrimination on grounds of nationality



A Moroccan citizen living in Spain who had been receiving unemployment benefits since 2009, brought a civil action against the State Public Employment Service (SPEE – a public agency managing unemployment benefits), challenging the retroactive annulment of his unemployment benefits. The decision was based on the fact that the complainant had left Spain for 20 days in 2009 without requesting authorisation from the SPEE.

As part of the 2011 Action Plan to control the illegal collection of unemployment benefits, the SPEE sent an internal note in June 2011 to all Benefits Offices ordering investigations where there was evidence of 'employment unavailability', in particular with regard to foreigners and young people. The SPEE's decision to revoke the complainant's benefits was adopted in October 2011, two years after his alleged 'employment unavailability' for 20 days. It implied a request to refund the full benefits received during those two years.

Social Court No 19 of Barcelona cancelled the SPEE's decision, finding among other reasons that it was discriminatory on the grounds of nationality.¹⁵⁷

The Court argued that the internal note of the SPEE was not discriminatory as such, but it had been implemented in a discriminatory manner by Benefits Offices. The Court's reasoning was based on statistics showing that before the implementation of the internal note (September 2011) 88% of the cases of withdrawal of benefits for 'employment unavailability' concerned Spanish citizens, whereas 12% concerned Moroccan citizens. After the implementation of the internal note, 3% of the withdrawals concerned Spanish citizens and 74% concerned Moroccan citizens. According to the Court, this increase was an 'indication of discrimination on grounds of nationality'. The burden of proof was shifted to the respondent, who was unable to prove that no discrimination had taken place.

Therefore, the Court ruled that the penalties imposed on the complainant should be annulled based on a violation of Article 14 of the Spanish Constitution, which establishes the right to non-discrimination, including on grounds of nationality.

Constitutional Court finds regulation of access to widow's pension to be discriminatory due to its unenforceability for unmarried same-sex couples



Since 1 January 2008, unmarried couples, whether heterosexual or homosexual, have been entitled to a widow's pension on the same terms as married couples. This right was extended retroactively to de facto union partners who had been widowed prior to this date where the survivor was in a situation of special need. Among other requirements for the establishment of such 'special needs' was that the couple had had children together (biological or adopted).

The complainant asked that this retroactive right to a widow's pension be applied in his case in March 2008, four years after the death of his partner, but the National Institute of Social Security refused based on the fact that the couple had not had children together. However, as this was a homosexual couple, for much of their life together (1982 to 2004) adoption was not permitted for homosexual couples.

Following the action brought by the complainant against the refusal of the National Institute of Social Security, Court No 33 of Barcelona raised a question of unconstitutionality before the Spanish Constitutional Court. The Court's reasoning was that the requirement of having children together is unenforceable for

¹⁵⁷ Social Court No 19 of Barcelona, Decision No 1/2013 of 29 December 2012.

unmarried couples of the same sex regarding biological children and very difficult to enforce in practice regarding adoptive children, as the right of adoption of unmarried couples (heterosexual or homosexual) was only recognised in Catalonia in 2005. Therefore, this apparently neutral requirement is indirectly discriminatory for unmarried couples of the same sex. The Court invoked the judgment of the CJEU in *Maruko* where the denial of a survivor's pension to a surviving same-sex partner in a comparable situation to that of a surviving spouse was in breach of Directive 2000/78/EC.¹⁵⁸

The Constitutional Court upheld the reasoning of the Barcelona court, finding that the difference in treatment based on the requirement to have had children together not only does not obey any objective reason related to the essence or purpose of the provisions on widow's pension, but also leads to a disproportionate result by unreasonably preventing certain surviving partners from accessing the protection provided as it is unenforceable in the case of these couples.¹⁵⁹

However, the Constitutional Court does not find discrimination on grounds of sexual orientation as the challenged provision is found to be unconstitutional based on the principle of equality before the law.

Internet source:

<http://www.boe.es/boe/dias/2013/03/12/pdfs/BOE-A-2013-2724.pdf>

Sweden

SE

Political developments

Financial compensation for non-recruitment due to refusal to shake hands

An applicant for a traineeship within the Municipality of Trollhättan was introduced to a unit leader of the opposite sex but refused to shake hands with her, although he was informed that it was required of him to do so. Following this incident, the applicant was not offered the traineeship and contacted the Equality Ombudsman in view of bringing a claim of discrimination on the grounds of religion or belief. However, before a formal complaint was made the Municipality voluntarily paid the applicant SEK 30,000 (approximately €3,300) as compensation, and issued a formal warning to the unit leader. This case caused an old debate to resurface, after a case judged by the District Court of Stockholm in 2010 where the National Employment Agency was ordered to pay SEK 60,000 in damages to a job applicant who had been sanctioned for refusing to shake a prospective employer's hand.¹⁶⁰



Case law

The winning party bears all its legal costs in a disability case where no discrimination was found

In a case of alleged discrimination where a child with a slight mental disability was refused access to a play room in a large furniture store, the municipal court found that no discrimination had occurred as the staff of the play room had been under the impression that the child could not be left alone (without her mother) inside the play room and could not change the policy of only children being allowed access. The respondent invoked a special rule regarding 'unnecessary claims', by the application of which the court ordered the losing party (the claimant) to pay the legal costs of the winning party not only to the



¹⁵⁸ C-267/2006, *Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008.

¹⁵⁹ Constitutional Court, Judgment 41/2013 of 14 February 2013.

¹⁶⁰ Stockholm District Court, *Equality Ombudsman v National Employment Agency*, Judgment of 8 February 2010.

usual statutory limit (of SEK 3,000; approximately €330) but all the actual legal costs, which in this case amounted to SEK 50,000 (€5,500).

The case was appealed and although the Court of Appeal upheld the finding that there had been no discrimination, it found that the claim had not been 'unnecessary', therefore reducing the amount of legal costs to be borne by the claimant to the usual statutory limit. However, in addition, the Court of Appeal applied the provision of Chapter 6, Section 7 of the Discrimination Act which allows the court to disregard the general principle of the losing party bearing the legal costs of the winning party in cases where the discrimination claim has been lost but where the claimant had 'reasonable cause' to bring the claim. Thus, the claimant was not obliged to cover any of the respondent's legal costs.

Discriminatory placement in social custody of the child of a mother with a mild cognitive disability



The claimant was a woman with an IQ evaluated at 60, who disputed the automatic placement in social custody of her child at birth. This decision was challenged before the administrative court. The Supreme Administrative Court found that there had been no legal ground for the custody decision and that the child should have been left with the mother under supervision while the case was thoroughly investigated.¹⁶¹

Most importantly however, the Equality Ombudsman also brought the case to the district court, asserting that the placement of the child constituted discrimination against the mother on grounds of disability and claiming damages for all the affected family members. The district court found easily that the claimant had been subjected to unfavourable treatment based on her disability, but the main question related to the construction of a 'comparable situation' for the determination of whether or not there had been discrimination. The district court found that the 'comparable situation' should not have been the treatment which would have been provided to other persons in similar situations, but the treatment which ought to have been given, according to the judgment of the Administrative Supreme Court. The district court awarded damages to the mother, the father and the child that totalled SEK 250,000 (approximately €19,300).¹⁶²

Internet source:

<http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2013/Diskriminering-nar-kommun-tvangsom-handertog-barn/>

TR

Turkey

Legislative developments

Parliament adopts a bill granting defendants in criminal cases a limited right to use mother tongue in courts

On 24 January 2013, Parliament passed a law enabling defendants in criminal cases to use their mother tongue during their oral defence in courts. Accordingly, defendants may make their oral defence in a language other than the official language of Turkish in which 'they declare that they can better express themselves'. The right is limited to two essential phases of the trial: during the reading of the indict-

¹⁶¹ Högsta förvaltningsdomstolen (Supreme Administrative Court) 2011 No 101. Judgment published on 9 December 2011.

¹⁶² *The Equality Ombudsman v Sigtuna Municipality*, District Court of Attunda, Case No T 5508-12, Judgment of 24 April 2013.

ment and in responding to the substantive allegations against the defendant. Defendants may choose an interpreter from among the list of interpreters to be determined by the State and are required to bear the costs themselves. The law entered into effect immediately, following its publication in the Official Gazette on 31 January 2013.

Internet source:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2013/01/20130131.htm&main=http://www.resmigazete.gov.tr/eskiler/2013/01/20130131.htm>

Case law

Entry into force of Constitutional Court's decision lifting ban on the use of minority languages by political parties

In its decision of 12 January 2012, the Constitutional Court found that the provision of the Law on Political Parties which imposes a prison sentence on those who breach the prohibition on political parties using other languages than Turkish in their meetings, campaigns, etc., was in violation with the principle of legality of crimes and punishments as it aimed to convict individuals for the actions of legal entities.¹⁶³ The decision entered into force on 5 January 2013, six months after its publication in the Official Gazette. The decision of the Constitutional Court lifting the ban on the use of minority languages by political parties is a positive development as regards the rights of minority groups; however, it is unfortunate that the Court did not examine the challenged provision under the constitutional principle of equality as it found that such an examination was unnecessary considering that the provision had already been found to be unconstitutional on other grounds. This decision is also to be read in conjunction with the judgment of the ECtHR of 22 January 2013,¹⁶⁴ where the Court found that an absolute ban on the use of unofficial languages by politicians coupled with criminal sanctions is not compatible with the principle of freedom of expression. The Court therefore found Turkey to be in breach of Article 10 of the ECHR, although no violation of Article 14 prohibiting discrimination was found.

Internet source:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2012/07/20120705.htm&main=http://www.resmigazete.gov.tr/eskiler/2012/07/20120705.htm>

Dismissal from the profession of referee on ground of sexual orientation

The claimant challenged his dismissal from the profession of football referee, claiming that it was discriminatory based on his sexual orientation. The decision to dismiss the claimant was based on the Turkish Football Federation's regulation which states that 'individuals who are exempt from military service due to health reasons are not eligible to become a referee', and on a health report issued by a medical hospital, exempting the claimant from military service as he was allegedly 'unfit for military service' due to 'sexual identity defects'.

The claimant filed a petition with the provincial human rights board of Istanbul, claiming that his rights to equality and non-discrimination, employment and privacy under the Turkish Constitution and the European Convention on Human Rights were violated. The Board unanimously found that the claimant's rights to life,¹⁶⁵ to equality and non-discrimination, to the protection of privacy and family life and to employment



¹⁶³ Decision of the Constitutional Court dated 12 January 2012 (E: 2011/62; K: 2012/2).

¹⁶⁴ ECtHR, *Şükran Aydın and Others v Turkey*, Applications Nos 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013.

¹⁶⁵ The claimant had received death threats.

had been violated.¹⁶⁶ The decision is, however, non-binding and no sanctions were issued against the Football Federation or the Armed Forces.

Legal standing of LGBT association in criminal cases



A national LGBT organisation, the Social Policies, Gender Identity and Sexual Orientation Studies Association (Sosyal Politikalar, Cinsiyet Kimliği ve Cinsel Yönelim Çalışmaları Derneği – SPoD), was recently granted legal standing to act on behalf of a victim: a teenager who had been killed due to his sexual orientation for having ‘brought shame on the family’. The Third Penal Court of Diyarbakır accepted the organisation’s request in spite of the argument invoked by the defendants that in order to be granted legal standing, an association must prove that it has ‘suffered harm from the crime’. However, the court did not provide its reasoning behind this decision.

Judicial practice with regard to the legal standing of human rights and non-discrimination associations in criminal cases is, however, varied, as such standing was denied to the same association in two more recent judgments by two other courts, although both cases concerned similar crimes motivated by trans- and homophobia.¹⁶⁷ These two courts had justified their decisions by the lack of any direct harm suffered by the association.

GB

United Kingdom

Legislative developments

Removal of prohibitions for persons with mental illness to access certain professions



The Mental Health (Discrimination) Act 2013 adopted on 28 February and entering into force two months later, amends existing law to remove prohibitions on persons with mental illness from serving as Members of Parliament and similarly jurors and company directors.

The precise nature of the pre-existing prohibitions differed: a Member of Parliament for example, would be removed from his or her seat if detained by reason of mental illness for at least six months. However, a company director would cease to hold position if his or her treating medical practitioner notified the company that the director had become physically or mentally incapable of acting as a director. Finally, no-one being treated for mental illness was eligible for jury service. The first two of these provisions have been repealed and the third replaced by a provision restricting from jury service only those liable to be detained or otherwise undergoing residential treatment in respect of mental illness.

Internet source:

http://www.legislation.gov.uk/ukpga/2013/8/pdfs/ukpga_20130008_en.pdf

Protection against discrimination extended to cover the ground of caste



The Equality Act 2010 (s9) provides the Government with the possibility to regulate discrimination on the ground of caste, which is defined in the Explanatory Notes as ‘a hereditary, endogamous (marrying within

¹⁶⁶ Decision of the provincial human rights body of Istanbul, 24 December 2012, as conveyed to the applicant in a letter from the Legal Affairs Branch Directorate, Istanbul Governorship, No B.05.4.WK.4.34.01.00-521.05, dated 9 January of 2013.

¹⁶⁷ Üsküdar 1st Heavy Penal Court, No 2009/166, 25 January 2013 and Bakırköy 4th Heavy Penal Court, No 2012/74, 13 February 2013.

the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity [...], generally (but not exclusively) associated with South Asia, particularly India, and its diaspora.' After initially opposing attempts to regulate caste discrimination, in April 2013 the Government finally amended the Equality Act to include caste as an aspect of race, thereby extending the protection provided by the Act.

Several alleged cases of caste discrimination have been brought to the courts since 2010 but the claims failed as the Equality Act did not cover this ground. Research conducted for the Government by the National Institute of Economic and Social Research also concluded in December 2010 that caste discrimination did occur, in particular in the context of employment and service provision, and that it might affect up to 200,000 people of 'low caste' Asian descent.

Internet source:

<http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>

Case law

Inconsistent case law on post-employment victimisation

In two recent judgments different Employment Appeal Tribunals (EAT) came to differing conclusions regarding the issue of whether or not the Equality Act 2010 provides protection against victimisation occurring after the end of an employment contract.

In *Rowstock Ltd & Anor v Jessemey* of 5 March 2013, the EAT came to the conclusion that there was a gap in the protection granted by the Equality Act as regards post-employment victimisation, and that although this gap was probably accidental it could not make a finding which would so significantly rewrite primary legislation.¹⁶⁸ In *Onu v Akwiwu & Anor* of 1 May, however, a differently composed EAT ruled that the legislator at the time of adoption of the Equality Act must be considered to have been aware of the previous case law which provided for protection against post-employment victimisation, and that such protection must be considered to be included implicitly in the Act.¹⁶⁹ In addition, the Tribunal reasoned that a construction compatible with EU law would have come to the same conclusion. The first of the two cases is awaiting appeal before the Court of Appeal, where a leading precedent can be expected.

Internet source:

http://www.bailii.org/uk/cases/UKEAT/2013/0022_12_0105.html

No religious harassment due to political debate

The applicant claimed that he had been subjected to harassment by other members and officials of his teaching union based on his (Jewish) religion during the debate on how the union should react to the conflict between Israel and Palestine. The Employment Tribunal found that repeated criticism of a religious institution could be seen as 'related to' the religion which it represents, and that unwanted conduct could 'relate to' a protected characteristic (here religion) even if there was only a 'loose, associative link between the behaviour under consideration and the protected characteristic'.¹⁷⁰ However, the Tribunal ruled that the conduct must be voluntary on the part of the respondent, or at the very least it must be 'such that the respondent can properly and lawfully bring it to an end.' Finally, the Tribunal ruled that 'a belief in the Zionist project or an attachment to Israel or any similar sentiment cannot amount to a protected charac-



¹⁶⁸ Employment Appeal Tribunal, *Rowstock Ltd & Anor v Jessemey*, 5 March 2013, Appeal No UKEAT/0112/12/DM.

¹⁶⁹ Employment Appeal Tribunal, *Onu v Akwiwu & Anor*, 1 May 2013, Appeal No UKEAT/0283/12/RN & UKEAT/0022/12/RN.

¹⁷⁰ Central London Employment Tribunal, *Fraser v University and College Union*, Case No 2203290/2011, of 22 March 2013.

teristic'. In addition, by choosing to engage in the activity of managing debates within union conferences, the claimant as a political activist accepted the risk of being hurt or offended on occasion by things said during the debates. The Employment Tribunal also weighed the interests of the claimant against the public interest in the protection of freedom of expression.

Internet source:

<http://www.judiciary.gov.uk/media/judgments/2013/fraser-uni-college-union>

