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# Country report

## Non-discrimination

Denmark

2015

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# **Country report**

# **Non-discrimination**

# **Denmark**

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Reporting period 1 January 2014 – 31 December 2014

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**CONTENTS**

<b>EXECUTIVE SUMMARY .....</b>	<b>5</b>
<b>RÉSUMÉ .....</b>	<b>11</b>
<b>ZUSAMMENFASSUNG .....</b>	<b>18</b>
<b>INTRODUCTION .....</b>	<b>25</b>
<b>1 GENERAL LEGAL FRAMEWORK .....</b>	<b>27</b>
<b>2 THE DEFINITION OF DISCRIMINATION .....</b>	<b>28</b>
2.1 Grounds of unlawful discrimination explicitly covered .....	28
2.1.1 Definition of the grounds of unlawful discrimination within the directives .....	29
2.1.2 Multiple discrimination .....	31
2.1.3 Assumed and associated discrimination .....	32
2.2 Direct discrimination (Article 2(2)(a)) .....	33
2.2.1 Situation testing .....	33
2.3 Indirect discrimination (Article 2(2)(b)) .....	34
2.3.1 Statistical evidence .....	35
2.4 Harassment (Article 2(3)) .....	37
2.5 Instructions to discriminate (Article 2(4)) .....	38
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78) .....	39
<b>3 PERSONAL AND MATERIAL SCOPE .....</b>	<b>45</b>
3.1 Personal scope .....	45
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78) .....	45
3.1.2 Protection against discrimination (Recital 16 Directive 2000/43) .....	45
3.2 Material scope .....	46
3.2.1 Employment, self-employment and occupation .....	46
3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) .....	46
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c)) .....	47
3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b)) .....	47
3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d)) .....	48
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43) .....	48
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43) .....	49
3.2.8 Education (Article 3(1)(g) Directive 2000/43) .....	49
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43) .....	50
3.2.10 Housing (Article 3(1)(h) Directive 2000/43) .....	51
<b>4 EXCEPTIONS .....</b>	<b>53</b>
4.1 Genuine and determining occupational requirements (Article 4) .....	53
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78) .....	53
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78) .....	54
4.4 Nationality discrimination (Article 3(2)) .....	54
4.5 Work-related family benefits (Recital 22 Directive 2000/78) .....	55
4.6 Health and safety (Article 7(2) Directive 2000/78) .....	56

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78) .....	56
4.7.1	Direct discrimination .....	56
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities .....	59
4.7.3	Minimum and maximum age requirements .....	59
4.7.4	Retirement .....	60
4.7.5	Redundancy .....	62
4.8	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78) .....	63
4.9	Any other exceptions .....	63
<b>5</b>	<b>POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78) .....</b>	<b>64</b>
<b>6</b>	<b>REMEDIES AND ENFORCEMENT .....</b>	<b>66</b>
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78) .....	66
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78) .....	68
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	71
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78) .....	72
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78) .....	73
<b>7</b>	<b>BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43) .....</b>	<b>76</b>
<b>8</b>	<b>IMPLEMENTATION ISSUES .....</b>	<b>80</b>
8.1	Dissemination of information, dialogue with NGOs and between social partners .....	80
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78) .....	80
<b>9</b>	<b>COORDINATION AT NATIONAL LEVEL .....</b>	<b>82</b>
<b>10</b>	<b>CURRENT BEST PRACTICES .....</b>	<b>83</b>
<b>11</b>	<b>SENSITIVE OR CONTROVERSIAL ISSUES .....</b>	<b>84</b>
11.1	Potential breaches of the directives (if any) .....	84
11.2	Other issues of concern .....	84
<b>12</b>	<b>LATEST DEVELOPMENTS .....</b>	<b>87</b>
12.1	Legislative amendments .....	87
12.2	Case law .....	87
	<b>ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION .....</b>	<b>93</b>
	<b>ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS .....</b>	<b>95</b>

## EXECUTIVE SUMMARY

### 1. Introduction

In the 1960s and 1970s, the Parliament [Folketinget] debated whether legislation on discrimination in the labour market due to race, religion or other grounds should be enacted. The social partners, i.e. employers' organisations and employees' organisation in the labour market rejected the proposal, arguing that Denmark has a tradition of collective agreements in the labour market instead of legislation. As no such collective agreements on anti-discrimination were concluded, victims of discrimination on grounds of race, ethnicity, sexual orientation, and religion were not protected until 1996, when anti-discrimination legislation was finally enacted.

The Danish population was until the 1960s and 1970s relatively homogeneous and the majority were members of the Evangelical-Lutheran Church by conviction, tradition and/or culture. However, minority religious groups were present in Danish society and were protected under the Danish Constitution of 1849. With new groups of migrant workers and later with the arrival of different groups of refugees, this picture changed.

Apart from foreign nationals, there is a group of Danish citizens who have either been born in another country or have parents born in countries other than Denmark. This group is referred to as "descendants". Foreign citizens and their descendants are often referred to as ethnic minority groups, while German-speaking Danish citizens are the only formally recognised national minority.

Denmark is a kingdom consisting of Denmark, Greenland and the Faroe Islands. Anti-discrimination legislation enacted by the Danish Parliament does not become law in the Faroe Islands or Greenland unless similar legislation is enacted there. The Faroe Islands and Greenland are not members of the European Union, and consequently under no obligation to transpose the Racial Equality Directive or the Employment Equality Directive.

EU legislation and judgments of the Court of Justice of the European Union (CJEU) and ECtHR are taken seriously and monitored quite closely by the central administration – even if Denmark is not a party in a particular case.

The domestic debate on whether and to what extent other international recommendations should be followed can be quite fierce. Politicians can be sceptical about the limitation of legislative power by international obligations.

In particular, there has been an emphasis on encouraging immigrants from third countries to explicitly sign up to basic values (e.g. gender equality and upbringing of children) and to actively participate in the labour market. In Denmark, the requirement to adapt and assimilate as understood by officials and the general public seems stronger than in some of our neighbouring countries.

In Denmark the most important recent case law on anti-discrimination has dealt with disability and age.

In 2014 the Maritime and Commercial Court delivered its judgment on disability based on the preliminary ruling of the CJEU in the joined cases C-335/11 and C-337/11 (Skouboe Werge and Ring).<sup>1</sup> The Danish court quoted the definition of disability in C-335/11 and C-337/11 and stated that both women in question had a disability and that their disability-related sickness absence was based on the fact that their employer had not established reasonable accommodation. The Court also concluded that the dismissals of both women with a shortened notice period (one month) for sick employees according to section 5(2)

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<sup>1</sup> Judgment printed in U2014.1223S.

of the Danish Salaried Employees Act constituted direct discrimination on account of disability. Both women were awarded compensation equal to 12 months of salary.

In two cases on age discrimination the Danish Supreme Court issued decisions on a dispute whether Section 2(a) of the Salaried Employees Act was in conflict with the Employment Directive and the general EU principle on non-discrimination because of age.<sup>2</sup> In judgments of 14 January 2014 the Danish Supreme Court ruled on the consequences of the CJEU Andersen judgment (CJEU Case C-499/08 Andersen). The Supreme Court concluded that a public employer is not allowed to use Section 2a(3), if the employee temporarily does not wish to exercise his right to retirement because of the fact that he wants to pursue a professional career. The Supreme Court established that it is illegal to cut off such public employees from their right to severance allowance.

## **2. Main legislation**

Anti-discrimination legislation in Denmark does not consist of one single piece of legislation. It is rather a combination of many acts, which have been introduced or amended when public debate or the ratification of international obligations has focused on a specific field of application or a specific vulnerable group. Hence, protection against discrimination is ensured by a web of civil and criminal legislation ranging from the Constitution to specific acts covering areas outside and inside the labour market, making it a challenge to explain and for the public to understand.

The Danish Constitution provides that no Danish subject shall be deprived of his or her liberty because of his or her political or religious convictions or because of his or her descent. Moreover, no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent, nor shall he for such reasons evade any common civil duty. Furthermore, the Constitution provides that no one shall be liable to make personal contributions to any denomination other than the one to which he adheres. Finally, the Constitution provides that citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.

The Act on the Prohibition of Discrimination due to Race etc. makes it a criminal offence to refuse, in connection with a commercial or non-profit business, to serve or allow entrance to a person on the basis of race, colour, national or ethnic origin, religious belief or sexual orientation.<sup>3</sup>

In May 2003 the first Act on Ethnic Equal Treatment was adopted.<sup>4</sup> The aim of the Act is to ensure protection against discrimination based on race or ethnic origin and to implement the non-employment aspects of the EU Racial Equality Directive. The Act on Equal Ethnic Treatment includes a prohibition against discrimination on the grounds of racial and ethnic origin as regards access to social protection, including social security and health care, social benefits, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry on a particular profession. The Act also includes a prohibition against harassment on the grounds of race and ethnic origin.

The Act on the Prohibition of Discrimination in the Labour market etc., which was first adopted in 1996, prohibits direct and indirect discrimination based on race, skin colour, religion or faith, political conviction, sexual orientation, age, disability and national, social or ethnic origin.<sup>5</sup> The Act prohibits discrimination in connection with recruitment, dismissal, transfer and promotion as well as discrimination with regard to pay and working conditions

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<sup>2</sup> Judgments printed in U2014.1116H and U2014.1119H.

<sup>3</sup> Consolidated Act No. 626 of 29 September 1987 with later amendments.

<sup>4</sup> Consolidated Act No. 438 of 16 May 2012 with later amendments.

<sup>5</sup> Consolidated Act No. 1349 of 16 December 2008.



and also provides protection against harassment. Similarly, employers are not allowed to discriminate among employees as regards access to vocational education and training, continued training and retraining. The same prohibition applies to people providing guidance and training as well to those involved in work placement activities and in making rules and decisions about the right to perform professional activities and membership of workers' and employers' organisations.

The discrimination grounds of age, sexual orientation, disability and religion or belief do not currently enjoy protection outside the labour market in Danish civil law. Criminal law covers direct differential treatment with regard to access to public places and services on the grounds of race, colour, national or ethnic origin, religious belief or sexual orientation outside the labour market, but not age or disability. Moreover, criminal law does not cover indirect discrimination, harassment or victimisation.

Denmark has signed and ratified all major human rights conventions except the UN Convention on Migrant Workers and Protocol 12 to the European Convention on Human Rights (ECHR). Denmark has signed but not yet ratified the COE Revised European Social Charter.

### **3. Main principles and definitions**

Direct discrimination is defined as a situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin (cf. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market and Section 3 (2) of the Act on Ethnic Equal Treatment).

Indirect discrimination is deemed to occur where an apparently neutral provision, criterion or practice would put persons of e.g. a particular racial or ethnic origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (cf. the main Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market and Section 3(3) of the Act on Ethnic Equal Treatment).

Harassment, instruction to discriminate and victimisation are also prohibited by the Act on the Prohibition of Discrimination in the Labour Market according to Section 1(4), 1(5) and Section 7(2) as well as by the Act on Ethnic Equal Treatment according to Section 3(4), 3(5) and Section 8.

The Act on the Prohibition of Discrimination in the Labour Market contains two main exceptions to the prohibition of discrimination.

The Act does not apply to: 1) employers whose establishments have the aim of promoting a certain political or religious ethos (Section 6(1)), and 2) as a general exception, a Government minister can, after having obtained a statement from the Ministry of Labour, deviate from the prohibition against differential treatment if it is of crucial significance that a person has a particular, political opinion, sexual orientation, or national, social or ethnic origin, or a particular skin colour, age or disability, or belongs to a certain religion or belief, and if the requirement for such an affiliation is in reasonable relation to the work in question (Section 6(2)).

Regarding reasonable accommodation for people with disabilities, Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market obliges the employer to adapt the workplace in order to accommodate persons with disabilities, unless this will place a disproportionate burden on the employer. In a concrete case the Eastern High Court found that an employer had not proved that it would have been an unreasonable burden to follow the recommendations on having a mentor or supervisor who could give concrete feedback

to the employee during a shorter period of time when she was returning to work after a stroke.<sup>6</sup>

The Danish acts on discrimination distinguish between natural persons and legal persons, and state that only natural persons are protected against direct or indirect discrimination. Discrimination based on association with an individual is explicitly covered by the Act on Ethnic Equal Treatment.

Discrimination based on association is not mentioned in the wording of the Act on the Prohibition of Discrimination in the Labour Market but it is covered according to case law. In a new judgment from the Supreme Court, the Court referred to the Coleman case (C-303/06) and stated that protection against discrimination and harassment covers an employee with a child who has a disability.<sup>7</sup> In the concrete case there was however no information to suggest that the employee (A) had been rejected leave because of her daughter's health situation.

Multiple discrimination is not directly covered by legislation. In cases of multiple discrimination, the different discrimination grounds are dealt with individually. Discrimination on more grounds does not involve higher amounts of financial compensation.

#### **4. Material scope**

In the public and private labour market, discrimination is prohibited on the grounds of race, colour of skin, religion or faith, political conviction, sexual orientation, age, disability and national, social or ethnic origin according to the Act on Prohibition of Discrimination in the Labour Market etc. In civil law covering areas outside the labour market, only discrimination on the grounds of race and ethnic origin is prohibited according to the Act on Ethnic Equal Treatment illustrated by cases where individuals with non-Danish sounding names had experienced the annulment of their football tickets.<sup>8</sup>

#### **5. Enforcing the law**

If the alleged case of discrimination is a criminal matter, the victim should report it to the police.

If the case is a civil matter, the victim can choose to go to:

- 1) civil courts, directly;
- 2) the Parliamentary Ombudsman[Folketingets Ombudsmand];
- 3) his or her trade union if it is a case within the labour market;
- 4) the Board of Equal Treatment;
- 5) the Institute for Human Rights – The National Human Rights Institute of Denmark (DIHR) (for advice/assistance);
- 6) the Citizens Advice Service which exists in some municipalities (advice/assistance);
- 7) NGOs;
- 8) the Danish Press Council [Pressenævnet], the Radio and Television Board on Commercials [Radio- og TV-Nævnet], the Consumer Ombudsman [Forbrugerombudsmanden].

##### **A. Non-governmental organisations**

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<sup>6</sup> Eastern High Court judgment printed in U2015.315Ø.

<sup>7</sup> Supreme Court judgment printed in U2015.16H.

<sup>8</sup> Board of Equal Treatment, Decisions No. 133/2014, 134/2014, 135/2014, 136/2014, 137/2014, 138/2014, 139/2014 and 140/2014.

In Denmark associations/organisations/trade unions are entitled to act on behalf of individual victims of discrimination under certain conditions.

Section 260 of the Administration of Justice Act allows persons or associations to represent and support a complainant or intervene in a lawsuit if they have a legal interest in becoming a party to the case.<sup>9</sup> One organisation working with non-discrimination issues is the Documentary and Advisory Centre on Racial Discrimination (DACoRD) [Dokumentations- og Rådgivningscenter om Racediskrimination] assisting victims of discrimination.

#### B. Shared burden of proof

The Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market include provisions on the shared burden of proof, ensuring that the principle of equal treatment is applied effectively. The shared burden of proof implies that when there is a prima facie case of discrimination, the burden of proof in court cases shifts back to the respondent.

#### C. Level of sanctions and monitoring the number of complaints

Statistics on the number of complaints to the Board of Equal Treatment can be found on the website of the Board as well as in the annual report of the Board.<sup>10</sup>

Level of compensation for discrimination on the labour market seems effective, proportionate and dissuasive. Outside the labour market the level of compensation for discrimination is very low.

#### D. Situation testing and statistical evidence used in practice

Statistical evidence has been used in some cases on age and gender discrimination, but would probably not be accepted as the only proof in a case of discrimination. Situation testing is not regulated in Danish legislation and is primarily used by journalists or NGOs to confirm their presumption that discrimination exists in a specific sector.

## 6. Equality bodies

*The Institute for Human Rights – The National Human Rights Institute of Denmark*<sup>11</sup>

#### Legal basis

The Institute for Human Rights – The National Human Rights Institute of Denmark (DIHR) has been designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive since 2003. A new act from 2012 clarified the role of DIHR as a separate and independent institution. The act also specifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute as a specialised equality body on race and ethnic origin as well as on gender under the EU Directives.

#### Mandate and competences

DIHR has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination. Also, DIHR issues a yearly report to the Parliament on the human rights situation in Denmark, which includes the situation of persons with disabilities.

<sup>9</sup> Consolidated Act No. 1308 of 9 December 2014 with later amendments.

<sup>10</sup> See: <http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fra-ligebehandlingsnaevnet>.

<sup>11</sup> Consolidated Act No. 553 of 18 June 2012 with later amendments.

## *The Board of Equal Treatment*<sup>12</sup>

### Legal basis

The Board of Equal Treatment started functioning on 1 January 2009. The Board covers all protected grounds, (gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin).

### Mandate

The Board of Equal Treatment is competent to hear individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Outside employment the Board only deals with complaints related to discrimination based on race, ethnic origin or gender.<sup>13</sup>

### Functioning and competences

Victims of discrimination can be awarded compensation for non-pecuniary damages directly by the Board. The Board is entitled to take the case to court if the discriminating party is not willing to pay.

## **7. Key issues**

There is a profound lack of recognition that discrimination takes place in Danish society. Also there is a serious lack of statistics and general research about discrimination.

There is very limited access to the establishment of positive action measures by employers. Legal barriers make it very difficult in practice for employers to initiate genuine positive measures.<sup>14</sup>

Protection against indirect discrimination because of ethnic origin may be too narrowly interpreted in Denmark. The headscarf judgment (U.2005.1265H) seems to accept a very wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities.

Outside the area of employment, e.g. in the discotheque cases, sanctions are so mild that it should be questioned whether they are sufficiently effective, proportionate and dissuasive as required by the directives.

The Danish Institute for Human Rights (DIHR) serves as a specialised equality body.<sup>15</sup> However, DIHR has assisted very few victims of discrimination and it can be questioned whether DIHR is an effective specialised equality body when it comes to the tasks of assisting victims of discrimination.

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<sup>12</sup> Consolidated Act No. 905 of 3 September 2012.

<sup>13</sup> Consolidated Act no. 905 of 3 September 2012.

<sup>14</sup> Section 4 of the Act on Prohibition of Discrimination in the Labour Market etc.

<sup>15</sup> Section 2(2) of the Act on The Institute for Human Rights – The National Human Rights Institute of Denmark.

## RÉSUMÉ

### 1. Introduction

Le Parlement danois [*Folketinget*] a débattu dans les années 1960 et 1970 de la nécessité de voter une législation relative à la discrimination sur le marché du travail fondée sur la race, la religion ou d'autres motifs. Les partenaires sociaux, à savoir les organisations d'employeurs et de travailleurs, ont rejeté cette proposition à l'époque en faisant valoir que la tradition danoise reposait, en matière d'emploi, sur des conventions collectives et non sur des dispositions législatives. En l'absence de convention collective portant sur l'interdiction de discrimination, les victimes de discrimination fondée sur la race, l'origine ethnique, l'orientation sexuelle et la religion n'ont bénéficié d'aucune protection jusqu'en 1996, date à laquelle une législation a finalement été adoptée.

La population danoise était, jusqu'aux années 1960 et 1970, relativement homogène et la majorité des habitants étaient membres de l'Église évangélique luthérienne par conviction, tradition et/ou culture. Des groupes religieux minoritaires existaient cependant au sein de la société danoise et jouissaient d'une protection en vertu de la Constitution de 1849. La situation a fortement évolué avec l'arrivée de nouveaux groupes de travailleurs migrants et, ultérieurement, de différents groupes de réfugiés.

Outre les ressortissants étrangers, le pays compte un groupe de citoyens danois qui sont nés à l'étranger ou dont les parents sont nés dans un autre pays que le Danemark. On désigne ce groupe sous le nom de «descendants». Les ressortissants étrangers et leurs descendants sont souvent désignés comme des minorités ethniques, la seule minorité nationale officiellement reconnue étant formée des citoyens danois germanophones.

Le Danemark est un royaume qui comprend le Danemark, le Groenland et les îles Féroé. La législation antidiscrimination adoptée par le Parlement danois n'a pas force de loi au Groenland ni aux îles Féroé, sauf si une législation similaire y est votée. N'étant pas membres de l'Union européenne, les îles Féroé et le Groenland n'ont aucune obligation de transposer la directive sur l'égalité raciale ni la directive sur l'égalité en matière d'emploi.

La législation de l'UE et les arrêts de la Cour de justice de l'Union européenne (CJUE) et de la Cour européenne des droits de l'homme (CEDH) sont pris au sérieux et suivis de très près par l'administration centrale danoise, même lorsque le pays n'est pas partie à une affaire particulière.

Le débat national sur la question de savoir si, et dans quelle mesure, d'autres recommandations internationales devraient être suivies peut être assez animé. Il arrive en effet que des politiciens expriment des réserves face à une limitation du pouvoir législatif par des obligations internationales.

Le Danemark insiste tout particulièrement pour que les immigrés issus de pays tiers adhèrent explicitement aux valeurs fondamentales (égalité des sexes et éducation des enfants notamment) et pour qu'ils participent activement au marché du travail. L'exigence d'adaptation et d'assimilation, telle qu'elle est comprise par l'administration comme par le grand public, semble un peu plus rigoureuse au Danemark que dans certains pays voisins.

La jurisprudence danoise récente en matière de non-discrimination porte principalement sur le handicap et l'âge.

Le Tribunal maritime et commercial a rendu en 2014 un arrêt en rapport avec le handicap qui repose sur la décision préjudicielle de la CJUE dans les affaires jointes C-335/11 et C-337/11 (*Skouboe Werge & Ring*).<sup>16</sup> La juridiction danoise cite la définition du handicap

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<sup>16</sup> Arrêt publié dans la revue juridique hebdomadaire U2014.1223S.

figurant dans ces deux arrêts et dit pour droit que les deux femmes concernées sont handicapées et que leur absence pour cause de maladie liée au handicap est la conséquence de l'omission par l'employeur de prévoir des aménagements raisonnables. Le Tribunal conclut également que le licenciement des deux femmes avec un préavis réduit (un seul mois) – prévu pour des salariés en arrêt maladie conformément à l'article 5, paragraphe 2, de la loi relative aux rapports juridiques entre employeurs et employés – constitue une discrimination directe fondée sur le handicap. Une indemnisation financière correspondant à douze mois de rémunération a été allouée aux deux femmes.

Dans deux affaires de discrimination fondée sur l'âge, la Cour suprême du Danemark a statué sur le point de savoir si l'article 2a de la loi relative aux rapports juridiques entre employeurs et employés est incompatible avec la directive en matière d'emploi et le principe général de l'UE quant à l'interdiction de discrimination fondée sur l'âge.<sup>17</sup> Dans ses arrêts du 14 janvier 2014, la Cour suprême s'est prononcée sur les effets de l'arrêt de la CJUE dans l'affaire Andersen (C-499/08). Elle conclut qu'un employeur public ne peut invoquer l'article 2a, paragraphe 3, lorsqu'un salarié souhaite renoncer temporairement à l'exercice de son droit à la retraite pour poursuivre sa carrière. La Cour suprême dit pour droit qu'il est illégal de priver ces fonctionnaires de leur droit à une indemnité de licenciement.

## **2. Législation principale**

La législation antidiscrimination ne consiste pas au Danemark en une seule et unique loi. Elle regroupe plusieurs textes législatifs qui ont été modifiés ou introduits lorsque le débat public ou la ratification d'engagements internationaux se sont focalisés sur un domaine d'application spécifique ou sur un groupe vulnérable particulier. La protection contre les discriminations est donc assurée au travers d'un réseau de lois civiles et pénales allant de la Constitution à des lois spécifiques visant des domaines relevant du marché du travail ou se situant en dehors de celui-ci. Cette législation s'avère donc difficile à expliquer – et difficile à comprendre pour des profanes.

La constitution danoise dispose qu'aucun sujet danois ne peut être privé de sa liberté en raison de ses convictions politiques ou religieuses ou de ses origines. Par ailleurs, nul ne peut être privé de la jouissance intégrale de ses droits civils ou politiques en raison de ses croyances ou de ses origines, ni ne peut, pour les mêmes raisons, se soustraire à ses obligations civiles. De surcroît, la Constitution stipule que nul ne saurait être tenu de contribuer personnellement à toute confession autre que celle à laquelle il adhère. Enfin, la Constitution établit que tous les citoyens ont le droit de former des congrégations pour le culte de Dieu, conformément à leurs convictions, pour autant que rien de contraire à la moralité ou à l'ordre public ne soit enseigné ou fait.

La loi danoise sur l'interdiction de discrimination liée à la race, etc. classe parmi les infractions pénales le fait de refuser, dans un contexte commercial ou caritatif, de servir ou de laisser entrer une personne en raison de sa race, de sa couleur, de son origine nationale ou ethnique, de ses croyances religieuses ou de son orientation sexuelle.<sup>18</sup>

La première loi danoise sur l'égalité de traitement sans distinction ethnique a été adoptée en mai 2003.<sup>19</sup> Elle vise à garantir la protection à l'encontre des discriminations fondées sur la race ou l'origine ethnique, et de transposer en droit interne les dispositions de la directive européenne relative à l'égalité raciale qui ne concernent pas l'emploi. La loi sur l'égalité ethnique comporte une interdiction de toute discrimination fondée sur l'origine raciale et ethnique en ce qui concerne l'accès à la protection sociale, en ce compris la sécurité sociale et les soins de santé, les prestations sociales, l'éducation, l'accès aux biens et aux services et leur fourniture, y compris le logement, et l'adhésion à des organisations

<sup>17</sup> Arrêts publiés dans les revues juridiques hebdomadaires U2014.1116H et U2014.1119H.

<sup>18</sup> Loi coordonnée n° 626 du 29 septembre 1987 avec amendements ultérieurs.

<sup>19</sup> Loi coordonnée n° 438 du 16 mai 2012 avec amendements ultérieurs.

dont les membres exercent une profession particulière et l'accès aux services qu'elles offrent. La loi comporte également une interdiction de harcèlement fondé sur la race et l'origine ethnique.

La loi sur l'interdiction de discrimination sur le marché du travail, dont la première adoption remonte à 1996, interdit toute discrimination directe et indirecte fondée sur la race, la couleur, la religion ou la foi, l'opinion politique, l'orientation sexuelle, l'âge, le handicap et l'origine nationale, sociale ou ethnique.<sup>20</sup> La loi interdit la discrimination en matière d'embauche, de licenciement, de transfert et de promotion ainsi que la discrimination en matière de rémunération et de conditions de travail; elle prévoit par ailleurs une protection contre le harcèlement. De même, les employeurs sont tenus de n'exercer aucune discrimination à l'égard de leurs salariés en matière d'accès à l'éducation et la formation professionnelle, à la formation continue et au recyclage. La même interdiction s'applique aux prestataires de services de formation et d'orientation ainsi qu'aux personnes participant à des activités de placement ou à l'élaboration de règles et à la prise de décisions concernant le droit d'exercer certaines activités professionnelles et l'adhésion à des organisations de travailleurs et d'employeurs.

Le droit civil danois n'accorde pas de protection en matière de discrimination fondée sur l'âge, l'orientation sexuelle, le handicap, la religion et les croyances religieuses en dehors du marché du travail. Quant au droit pénal, il couvre le traitement différencié direct en termes d'accès à des lieux et des services publics pour des raisons de race, couleur, origine nationale ou ethnique, croyances religieuses ou orientation sexuelle en dehors du marché de l'emploi, mais il ne couvre ni l'âge ni le handicap. Le droit pénal ne couvre en outre ni la discrimination indirecte, ni le harcèlement, ni les rétorsions.

Le Danemark a signé et ratifié les principales conventions relatives aux droits de l'homme, à l'exception de la convention des Nations unies sur la protection des droits des travailleurs migrants et des membres de leur famille et le protocole n° 12 à la convention européenne des droits de l'homme (CEDH). Le Danemark a signé, mais n'a pas encore ratifié, la Charte sociale européenne révisée du Conseil de l'Europe.

### **3. Principes généraux et définitions**

La discrimination directe est définie comme une situation dans laquelle une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable pour des raisons de race ou d'origine ethnique (voir l'article 1, paragraphe 2, de la loi danoise relative à l'interdiction de discrimination sur le marché du travail et l'article 3, paragraphe 2, de la loi danoise sur l'égalité ethnique).

Une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner pour des personnes ayant, par exemple, une origine raciale ou ethnique particulière, un désavantage par rapport à d'autres personnes, sauf si cette disposition, ce critère ou cette pratique est objectivement justifié par un but légitime et que les moyens d'atteindre ce but sont appropriés et nécessaires (voir l'article premier principal, paragraphe 3, de la loi relative à l'interdiction de discrimination sur le marché du travail et l'article 3, paragraphe 3, de la loi sur l'égalité ethnique).

Le harcèlement, l'injonction de discriminer et les rétorsions sont également proscrits par la loi relative à l'interdiction de discrimination sur le marché du travail en vertu de ses articles 1, paragraphes 4 et 5, et 7, paragraphe 2, ainsi que par la loi sur l'égalité ethnique en vertu de ses articles 3, paragraphes 4 et 5, et 8.

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<sup>20</sup> Loi coordonnée n° 1349 du 16 décembre 2008.

La loi relative à l'interdiction de discrimination sur le marché du travail prévoit deux exceptions à l'interdiction de traitement différencié.

Elle ne s'applique pas: 1) aux employeurs dont les établissements ont pour objectif de promouvoir une certaine philosophie politique ou religieuse (article 6, paragraphe 1) et 2), à titre d'exception générale, à un ministre du gouvernement qui peut, après avoir obtenu l'accord du ministre du travail, passer outre l'interdiction de traitement différencié, s'il est particulièrement important qu'une personne soit d'une certaine race, opinion politique, orientation sexuelle, origine nationale, sociale ou ethnique, couleur de peau, ou d'un certain âge, ou qu'elle possède un certain handicap, ou qu'elle appartienne à une certaine religion ou croyance, et que ces exigences particulières soient raisonnablement justifiées par l'emploi concerné (article 6, paragraphe 2).

En ce qui concerne les aménagements raisonnables en faveur des personnes handicapées, l'article 2a de la loi relative à l'interdiction de discrimination sur le marché du travail oblige l'employeur à adapter le lieu de travail pour faciliter l'emploi de personnes handicapées, sauf si cela engendre pour lui une charge disproportionnée. Dans une affaire dont elle a été saisie, la Haute Cour de l'Est a jugé qu'un employeur n'avait pas démontré que la mise en œuvre d'une recommandation consistant à prévoir qu'un accompagnateur ou un superviseur veille pendant une brève période à l'information pratique d'une salariée de retour au travail après un AVC constituait une charge déraisonnable.<sup>21</sup>

Les lois danoises en matière de discrimination font une distinction entre les personnes physiques et les personnes morales, et prévoient que seules les premières sont protégées contre les discriminations directes ou indirectes. La discrimination par association est explicitement couverte par la loi sur l'égalité ethnique.

La discrimination par association n'est pas libellée en tant que telle par la loi relative à l'interdiction de discrimination sur le marché du travail, mais elle est couverte en vertu de la jurisprudence. Dans un récent arrêt, la Cour suprême fait référence à l'affaire Coleman (C-303/06) et dit pour droit que la protection contre la discrimination et le harcèlement couvre une salariée mère d'un enfant handicapé.<sup>22</sup> En l'espèce, rien n'indiquait cependant qu'un congé supplémentaire avait été refusé à la salariée A en raison de l'état de santé de sa fille.

La discrimination multiple n'est pas directement couverte par la législation. En cas de discrimination de ce type, les différents motifs sont traités individuellement. Une discrimination fondée sur plusieurs motifs n'implique pas une indemnisation financière plus élevée.

#### **4. Champ d'application matériel**

La discrimination fondée sur la race, la couleur de peau, la religion ou les croyances, les convictions politiques, l'orientation sexuelle, l'âge, le handicap ou les origines nationales, sociales ou ethniques est interdite sur le marché du travail tant public que privé en vertu de la loi sur l'interdiction de discrimination sur le marché du travail. En droit civil, en dehors du marché de l'emploi, seule la discrimination fondée sur la race ou l'origine ethnique est prohibée en vertu de la loi sur l'égalité de traitement ethnique; on peut citer à titre d'exemple les affaires dans lesquelles des supporters portant des noms à consonance non danoise ont vu leurs tickets de football annulés.<sup>23</sup>

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<sup>21</sup> Arrêt de la Haute Cour de l'Est publié dans la revue juridique hebdomadaire U2015.315Ø.

<sup>22</sup> Arrêt de la Cour suprême publié dans la revue juridique hebdomadaire U2015.16H.

<sup>23</sup> Commission pour l'égalité de traitement, décisions n° 133/2014, 134/2014, 135/2014, 136/2014, 137/2014, 138/2014, 139/2014 et 140/2014.



## 5. Mise en application de la loi

Si la discrimination présumée relève du droit pénal, la victime doit la signaler à la police.

Si la discrimination présumée relève du droit civil, la victime peut choisir de s'adresser :

- 1) directement à une juridiction civile;
- 2) au Médiateur parlementaire [*Folketingets Ombudsmand*];
- 3) à son syndicat, si l'affaire est liée au marché du travail;
- 4) à la Commission pour l'égalité de traitement;
- 5) à l'Institut national des droits de l'homme (avis/assistance);
- 6) au service d'assistance aux citoyens mis en place par certaines municipalités (conseil/assistance);
- 7) à des ONG;
- 8) au Conseil danois de la presse [*Pressenævnet*], au Conseil danois de la radio et de la télévision [*Radio- og TV-Nævnet*] ou au Médiateur des consommateurs [*Forbrugerombudsmanden*].

### A. Organisations non gouvernementales

Au Danemark, les associations/organisations/syndicats sont habilités à agir, moyennant certaines conditions, pour le compte de victimes individuelles de discrimination.

L'article 260 de la loi sur l'administration de la justice autorise des personnes ou des associations à représenter et à soutenir un plaignant ou à intervenir dans une procédure judiciaire lorsqu'elles ont un intérêt légitime à devenir partie à l'affaire.<sup>24</sup> Parmi les organisations exerçant leur activité en rapport avec les questions de non-discrimination figure le centre de documentation et de conseil en matière de discrimination raciale (DACoRD) [*Dokumentations- og Rådgivningscenter om Racediskrimination*], qui vient en aide aux victimes de discrimination.

### B. Partage de la charge de la preuve

La loi sur l'égalité de traitement ethnique et la loi relative à l'interdiction de discrimination sur le marché du travail comportent des dispositions en matière de partage de charge de la preuve, afin de garantir l'application effective du principe de l'égalité de traitement. Le partage de la charge de la preuve signifie qu'en cas d'apparence de discrimination, la charge de la preuve est renversée en justice, autrement dit qu'elle incombe à la partie défenderesse.

### C. Niveau des sanctions et suivi du nombre de plaintes

Des statistiques relatives au nombre de plainte adressées à la Commission pour l'égalité de traitement, de même que le rapport annuel de celle-ci, peuvent être consultés sur son site web.<sup>25</sup>

Le niveau d'indemnisation en cas de discrimination sur le marché du travail semble effectif, proportionné et dissuasif. En dehors du marché du travail, ce niveau d'indemnisation est très faible.

### D. Utilisation de tests de situation et de preuves statistiques dans la pratique

Des éléments statistiques probants ont parfois été utilisés dans des cas de discrimination fondée sur l'âge et le genre, mais ils ne seraient probablement pas admis en tant que

<sup>24</sup> Loi coordonnée n° 1308 du 9 décembre 2014 avec amendements ultérieurs.

<sup>25</sup> Voir: <http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fra-ligebehandlingsnaevnet>.

preuve unique dans une affaire de discrimination. Les tests de situation ne sont pas réglementés par la législation danoise et sont principalement utilisés par des journalistes ou des ONG pour confirmer leurs présomptions quant à l'existence de pratiques discriminatoires dans un secteur spécifique.

## **6. Organismes de promotion de l'égalité de traitement**

### *Institut national danois des droits de l'homme*<sup>26</sup>

#### Base juridique

L'Institut national danois des droits de l'homme est désigné depuis 2003 en tant qu'organisme chargé de promouvoir l'égalité de traitement et d'assurer une protection effective contre toute discrimination fondée sur l'origine raciale ou ethnique, conformément aux dispositions de l'article 13 de la directive européenne relative à l'égalité raciale. Une nouvelle loi adoptée en 2012 précise le rôle de l'Institut en tant qu'institution distincte et indépendante (loi coordonnée n° 553 du 18 juin 2012), ainsi que son rôle en matière de promotion de l'égalité et de lutte contre la discrimination; elle définit le mandat de l'Institut en sa qualité d'organisme spécialisé en matière d'égalité, à la fois en termes de race et d'origine ethnique et en termes de genre, conformément aux directives de l'UE.

#### Mandat et compétences

L'Institut national des droits de l'homme est habilité à venir en aide aux victimes de discrimination ainsi qu'à réaliser des enquêtes, à publier des rapports et à formuler des recommandations concernant les discriminations. Il soumet chaque année au Parlement un rapport sur la situation des droits de l'homme au Danemark, y compris en ce qui concerne la situation des personnes handicapées.

### *La Commission pour l'égalité de traitement*<sup>27</sup>

#### Base juridique

La Commission pour l'égalité de traitement est opérationnelle depuis le 1<sup>er</sup> janvier 2009. Elle traite l'ensemble des motifs protégés (genre, race, couleur de peau, religion ou convictions, opinions politiques, orientation sexuelle, âge, handicap et origine nationale, sociale ou ethnique).

#### Mandat

La Commission pour l'égalité de traitement est habilitée à recevoir des plaintes pour discrimination fondée sur le genre, la race, la couleur de peau, la religion ou les convictions, les opinions politiques, l'orientation sexuelle, l'âge, un handicap ou l'origine nationale, sociale ou ethnique intervenant sur le marché du travail. En dehors de celui-ci, elle peut uniquement être saisie de plaintes liées à une discrimination fondée sur la race, l'origine ethnique ou le genre.<sup>28</sup>

#### Fonctionnement et compétences

La Commission pour l'égalité de traitement peut allouer directement une indemnisation pour préjudice moral aux victimes de discrimination. Elle peut saisir la justice si l'auteur de la discrimination refuse de payer.

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<sup>26</sup> Loi coordonnée n° 553 du 18 juin 2012 avec amendements ultérieurs.

<sup>27</sup> Loi coordonnée n° 905 du 3 septembre 2012.

<sup>28</sup> Loi coordonnée n° 905 du 3 septembre 2012.

## 7. Points essentiels

On observe un manque profond de reconnaissance quant à l'existence de discriminations au sein de la société danoise, de même qu'un manque préoccupant de statistiques et d'études générales concernant le phénomène discriminatoire.

L'accès à la mise en place de mesures d'action positives s'avère très limité pour les employeurs: des entraves juridiques ne permettent effectivement pas à ceux-ci d'instaurer dans la pratique de véritables mesures de cette nature.<sup>29</sup>

Il se pourrait que la protection contre la discrimination indirecte fondée sur l'origine ethnique fasse l'objet d'une interprétation trop étroite au Danemark. L'arrêt relatif au port du voile (U.2005.1265H) semble admettre une très large marge discrétionnaire soit laissée à la direction pour ce qui concerne les règles vestimentaires ayant une incidence discriminatoire sur les minorités ethniques ou religieuses.

En dehors du domaine de l'emploi, et notamment dans des affaires impliquant des discothèques, les sanctions sont à ce point légères qu'il convient de se demander si elles sont suffisamment effectives, proportionnées et dissuasives pour se conformer aux directives.

L'institut national danois des droits de l'homme remplit la fonction d'organisme spécialisé pour l'égalité de traitement.<sup>30</sup> Il n'a cependant prêté assistance qu'à un très petit nombre de victimes et la question se pose de savoir s'il remplit efficacement ladite fonction lorsqu'il s'agit d'aider des victimes de discrimination.

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<sup>29</sup> Article 4 de la loi sur l'interdiction de discrimination sur le marché du travail.

<sup>30</sup> Article 2, paragraphe 2, de la loi sur l'Institut national danois des droits de l'homme.

## **ZUSAMMENFASSUNG**

### **1. Einleitung**

In den 1960er und 1970er Jahren erörterte das Parlament [Folketinget], ob Rechtsvorschriften erlassen werden sollten, die sich mit der Diskriminierung auf dem Arbeitsmarkt aufgrund von Rasse, Religion oder aus anderen Gründen befasst. Die Sozialpartner, d. h. Arbeitgeberverbände und Arbeitnehmerorganisationen auf dem Arbeitsmarkt, lehnten den Vorschlag mit der Begründung ab, dass Dänemark anstatt der Gesetzgebung über eine Tradition von Tarifverträgen auf dem Arbeitsmarkt verfüge. Da keine entsprechenden Kollektivvereinbarungen zur Bekämpfung von Diskriminierungen abgeschlossen worden waren, waren Opfer von Diskriminierungen aus Gründen der Rasse, der ethnischen Zugehörigkeit, der sexuelle Orientierung und der Religion ungeschützt, bis 1996 schließlich das Antidiskriminierungsgesetz erlassen wurde.

Die dänische Bevölkerung war bis in die 1960er und 1970er Jahre relativ homogen und die meisten gehörten aus Überzeugung, Tradition und/oder kulturellen Gründen der Evangelisch-Lutherischen Kirche an. Es gab in der dänischen Gesellschaft jedoch religiöse Minderheiten und diese standen unter dem Schutz der dänischen Verfassung von 1849. Mit neuen Gruppen von Wanderarbeitnehmern und der späteren Ankunft verschiedener Flüchtlingsgruppen änderte sich das Bild.

Neben den Ausländern gibt es des Weiteren eine Gruppe von dänischen Bürgerinnen und Bürgern, die entweder in einem anderen Land geboren wurden oder deren Eltern aus einem anderen Land als Dänemark stammen. Diese Gruppe wird als „Nachkommen“ bezeichnet. Ausländische Bürger und ihre Nachkommen werden häufig als ethnische Minderheiten bezeichnet, während deutschsprachige dänische Staatsbürger die einzige offiziell anerkannte nationale Minderheit darstellen.

Dänemark ist ein Königreich, bestehend aus Dänemark, Grönland und den Färöer-Inseln. Vom dänischen Parlament verabschiedete Antidiskriminierungsgesetze treten auf den Färöer-Inseln oder in Grönland nur in Kraft, wenn dort ähnliche Gesetze erlassen werden. Die Färöer-Inseln und Grönland sind nicht Mitglied der Europäischen Union und somit nicht verpflichtet, die Antirassismusrichtlinie oder die Gleichbehandlungsrichtlinie umzusetzen.

Die EU-Rechtsvorschriften und Urteile des Gerichtshofs der Europäischen Union (EuGH) sowie des Europäischen Gerichtshofs für Menschenrechte (EGMR) werden ernst genommen und von der Zentralverwaltung sehr genau überwacht, auch in Fällen, in denen Dänemark nicht betroffen ist.

Es kommt mitunter zu ziemlich heftigen innenpolitischen Debatten darüber, ob und in welchem Umfang andere internationale Empfehlungen befolgt werden sollten. Politiker können sehr skeptisch sein, wenn es um Einschränkungen der gesetzgebenden Gewalt aufgrund internationaler Verpflichtungen geht.

Ein besonderer Schwerpunkt lag darin, Einwanderer aus Drittstaaten darin zu bestärken, sich explizit für Grundwerte auszusprechen (z. B. Gleichstellung der Geschlechter und Erziehung der Kinder) und sich aktiv am Arbeitsmarkt zu beteiligen. In Dänemark scheinen die seitens der Beamten und allgemeinen Öffentlichkeit gestellten Anforderungen zur Anpassung und Assimilierung stärker ausgeprägt zu sein, als in einigen unserer Nachbarländer.

Die wichtigste jüngste Rechtsprechung zur Bekämpfung von Diskriminierungen in Dänemark befasst sich mit Behinderung und dem Alter.

Im Jahr 2014 urteilte das See- und Handelsgericht über Behinderungen basierend auf der Vorabentscheidung des EuGH in den verbundenen Rechtssachen C-335/11 und C-337/11

(Skouboe Werge und Ring).<sup>31</sup> Das dänische Gericht bediente sich der Definitionen von Behinderung in C-335/11 und C-337/11 und stellte fest, dass die beiden betroffenen Frauen eine Behinderung hatten und dass ihre Fehlzeiten aufgrund der Behinderung auf der Tatsache beruhten, dass ihr Arbeitgeber keine angemessenen Vorkehrungen getroffen hatte. Der Gerichtshof stellte zudem fest, dass die Entlassungen der beiden Frauen mit einer verkürzten Kündigungsfrist (ein Monat) für kranke Mitarbeiter gemäß § 5 (2) des dänischen Angestelltengesetzes eine unmittelbare Diskriminierung aufgrund von Behinderung darstellten. Beide Frauen erhielten eine Entschädigung in Höhe von 12 Monatsgehältern.

In zwei Fällen der Altersdiskriminierung fällte der dänische Oberste Gerichtshof ein Urteil darüber, ob Abschnitt 2 (a) des Angestelltengesetzes im Konflikt mit der Beschäftigungsrichtlinie und dem allgemeinen EU-Grundsatz der Nichtdiskriminierung aufgrund des Alters steht.<sup>32</sup> Die durch den dänischen Obersten Gerichtshof am 14. Januar 2014 gefällten Urteile über die Folgen des EuGH Andersen Urteils (EuGH Rechtssache C-499/08 Andersen). Der Oberste Gerichtshof stellte fest, dass ein öffentlicher Arbeitgeber nicht berechtigt ist, Abschnitt 2a (3) anzuwenden, wenn der Arbeitnehmer vorübergehend nicht wünscht, von seinem Recht auf Ruhestand Gebrauch zu machen, da er seine berufliche Laufbahn weiter verfolgen will. Der Oberste Gerichtshof stellte fest, dass es illegal ist, diesen Angestellten des öffentlichen Dienstes ihren Anspruch auf Abfindung zu verweigern.

## **2. Wichtigste Gesetze**

Die Antidiskriminierungsgesetzgebung in Dänemark besteht nicht aus einem einzigen Rechtsakt. Es handelt sich vielmehr um eine Kombination mehrerer Rechtsakte, die entsprechend der öffentlichen Debatte und aufgrund einer Ratifizierung der internationalen Verpflichtungen zu einem bestimmten Anwendungsgebiet oder einer bestimmten gefährdeten Gruppe jeweils eingeführt oder abgeändert wurden. Daher besteht der Schutz vor Diskriminierung aus einem Netz von Bestimmungen des Zivil- und Strafrechts, die von der Verfassung bis hin zu einzelnen Gesetzen reichen und Bereiche außerhalb und innerhalb des Arbeitsmarktes abdecken, wodurch dieser Schutz schwierig zu erklären und für die Öffentlichkeit schwer verständlich ist.

Die dänische Verfassung sieht vor, dass keiner dänischen Person aufgrund seiner oder ihrer politischen oder religiösen Überzeugungen oder der Abstammung die Freiheit entzogen werden darf. Darüber hinaus darf niemandem aus Gründen seiner Religion oder Herkunft das Recht auf uneingeschränkte Wahrnehmung der bürgerlichen und politischen Rechte verweigert werden, noch darf er oder sie sich aus solchen Gründen einer allgemeinen Bürgerpflicht entziehen. Zusätzlich sieht die Verfassung vor, dass niemand verpflichtet ist, einer anderen Glaubensgemeinschaft als der eigenen persönliche Beiträge zu leisten. Schließlich sieht die Verfassung vor, dass Bürgerinnen und Bürger berechtigt sind, die Gemeinschaften zur Verehrung Gottes in Einklang mit ihren Überzeugungen zu bilden, vorausgesetzt, dass nichts gelehrt oder durchgeführt wird, das im Widerspruch zu den guten Sitten oder der öffentlichen Ordnung steht.

Das Gesetz über das Verbot der Diskriminierung aus Gründen der Rasse usw. macht es zu einem Straftatbestand, wenn einer Person im Zusammenhang mit einem gewerblichen oder gemeinnützigen Unternehmen aus Gründen der Rasse, Hautfarbe, nationalen oder ethnischen Herkunft, religiösen Überzeugung oder sexuellen Orientierung der Zutritt verweigert oder diese nicht bedient wird.<sup>33</sup>

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<sup>31</sup> Urteil abgedruckt in U2014.1223S.

<sup>32</sup> Urteile abgedruckt in U2014.1116H und U2014.1119H.

<sup>33</sup> Gesetz Nr. 626 vom 29. September 1987 mit späteren Änderungen.

Im Mai 2003 wurde das erste Gesetz über ethnische Gleichbehandlung verabschiedet.<sup>34</sup> Der Zweck des Gesetzes besteht darin, den Schutz vor Diskriminierung aufgrund der Rasse oder der ethnischen Herkunft zu gewährleisten und die Nichtbeschäftigungsaspekte der EU Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse umzusetzen. Das Gesetz über die ethnische Gleichbehandlung (Act on Equal Ethnic Treatment) beinhaltet ein Verbot der Diskriminierung aus Gründen der Rasse oder der ethnischen Herkunft im Zusammenhang mit dem Zugang zu Sozialschutz, einschließlich der sozialen Sicherheit und Gesundheitsversorgung, Sozialleistungen, Bildung, Zugang zu und Versorgung mit Gütern und Dienstleistungen, einschließlich Wohnraum, sowie die Mitgliedschaft in und den Zugang zu Dienstleistungen von Organisationen, deren Mitglieder einer bestimmten Berufsgruppe angehören. Das Gesetz beinhaltet auch ein Verbot der Belästigung aus Gründen der Rasse und ethnischen Herkunft.

Das Gesetz über das Verbot der Diskriminierung auf dem Arbeitsmarkt (Act on the Prohibition of Discrimination in the Labour market) usw., das erstmals im Jahr 1996 verabschiedet wurde, verbietet unmittelbare und mittelbare Diskriminierung aus Gründen der Rasse, Hautfarbe, Religion oder des Glaubens, der politischen Überzeugung, sexuellen Orientierung, des Alters, einer Behinderung und der nationalen, sozialen oder ethnischen Herkunft.<sup>35</sup> Das Gesetz verbietet Diskriminierung im Zusammenhang mit der Einstellung, Entlassung, Versetzung und Beförderung sowie Diskriminierung in Bezug auf Dienst- und Arbeitsbedingungen und bietet zudem Schutz vor Belästigungen. In ähnlicher Weise ist es Arbeitgebern nicht erlaubt, zwischen den Mitarbeitern hinsichtlich des Zugangs zur beruflichen Aus- und Weiterbildung, Fortbildung und Umschulung zu unterscheiden. Das gleiche Verbot gilt für Menschen, die in der Aus- und Weiterbildung tätig sind sowie für Personen, die an der Durchführung von Praktika sowie an der Entscheidungsfindung und der Schaffung von Regelungen über das Recht auf das Ausführen beruflicher Tätigkeiten und die Mitgliedschaft in Arbeitgeber- und Arbeitnehmerorganisationen beteiligt sind.

Die Diskriminierung aus Gründen des Alters, der sexuellen Orientierung, einer Behinderung oder der Religion bzw. Weltanschauung wird gegenwärtig im dänischen Zivilrecht außerhalb des Arbeitsmarktes nicht abgedeckt. Das Strafrecht deckt die direkte Ungleichbehandlung außerhalb des Arbeitsmarktes beim Zugang zu öffentlichen Einrichtungen und Dienstleistungen aus Gründen der Rasse, Hautfarbe, nationalen oder ethnischen Herkunft, Religion oder der sexuellen Orientierung ab, jedoch nicht aufgrund von Alter oder Behinderung. Hinzu kommt, dass das Strafrecht mittelbare Diskriminierung, Belästigung oder Viktimisierung nicht abdeckt.

Dänemark hat alle wichtigen Menschenrechtskonventionen ratifiziert mit Ausnahme der UN-Konvention über Wanderarbeitnehmer und das Protokoll 12 zur Europäischen Menschenrechtskonvention (EMRK). Dänemark hat die COE revidierte Europäische Sozialcharta zwar unterzeichnet, jedoch noch nicht ratifiziert.

### **3. Wichtigste Grundsätze und Definitionen**

Unmittelbare Diskriminierung wird als eine Situation definiert, in der eine Person in einer vergleichbaren Situation aus Gründen der Rasse oder der ethnischen Herkunft eine weniger wohlgesinnte Behandlung als eine andere erfährt oder erfahren würde (siehe Abschnitt 1 (2) des Gesetzes über das Verbot der Diskriminierung auf dem Arbeitsmarkt [Act on the Prohibition of Discrimination in the Labour Market] und Abschnitt 3 (2) des Gesetzes über ethnische Gleichbehandlung [Act on Ethnic Equal Treatment]).

Mittelbare Diskriminierung liegt vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren jeweils Personen, die z. B. einer bestimmten Rasse oder ethnischen Herkunft angehören, gegenüber einer anderen Person benachteiligen würden,

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<sup>34</sup> Gesetz Nr. 438 vom 16. Mai 2012 mit späteren Änderungen.

<sup>35</sup> Gesetz Nr. 1349 vom 16. Dezember 2008.

außer die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel zur Erreichung dieses Ziels sind angemessen und erforderlich (vgl. Hauptabschnitt 1 (3) des Gesetzes über das Verbot der Diskriminierung auf dem Arbeitsmarkt [Act on the Prohibition of Discrimination in the Labour Market] und Abschnitt 3 (3) des Gesetzes über ethnische Gleichbehandlung [Act on Ethnic Equal Treatment]).

Bedrohung und Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind durch das Gesetz über das Verbot der Diskriminierung auf dem Arbeitsmarkt (Act on the Prohibition of Discrimination in the Labour Market) Absatz 1 (4), 1 (5) und Abschnitt 7 (2) sowie das Gesetz über ethnische Gleichbehandlung (Act on Ethnic Equal Treatment) Abschnitt 3 (4), 3 (5) und Abschnitt 8 verboten.

Das Gesetz über das Verbot der Diskriminierung auf dem Arbeitsmarkt enthält zwei wichtige Ausnahmen zum Verbot der Diskriminierung.

Das Gesetz gilt nicht für: 1) Arbeitgeber, deren Einrichtungen das Ziel der Förderung eines bestimmten politischen oder religiösen Ethos haben (Abschnitt 6 (1)), und 2), ein Minister kann von dem Verbot der Ungleichbehandlung abweichen, nachdem er eine Erklärung des Ministeriums für Arbeit erhalten hat, wenn es von entscheidender Bedeutung ist, dass eine Person einer bestimmten politischen Überzeugung, sexuellen Orientierung oder nationalen, sozialen oder ethnischen Herkunft bzw. einer bestimmten Hautfarbe, Altersgruppe, Religion oder Weltanschauung angehört oder eine bestimmte Behinderung hat und wenn diese Voraussetzungen in angemessenem Verhältnis zu der entsprechenden Arbeit stehen (Abschnitt 6 (2)).

In Bezug auf angemessene Vorkehrungen für Menschen mit Behinderungen, verpflichtet Abschnitt 2 (a) des Gesetzes über das Verbot von Diskriminierung auf dem Arbeitsmarkt (Act on the Prohibition of Discrimination in the Labour Market) den Arbeitgeber, den Arbeitsplatz entsprechend für Menschen mit Behinderungen anzupassen, es sei denn, dies würde für den Arbeitgeber eine unverhältnismäßige Belastung darstellen. In einem konkreten Fall stellte das östliche Landgericht (Eastern High Court) fest, dass ein Arbeitgeber nicht nachgewiesen hatte, dass es eine unverhältnismäßige Belastung dargestellt hätte, entsprechend der Empfehlungen für einen kurzen Zeitraum einen Mentor oder Betreuer zur Vergabe konkreter Rückmeldungen für eine Mitarbeiterin zu stellen, die nach einem Schlaganfall zurück an Ihrer Arbeitsplatz gekommen war.<sup>36</sup>

Die dänischen Gesetze zum Schutz vor Diskriminierung unterscheiden zwischen natürlichen und juristischen Personen und legen fest, dass einzig natürliche Personen gegen unmittelbare oder mittelbare Diskriminierung geschützt sind. Diskriminierung aufgrund der Assoziation mit einer bestimmten Person wird durch das Gesetz über ethnische Gleichbehandlung (Act on Ethnic Equal Treatment) ausdrücklich abgedeckt.

Diskriminierung aus Gründen der Assoziierung ist nicht im Wortlaut des Gesetzes über das Verbot von Diskriminierung auf dem Arbeitsmarkt enthalten, ist jedoch nach der Rechtsprechung gedeckt. In einem neuen Urteil des obersten Gerichtshofs, verwies der Gerichtshof auf das Urteil des Falles Coleman (C-303/06) und erklärte, dass der Schutz vor Diskriminierung und Belästigung auch für einen Mitarbeiter mit einem Kind greift, das eine Behinderung hat.<sup>37</sup> In diesem konkreten Fall gab es jedoch keine Hinweise darauf, dass der Mitarbeiter (A) aufgrund der gesundheitlichen Situation ihrer Tochter der Urlaubsantrag abgelehnt wurde.

Mehrfachdiskriminierung wird durch Rechtsvorschriften nicht direkt abgedeckt. In Fällen von Mehrfachdiskriminierung werden die verschiedenen Diskriminierungsgründe individuell

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<sup>36</sup> Urteil des östlichen Landgerichts gedruckt in U2015.315Ø.

<sup>37</sup> Urteil des obersten Gerichtshofs gedruckt in U2015.16H.

behandelt. Diskriminierung aus mehreren Gründen führt nicht zu höheren Ausgleichszahlungen.

#### **4. Sachlicher Anwendungsbereich**

Auf dem öffentlichen und privaten Arbeitsmarkt ist die Diskriminierung aus Gründen der Rasse, der Hautfarbe, der Religion oder des Glaubens, der politischen Überzeugung, der sexuellen Orientierung, des Alters, einer Behinderung und der nationalen, sozialen oder ethnischen Herkunft laut dem Gesetz zum Verbot der Diskriminierung auf dem Arbeitsmarkt usw. verboten. Im Zivilrecht für Bereiche außerhalb des Arbeitsmarktes ist lediglich die Diskriminierung aus Gründen der Rasse und der ethnischen Herkunft gemäß dem Gesetz über ethnische Gleichbehandlung verboten, wie auch in Fällen veranschaulicht, in denen die Fußball-Tickets von Personen mit nicht dänischen klingenden Namen ungültig gemacht wurden.<sup>38</sup>

#### **5. Rechtsdurchsetzung**

Wenn es sich bei einem angeblichen Fall von Diskriminierung um eine Strafsache handelt, sollte das Opfer diese bei der Polizei anzeigen.

Wenn es sich bei dem Fall um eine zivilrechtliche Angelegenheit handelt, kann sich das Opfer wahlweise wenden an:

- 1) die Zivilgerichte, direkt;
- 2) den parlamentarischen Bürgerbeauftragten [Folketingets Ombudsmand];
- 3) die Gewerkschaft, wenn es sich um einen Fall auf dem Arbeitsmarkt handelt;
- 4) den Gleichstellungsausschuss (Board of Equal Treatment);
- 5) das Institut für Menschenrechte - Das Nationale Institut für Menschenrechte Dänemarks (DIHR) (für Beratung / Unterstützung);
- 6) den in einigen Gemeinden zur Verfügung stehenden Bürgerberatungsdienst (Beratung / Unterstützung);
- 7) NRO;
- 8) den dänischen Presserat [Pressenævnet], den Rundfunk- und Fernsehrat in Sachen Werbung [Radio- og TV-Nævnet], den Verbraucherombudsmann [Forbrugerombudsmanden].

##### **A. Nichtregierungsorganisationen**

In Dänemark sind Verbände / Organisationen / Gewerkschaften berechtigt, unter bestimmten Voraussetzungen im Namen einzelner Diskriminierungsopfer zu handeln.

Abschnitt 260 der Prozessordnung (Administration of Justice Act) ermöglicht es Personen oder Verbänden, einen Beschwerdeführer zu vertreten und zu unterstützen oder in einem Rechtsstreit zu intervenieren, wenn sie ein rechtliches Interesse am Beitritt zu dem Fall zu haben.<sup>39</sup> Eine Organisation, die sich mit Nichtdiskriminierungsfragen befasst, ist das Dokumentations- und Beratungszentrum für Rassendiskriminierung (DACoRD) [Dokumentations- og Rådgivningscenter om Racediskrimination], welches die Opfer von Diskriminierung unterstützt.

##### **B. Teilung der Beweislast**

Das Gesetz über ethnische Gleichbehandlung (Act on Ethnic Equal Treatment) und das Gesetz über das Verbot der Diskriminierung auf dem Arbeitsmarkt (Act on the Prohibition of Discrimination in the Labour Market) umfassen Bestimmungen über die Teilung der

<sup>38</sup> Gleichstellungsausschuss, Urteile Nr. 133/2014, 134/2014, 135/2014, 136/2014, 137/2014, 138/2014, 139/2014 und 140/2014.

<sup>39</sup> Gesetz Nr. 1308 vom 9. Dezember 2014 mit späteren Änderungen.



Beweislast, wodurch sichergestellt wird, dass der Grundsatz der Gleichbehandlung wirksam angewendet wird. Die geteilte Beweislast bedeutet, dass, sobald ein glaubhafter Anschein der Diskriminierung besteht, die Beweislast während des Gerichtsverfahrens auf die beklagte Partei übergeht.

#### C. Höhe der Sanktionen und Überwachung der Beschwerdezahlen

Statistiken über die Zahl der dem Gleichstellungsausschusses (Board of Equal Treatment) vorliegenden Beschwerden können auf der Website sowie im Jahresbericht des Ausschusses eingesehen werden.<sup>40</sup>

Die Höhe der Entschädigung für Diskriminierungen auf dem Arbeitsmarkt scheint wirksam, angemessen und abschreckend zu sein. Außerhalb des Arbeitsmarktes ist die Höhe der Entschädigung für Diskriminierungen jedoch sehr gering.

#### D. Situationsanalyse und statistische Beweise in der Praxis

Statistische Beweise wurden in einigen Fällen der Diskriminierung auf Grund von Alter und Geschlecht verwendet, würden aber wahrscheinlich in einem Fall von Diskriminierung nicht als einziger Beweis akzeptiert werden. Situationsanalysen sind in den dänischen Rechtsvorschriften nicht geregelt und werden vor allem von Journalisten und NRO verwendet, um deren Vermutungen zu bestätigen, dass Diskriminierung in einem bestimmten Sektor existiert.

### 6. Gleichbehandlungsstellen

#### *Das Institut für Menschenrechte - Das Nationale Institut für Menschenrechte Dänemarks*<sup>41</sup>

##### Rechtsgrundlage

Das Institut für Menschenrechte - Das Nationale Menschenrechtsinstitut Dänemarks (DIHR) wurde zu jenem Gremium für die Förderung der Gleichbehandlung und den wirksamen Schutz gegen Diskriminierung aus Gründen der Rasse oder ethnischen Herkunft, das seit 2003 in Artikel 13 der Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse (Racial Equality Directive) festgelegt ist. Ein im Jahr 2012 neu eingeführtes Gesetz klärte die Rolle des DIHR als eigene und unabhängige Institution. Das Gesetz legt des Weiteren die Rolle des DIHR im Hinblick auf die Förderung der Gleichstellung und der Nichtdiskriminierung fest und legt das Mandat des Instituts als Gleichstellungsstelle für Diskriminierung aus Gründen der Rasse und ethnischen Herkunft sowie des Geschlechts im Rahmen der EU-Richtlinien fest.

##### Mandat und Zuständigkeiten

Das DIHR erhielt die Befugnis, die Opfer von Diskriminierungen zu unterstützen und Untersuchungen zum Thema der Diskriminierung durchzuführen sowie Berichte zu veröffentlichen und Empfehlungen zur Diskriminierung zu geben. Des Weiteren legt das DIHR dem Parlament einen jährlichen Bericht über die Menschenrechtssituation in Dänemark vor, der auch die Situation von Menschen mit Behinderungen enthält.

#### *Der Gleichstellungsausschuss (Board of Equal Treatment)*<sup>42</sup>

##### Rechtsgrundlage

Der Gleichstellungsausschuss konstituierte sich am 1. Januar 2009. Der Ausschuss deckt alle geschützten Diskriminierungsgründe ab (Geschlecht, Rasse, Hautfarbe, Religion oder

<sup>40</sup> Siehe: <http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fra-ligebehandlingsnaevnet>.

<sup>41</sup> Gesetz Nr. 553 vom 18. Mai 2012 mit späteren Änderungen.

<sup>42</sup> Gesetz Nr. 905 vom 3. September 2012.

Weltanschauung, politische Überzeugung, sexuelle Orientierung, Alter, Behinderung oder nationale, soziale oder ethnische Herkunft).

#### Mandat

Der Gleichstellungsausschuss ist befugt, Beschwerden von Einzelpersonen im Zusammenhang mit Diskriminierung auf dem Arbeitsmarkt aufgrund von Geschlecht, Rasse, Hautfarbe, Religion oder Weltanschauung, politischer Überzeugung, sexueller Orientierung, Alter, Behinderung oder nationaler, sozialer oder ethnischer Herkunft anzuhören. Außerhalb des Beschäftigungsbereichs, befasst sich der Ausschuss nur mit Beschwerden im Zusammenhang mit Diskriminierung aus Gründen der Rasse, ethnischen Herkunft oder des Geschlechts.<sup>43</sup>

#### Funktionsweise und Kompetenzen

Opfern von Diskriminierung kann eine Entschädigung für immaterielle Schäden zustehen, das wird vom Ausschuss entschieden. Der Ausschuss ist berechtigt, den Fall vor Gericht zu bringen, sollte die diskriminierende Seite nicht bereit sein, diese Entschädigung zu zahlen.

### 7. Wichtige Herausforderungen

Es mangelt weitgehend an der Erkenntnis, dass es in der dänischen Gesellschaft sehr wohl zu Diskriminierungen kommt. Auch liegt ein ernsthafter Mangel an Statistiken und allgemeiner Forschung im Bereich der Diskriminierung vor.

Es gibt nur sehr begrenzte Möglichkeiten zur Umsetzung positiver Maßnahmen durch die Arbeitgeber. Rechtliche Hindernisse erschweren es Arbeitgebern in der Praxis, ernstzunehmende positive Maßnahmen zu ergreifen.<sup>44</sup>

Der Schutz gegen mittelbare Diskriminierung aufgrund der ethnischen Herkunft wird in Dänemark möglicherweise zu streng ausgelegt. Das Kopftuch-Urteil (U.2005.1265H) scheint einen sehr weiten Bereich der Führungsbefugnisse in Bezug auf Bekleidungsvorschriften zu unterstützen, die wiederum diskriminierende Auswirkungen auf ethnische oder religiöse Minderheiten haben.

Außerhalb des Beschäftigungsbereichs, z. B. in den Diskothek-Rechtsfällen, fallen Sanktionen so gering aus, dass in Frage gestellt werden sollte, ob diese ausreichend wirksam, verhältnismäßig und abschreckend sind, wie das in den Richtlinien vorgesehen ist.

Das dänische Institut für Menschenrechte (DIHR) dient als spezialisierte Gleichstellungsstelle.<sup>45</sup> Allerdings hat das DIHR bisher nur sehr wenige Opfer von Diskriminierungen unterstützt und es stellt sich die Frage, ob es sich bei dem DIHR um eine wirksame spezialisierte Gleichstellungsstelle handelt, wenn es um die Unterstützung von Diskriminierungsopfern geht.

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<sup>43</sup> Gesetz Nr. 905 vom 3. September 2012.

<sup>44</sup> Abschnitt 4 des Gesetzes zum Verbot der Diskriminierung auf dem Arbeitsmarkt usw.

<sup>45</sup> Abschnitt 2 (2) des Instituts für Menschenrechte - Das Nationale Institut für Menschenrechte Dänemarks.

## **INTRODUCTION**

### **The national legal system**

The basic law of Denmark is the current Constitution adopted by referendum in 1953. This is the latest successor to the 1849 Constitution. The Constitution sets out the essential rules governing the most important institutions of the State, the Government, the Parliament and the judiciary, and the relationship between these institutions.

National legislative authority rests with the Government and the Parliament jointly.

The legal system is a continental system following primarily German traditions. Fundamental legal principles are laid down by the Constitution in very general terms. Constitutional rules are expounded in laws, while detailed regulation is provided by administrative orders (delegated/secondary legislation). In contrast to the German legal system, however, Denmark has no Constitutional Court. The Supreme Court has traditionally been very reluctant to use its power to annul laws that may contradict the Constitution.

The legal system is structured into legal fields (criminal law, civil law, labour law, administrative law etc.), and anti-discrimination laws are represented in all these various fields.

Public authorities are governed by a general principle of equality applicable under administrative law. The general principle has the force of legislation (and not constitutional law) and means that public authorities must treat equal matters in full equality before the law.

The Danish private and public labour market is still under influence by the so-called "Danish model", that is, the labour market is generally regulated by collective agreements between the labour market social partners. A specialised Labour Court exists to resolve conflicts between the social partners regarding breaches of collective agreements. Anti-discrimination is also to some degree covered by collective agreements, for example on the question of equal pay.

The Board of Equal Treatment was established on 1 January 2009 to deal with individual complaints of discrimination.

The Institute for Human Rights – the National Human Rights Institute of Denmark holds two EU mandates as Specialised Equality Body on Race or Ethnic Origin as well as on Gender. In addition the institute monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with article 33 of the Convention.

Denmark is a member of the Council of Europe and has acceded to the European Convention on Human Rights and all of its protocols, apart from Protocol 12. The European Convention on Human Rights is the only human rights convention currently being incorporated into Danish law. International human rights conventions such as the UN Convention on Racial Discrimination and the UN Disability Convention are not incorporated into Danish law. In November 2014 the Danish government turned down the recommendation from a government committee to incorporate six fundamental UN human rights conventions into Danish law.<sup>46</sup>

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<sup>46</sup> Letter from the Minister of Justice of 10 November 2014. See: <http://www.ft.dk/samling/20141/almindel/REU/bilag/53/index.htm>.

With regard to unincorporated and ratified human rights conventions, it is generally assumed that they are a relevant source of law, which may be invoked and must be applied by national courts and administrative authorities.

### **List of main legislation transposing and implementing the directives**

Criminal Act on the Prohibition of Discrimination due to Race etc. [*Lov om forbud mod forskelsbehandling på grund af race m.v.*] covers the following grounds: race, colour of skin, national or ethnic origin, belief and sexual orientation.<sup>47</sup> The Act contains a prohibition against discrimination in two areas: the provision of goods or services, and access to public places or events. The Act was adopted on June 9, 1971 and entered into force on August 1, 1971. The last amendments entered into force on July 1, 2001.<sup>48</sup>

Act on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*] is a civil law.<sup>49</sup> The Act covers the following grounds of discrimination: race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. The material scope of the Act is the labour market not regulated by collective agreements. The Act was adopted on May 24, 1996 and entered into force on July 1, 1996. The last amendments entered into force on January 1, 2015.<sup>50</sup>

Act on Ethnic Equal Treatment [*Lov om etnisk ligebehandling*] is a civil law.<sup>51</sup> It covers race and ethnic origin only. The material scope of the act is the following: access to social protection, including social security and health care, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. The act was adopted on May 28, 2003 and entered into force on July 1, 2003. The last amendments entered into force on January 1, 2013.<sup>52</sup>

Act on The Board of Equal Treatment [*Ligebehandlingsnævnet*] is a civil law.<sup>53</sup> Within the labour market the Board deals with complaints related to discrimination based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Outside the labour market, the Board only deals with complaints related to discrimination based on race, ethnic origin or gender. The act was adopted on May 27, 2008 and entered into force on January 1, 2009. The last amendments entered into force on July 1, 2012.<sup>54</sup>

Act on The Institute for Human Rights – the National Human Rights institute of Denmark [*Lov om Institut for Menneskerettigheder – Danmarks Nationale Menneskerettighedsinstitution*] is a civil act.<sup>55</sup> The institute is an independent public body appointed as the National Human Rights Institution (NHRI) of Denmark and holds two EU mandates as Specialised Equality Body on Race or Ethnic Origin as well as on Gender.<sup>56</sup> In addition the institute monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with article 33 of the Convention.<sup>57</sup> The act was adopted on June 18, 2012 and entered into force on January 1, 2013. The last amendments were adopted on December 19, 2013.<sup>58</sup>

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<sup>47</sup> Consolidated Act No. 626 of 29 September 1987 with later amendments.

<sup>48</sup> Act No. 433 of 31 May 2000.

<sup>49</sup> Consolidated Act No. 1349 of 16 December 2008.

<sup>50</sup> Act No. 1489 of 23 December 2014.

<sup>51</sup> Consolidated Act No. 438 of 16 May 2012 with later amendments.

<sup>52</sup> Act No. 553 of 18 June 2012.

<sup>53</sup> Consolidated Act no. 905 of 3 September 2012.

<sup>54</sup> Consolidated Act no. 905 of 3 September 2012.

<sup>55</sup> Act No. 553 of 18 June 2012 with later amendments.

<sup>56</sup> Section 2(2) of the Act No. 553 of 18 June 2012 with later amendments.

<sup>57</sup> Decision B15 on the promotion, protection and monitoring of the implementation of the UN Convention on Rights of Persons with Disabilities. Decision B15 was adopted by the Parliament on 17 December 2010.

<sup>58</sup> Act No. 1678 of 19 December 2013.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The Danish Constitution does not contain a general provision prohibiting discrimination or a general equality clause. The Constitution includes four articles dealing with non-discrimination and these provisions do not apply to the material areas covered by the directives. Only one discrimination ground listed in the directives – religion – is directly covered in the Danish Constitution.

Section 71 (1) of the Constitution provides that “No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent.” As a point of departure the Section only covers Danish citizens, but the liberty of foreigners is to some extent protected by Section 70: “No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons.”

Section 68 of the Constitution provides that “No one shall be liable to make personal contribution to any denomination other than the one to which he adheres.”

Section 67 of the Constitution provides that “Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done.”

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses can be enforced against private actors (as opposed to the State).

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in various national legislation.

#### *The Constitution*

Several sections of the Constitution stipulate some protection against discrimination because of creed or religious conviction.

#### *Criminal law*

Section 266b of the Criminal Code [*Straffeloven*]<sup>59</sup> prohibits hate speech. It covers the following grounds: race, skin colour, national or ethnic origin, religion and sexual orientation.

Act on the Prohibition of Discrimination due to Race etc. covers the following grounds: race, skin colour, national or ethnic origin, religion and sexual orientation.

#### *Civil acts*

Act on the Prohibition of Discrimination in the Labour Market etc. covers the following grounds: race, skin colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin.

Act on Ethnic Equal Treatment covers race and ethnic origin.

#### *The principle of equality in public administrative law*

Public authorities are governed by the principle of equality [*lighedsprincipet*] applicable under general administrative law. The general principle has the force of legislation (and not constitutional law) and means that public authorities must treat equal matters in full equality before the law.

In general this means that situations should be treated equally unless there are objective and reasonable grounds for different treatment. This is a limitation of the powers of the public authorities. Whether a criterion is objective and reasonable depends on the interpretation of the relevant legislation and the implicated public authorities deciding the case and the context of a specific case. The administrative principle of equality, which public authorities apply in case handling along with relevant provisions of law is often also supplemented by the unwritten administrative principle of proportionality.

When it comes to an administrative authority exercising discretionary power as an employer, the same principle applies. The Danish Parliamentary Ombudsman [*Folketingets Ombudsmand*] has stated<sup>60</sup> that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant who is the most qualified, thus ruling out the possibility of giving preference to applicants of a certain sexual orientation, ethnic or religious background etc. This is also the case when it comes to the promotion of public employees, salary and other employment conditions. It is the employee's qualifications that count and not, for example, age or disability or any other grounds.

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<sup>59</sup> Consolidated Act No. 871 of 4 July 2014 with later amendments.

<sup>60</sup> Annual report of the Parliamentary Ombudsman 1987 p. 107 ff. (FOB 1987, s. 107) [*Folketingets Ombudsmand – Årsrapport 1987*].

The principle of equality also applies when the public sector acts as a labour exchange, or is engaged in job skills training, and any other labour market related activity.

### **2.1.1 Definition of the grounds of unlawful discrimination within the directives**

In general, the grounds of discrimination are only vaguely defined in Danish legislation.

#### *i) racial or ethnic origin*

Race is not defined in the laws implementing the Racial Directive.

Anti-discrimination criminal law on hate speech and access to public places was passed in 1971 in order to ratify the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and consequently the definition of "racial discrimination" in Article 1 of the ICERD is relevant in a Danish legal context, courts cases, public administration etc.

Race must therefore be understood in accordance with international human rights conventions as a social concept in contrary to a biological concept.

According to the preparatory work of the Danish legislation, ethnic origin should also be understood in accordance with international human rights conventions. Ethnic origin includes a person's association to a particular group of people with a common culture, religion, history, country of origin etc.

#### *ii) religion or belief*

The term "religion" is not defined in the laws implementing the Employment directive. According to the guidelines to the Act on the Prohibition of Discrimination in the Labour Market etc. religion is understood as formally approved or recognized religions.<sup>61</sup> A definition may thus be found indirectly through the Danish authorities' practice of approving "religious communities". The Ministry of Children, Gender Equality, Integration and Social Affairs may approve a group of adult citizens (over 18 years) belonging to a particular religion as a religious community or congregation in accordance with the Marriage Act [*Ægteskabsloven*].<sup>62</sup>

A Standing Advisory Committee regarding religious communities [*Det Rådgivende Udvalg vedr. Trossamfund*] is appointed to assess whether the conditions for approval as a religious community are fulfilled. The Committee is independent of the Ministry and has expertise in religious sociology, religious history, law and theology. The Committee has prepared guidelines for approval as a religious community.<sup>63</sup> The Committee uses a minimal definition of religion, understanding religion as a specifically formulated belief in the human being's dependence on a power over the human race and the laws of nature and a belief that provides guidelines for human ethics and morality.<sup>64</sup>

"Belief" is not defined in the legislation but generally assumed to protect a wider area than religion.<sup>65</sup> Thus, belief includes religions that are not formally recognized. In short, belief

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<sup>61</sup> Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

<sup>62</sup> <http://sm.dk/arbejdsmrader/trossamfund/godkendelse>.

<sup>63</sup> Vejledende retningslinjer udarbejdet af Det Rådgivende Udvalg vedr. Trossamfund, 6. rev. udgave, den 18. august 2011 (opdateret 20. marts 2014). Available in Danish at: <http://sm.dk/arbejdsmrader/trossamfund/godkendelse>.

<sup>64</sup> Vejledende retningslinjer udarbejdet af Det Rådgivende Udvalg vedr. Trossamfund, 6. rev. udgave, den 18. august 2011 (opdateret 20. marts 2014).

<sup>65</sup> Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

is considered to be a more defined conviction covering something different than formally recognised religions. Examples of belief are atheism and other philosophical orientations.

### iii) disability

Danish legislation implementing the Employment Directive does not contain a definition of "disability". In social security legislation the concept of disability has traditionally been defined as an impairment that generates a need for compensation in order for the person in question to function on an equal level with other citizens in a similar situation.

According to the preparatory work of the Act on the Prohibition of Discrimination in the Labour Market etc., a disability occurs where a person with a "physical, psychological or intellectual impairment generating a need for compensation in order for that person to function on an equal level with other citizens in a similar situation." The need for compensation covers various public services and facilities with the purpose of limiting the consequences of the disability. Compensation provided by the public sector can, for instance, take the form of providing a wheelchair, hearing aid, personal assistance etc. Compensation can also consist of the provision of parallel services, for instance publishing written material as well as an audiotape.<sup>66</sup> However the preparatory work also states: "it is not a requirement for protection against differential treatment on the grounds of disability that there is a *specific* need for compensation."<sup>67</sup>

The meaning of the disability concept within anti-discrimination legislation has been ambiguous and arguably too narrow as it has adopted the strict disability concept of the social legislation. Since the Supreme Court judgment of 13 June 2013, the meaning of disability should be clearer.<sup>68</sup> In the arguing, the Supreme Court referred to the EU cases Ring and Skouboe Werge of the Court of Justice of the European Union (C-335/11 and C-337/11) and based on the medical information provided in the case, the Supreme Court concluded that the woman in the case had a disability. The Supreme Court judgment illustrates that it is not necessary to document a need for reasonable accommodation to be encompassed by the disability concept of the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the current legal position with regard to the interpretation of the concept of "disability" is now clearly established by the Supreme Court: to be encompassed by the concept of disability does not require a need for compensation or a need for special accommodation.

In judgments of 31 January 2014 the Danish Maritime and Commercial Court also referred to CJEU C-335/11 and C-337/11 (Ring and Skouboe Werge) and stated that the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, if that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other employees, and the limitation is a long term one.<sup>69</sup>

In a judgment of 1 December 2014 the Danish Maritime and Commercial Court also referred to CJEU C-335/2011 and C-377/2011 (Ring and Skouboe Werge).<sup>70</sup> The court concluded that according to the definition in Ring and Skouboe Werge, the woman in the case who had tenosynovitis in her right hand did not have a disability. The Court referred to medical records stating that the woman would be completely healthy again and that she

<sup>66</sup> Handicap og Ligebehandling – et refleksionspapir, Det Centrale Handicapråd (2001) p. 11.

<sup>67</sup> Proposal L92 of 11 November 2004, '4.1. Handicapkriteriet' and 'Bemærkninger til de enkelte bestemmelser', 'Til nr. 2'.

<sup>68</sup> U.2013.2575H.

<sup>69</sup> The Maritime and Commercial Court, F-13-06 and F-19-06, judgments delivered on 31 January 2014. Judgment in F-19-06 was printed in U2014.1223S.

<sup>70</sup> The Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014. Judgment printed in U2015.1041S.



would not need to take special account of her condition in her future job search except for making sure that her future workplace was arranged in a reasonable ergonomic way. The Court stated that the woman had not demonstrated that she at the time of the dismissal suffered from a medically diagnosed curable or incurable latent disorder. The judgment established that a latent disorder does not constitute a disability if its breakout can be prevented by the reasonable ergonomic design of a workplace.

Recital 17 of the Employment Equality Directive is not directly reflected in legislation. It is, however, stated in the preparatory work to the Act on the Prohibition of Discrimination in the Labour Market etc. that an employer should only choose an applicant with a disability if the applicant is as qualified as an applicant without a disability. When comparing the qualifications, the person with a disability is to be judged according to his or her capacity to carry out the essential functions of the post after reasonable accommodation is made.

*iv) age*

Age is not defined in the legislation implementing the directives but according to the guidelines to the Act on the Prohibition of Discrimination in the Labour Market etc. everybody is protected against discrimination on account of age.<sup>71</sup> It goes to young age and old age - all ages are protected discrimination grounds. For the various exceptions, see section 4.7.

*v) sexual orientation*

Sexual orientation is not defined in the legislation implementing the directives. The concept is generally understood to mean homo- and heterosexual relations and other kinds of lawful sexual orientation such as bisexuals, intersexuals, transsexuals, masochists etc.<sup>72</sup> Lawful sexual orientation refers to Danish criminal law. This means that an employee who for example promotes paedophilia (which is illegal) would not be considered to be protected by the Act on the Prohibition of Discrimination in the Labour Market etc.

### **2.1.2 Multiple discrimination**

In Denmark prohibition of multiple discrimination is not included in the law. To enhance the legal protection and raise awareness in this area, it would be preferable that multiple discrimination was encompassed directly by the anti-discrimination legislation. There are no plans, however, for adoption of such amendments.

In Denmark there is no civil case law dealing with multiple discrimination. There are, however, cases in which the Board of Equal Treatment has dealt with situations of multiple discrimination.

One example is a decision by the Board of Equal Treatment in which a 58-year-old electrician with a number of other colleagues was dismissed from his job in a supermarket.<sup>73</sup> The electrician had worked as a technician and because of a long-term depression he had a flexible job with reduced working hours. The Board argued that there was a higher percentage of dismissed employees among the more than 55-year-old employees. Furthermore, the Board stated that the argument from the employer that the electrician had to be dismissed because of the fact that he could not handle a full time position constituted discrimination because of his disability. The Board adjudicated the claims of discrimination individually. In other words, the Board separately assessed the claims of age discrimination and of disability discrimination almost as if two different cases

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<sup>71</sup> Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

<sup>72</sup> Finn Schwarz and Jens Jakob Hartmann, *Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven* (2011), page 178.

<sup>73</sup> Board of Equal Treatment, Decision No. 222/2014 of 17 December 2014.

existed. In the end the Board concluded that the man had been discriminated against because of both his age and his disability. The electrician was awarded a compensation of DKR 270.000 (€ 36.000) corresponding to approximately nine months of salary.

Another example is a decision in which the claimant argued that discrimination had taken place due to both to age and disability.<sup>74</sup> The case dealt with a 58 year old woman who was diagnosed with rheumatoid arthritis as well as deafness on her one ear. She was dismissed and her company argued that the dismissal was motivated by the financial situation of the company. Again, the Board adjudicated the claims of discrimination individually but concluded that no discrimination had taken place.

In another decision a woman was dismissed from her flexible job as a support worker.<sup>75</sup> The woman claimed that she had been discriminated against on grounds of her gender, age and disability. The Board considered that the woman had demonstrated facts that gave rise to suspect that she had been discriminated against on the grounds of disability, as she was dismissed from her flexible position at the same time as the employer had appointed a new full time employee instead. She had not, however, demonstrated facts that gave rise to suspect that her age and gender had been influential in her dismissal. The Board therefore concluded that the woman had been discriminated against only because of her disability and she was awarded a compensation of DKR 290.000 (€ 39.000) corresponding to approximately nine months' salary. Also in this case, the Board separately assessed the claims of disability discrimination and of gender and age discrimination.

The awarding of 9 months of salary in compensation is common in cases of discrimination on account of a single discrimination ground. Thus the above cases seem to imply that the Board does not award higher damages when several discrimination grounds are at stake.

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Denmark the legislation implementing the directives does not directly prohibit discrimination based on perception or assumption of what a person is.

In the commentary to the Act on Ethnic Equal Treatment, it is stated that the prohibition against differential treatment is applicable irrespective of whether the actual race or ethnic origin of the victim is as assumed by the perpetrator or not. Discrimination based on a perception or assumption of who a person is, is therefore prohibited.

Such a statement is, however, not included in the commentary to the Act on the Prohibition of Discrimination in the Labour Market etc. The view of the author is, however, that discrimination based on assumed characteristics in the labour market is also prohibited.

#### **b) *Discrimination by association***

In Denmark the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

It follows from Section 3(1) of the Act on Ethnic Equal Treatment that no person may subject another person to direct or indirect discrimination on grounds of the latter's or a third party's race or ethnic origin.

No such article appears in the Act on the Prohibition of Discrimination in the Labour Market etc. However, discrimination in the labour market based on a third party's disability is

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<sup>74</sup> Board of Equal Treatment, Decision No. 192/2013 of 11 September 2013.

<sup>75</sup> Board of Equal Treatment, Decision No. 26/2013 of 6 February 2013.

prohibited according to case law concluding that discrimination by association is covered by the Act. In a judgment by the Supreme Court of 8 October 2014, the Court referred to the Coleman case (C-303/06) and stated that the protection against discrimination and harassment covers an employee with a child who has a disability.<sup>76</sup> In the case there was, however, no information to suggest that the employee because of her daughter's health situation had been discriminated against or harassed by the employer's refusal to grant her additional leave of absence.

Furthermore in a judgment by the Western High Court a mother to a son with a disability was protected against discrimination because of disability.<sup>77</sup> In that case, the Court did not directly refer to C-303/06 – Coleman. In a decision by the Board of Equal Treatment, the Board states that the protection against discrimination is not limited to persons who have a disability.<sup>78</sup> The Board concludes that a mother being dismissed because of absence due to the disability of her child is discriminated against because of disability.

## **2.2 Direct discrimination (Article 2(2)(a))**

### **a) Prohibition and definition of direct discrimination**

In Denmark, direct discrimination is prohibited and defined in national law.

Direct discrimination is deemed to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of race or ethnic origin, cf. Section 3 (2) of the Act on Ethnic Equal Treatment. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. defines direct discrimination in the same manner referring to the discrimination grounds of race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

### **b) Justification of direct discrimination**

The law does not permit direct discrimination – not even if it could be argued to be objectively justified and proportionate.

In 2011 the Board concluded that it was not a violation of the Act on Prohibition of Discrimination in the Labour Market etc. to advertise for Asian children to perform as extras in a TV-show.<sup>79</sup> The Board reasoned that it was not possible to get an exemption from the prohibition of discriminatory advertisements in section 5 of the Act. However, the Board also found that it was not the intention of the Act to limit the artistic freedom in the making of TV-shows and thus concluded that no discrimination had taken place.

### **2.2.1 Situation testing**

#### **a) Legal framework**

In Denmark situation testing is not prohibited in national law. The law is silent on the issue.

#### **b) Practice**

In Denmark situation testing is not widely known and rarely used in practice as a method of documenting discrimination. There are no specific procedural requirements on the use of situation testing in Denmark.

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<sup>76</sup> Supreme Court Judgment of 8 October 2014. Printed in U2015.16H.

<sup>77</sup> Western High Court Judgment of 22 June 2010. Printed in U.2010.2610 V.

<sup>78</sup> Board of Equal Treatment, Decision No. 101/2011 of 24 June 2011.

<sup>79</sup> Board of Equal Treatment, Decision No. 22/2011.

In few instances, tests have been used to examine discrimination in nightlife. In January 2005 a television programme followed two groups of youngsters trying to enter nightclubs in Copenhagen with a hidden camera. One group of youngsters belonging to the ethnic majority were allowed to enter while a group of ethnic minority youngsters were refused entry into a number of places. Doormen from three different nightclubs were subsequently sentenced by the City Court of Copenhagen – at least partly - based on this evidence. These were criminal cases under the Act on the Prohibition of Discrimination due to Race from 1971 and the situation testing was invoked as evidence.

Typically journalists and NGOs have used situational testing as a way of exposing discriminatory practices, especially by private businesses or in specific sectors of society.

To the author's knowledge there is no civil court case law on this issue.

### **2.3 Indirect discrimination (Article 2(2)(b))**

#### **a) Prohibition and definition of indirect discrimination**

In Denmark indirect discrimination is defined and prohibited in national law.

Definition of indirect discrimination: Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of e.g. a particular racial or ethnic origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary, cf. Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(3) of the Act on Ethnic Equal Treatment.

#### **b) Justification test for indirect discrimination**

Each case of alleged indirect discrimination must be individually assessed. The assessment must be adapted to the development of society. Legitimate aims could be safety, health or hygiene.<sup>80</sup>

From an overall perspective Danish case law (including decisions from the Board of Equal Treatment) on indirect discrimination seems to be in accordance with the Directives. However, there are only few judgments from the Supreme Court clarifying the state of the law with regard to indirect discrimination.

In a judgment of 12 September 2014 the Supreme Court assessed the question of indirect discrimination in a case of reorganising in a hospital and resulting redundancies.<sup>81</sup> The case dealt with a nursing assistant who had incapacities in her arm and worked in a flexible job at a large public psychiatric hospital. The parties of the case agreed that the nursing assistant had a disability. In the case the hospital had closed down open psychiatric units and dismissed a large number of employees based on a prioritisation of employees according to a number of general criteria. The Court found that the dismissal criteria of psychical strength and flexibility put the nursing assistant in a worse off situation than other employees. However, the court concluded that the differential treatment was legitimate because of the actual change in working tasks after the reorganization. The Court also stated that the dismissal could not have been avoided by establishing reasonable accommodation according to section 2(a) of the Act on Prohibition of Discrimination in the

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<sup>80</sup> Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

<sup>81</sup> Supreme Court Judgment of 12 September 2014 in Case No. 163/2013.

Labour Market etc. The Court concluded that the dismissal was a necessary means and that it did not constitute indirect discrimination because of disability.

In another judgment, the Supreme Court accepted a supermarket's wish to be politically and religiously neutral as a legitimate aim and found that a clothing requirement as a means to achieve that aim was appropriate and necessary.<sup>82</sup> In the case the Supreme Court found that the dismissal of a female employee for having worn a headscarf for religious reasons in opposition to the rules on clothing did not amount to illegal differential treatment. The clothing rules in the supermarket applied to every employee and the rules were consistently enforced. The Court recognised that the prohibition of wearing a headscarf when having direct contact with customers would mainly affect Muslim women but found that differential treatment was objectively justified in the performance of the work. The judgment seems to accept a very wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities. The wish to appear politically and religiously neutral to the customers was accepted by the Supreme Court as a legitimate purpose.

In Decision No. 259/2012 the Board of Ethnic Equality concluded that it was not a violation of the law to ask a job applicant if she would take off her religious headscarf during working hours. The case is in line with the Supreme Court headscarf decision described above and illustrates that it is legal for companies to establish clothing rules prohibiting the wearing of headgear.

It can be questioned whether this rather wide interpretation of "legitimate purpose" in the headscarf cases is compatible with the directives.

#### c) Comparison in relation to age discrimination

In relation to age discrimination, Danish law does not specify how a comparison is to be made.

### **2.3.1 Statistical evidence**

#### a) Legal framework

In Denmark there are general national rules permitting data collection, however, to a very limited extent.

Restrictions on data collection arise from legislation on personal data protection. Without an explicit consent from the individual in question, at the outset Danish law<sup>83</sup> does not permit the collection of data on race or ethnicity, religion, political, religious or philosophical conviction, membership of unions and information related to health or sexual relations. Disability is not directly mentioned in the Act on Personal data.

On the labour market, section 4 of the Act on Prohibition of Discrimination in the Labour Market etc. contains an even stricter rule than the general Act on Personal Data protection sensible data. Section 4 of the Act on Prohibition of Discrimination in the Labour Market etc. prohibits employers to ask for, obtain, receive or use information about the race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin of a job applicant or an employee. Neither anonymity nor informed consent or any other exemption will allow an employer to ask about or use such information about ethnic origin etc.

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<sup>82</sup> Printed judgment in U.2005.1265H.

<sup>83</sup> Act on Personal Data, no. 429 of 31 May 2000 [*Persondataloven*] with later amendments and Consolidated Act on Statistics Denmark [*Lov om Danmarks Statistik*] nr. 599 of 22 June 2000 with later amendments.

Whether the aim is to obtain statistical data for litigation or for measuring the success of a diversity management initiative, the only way to retrieve data on ethnic origin of employees is by the so-called Personal Number method (CPR method). The CPR method is a tool to collect data on the ethnic composition of staff and show trends in recruitment. It is based on data retrieved via the so-called CPR number – a personal number consisting of birth-date and a four digit code – that allows Statistics Denmark [*Danmarks Statistik*] to collect data on country of birth, parents' country of birth and citizenship.<sup>84</sup> To avoid revealing the personal data of identifiable persons, information is provided in a format that ensures anonymity and individual data protection, e.g. by showing benchmark numbers for a sector or a group of entities. Thus, only relatively large companies are able to make such anonymous data collection after the CPR-method.

Data on the age of employees may be retrieved from official surveys on the population as a whole or on sectors or branches of industry from Statistics Denmark. Data on age may also be compiled by labour market organisations, employer's organisations or by individual employers.

According to section 9(2) of the Act on Prohibition of Discrimination in the Labour Market etc. positive action measures may be initiated by public measures or according to other rules. Such positive measures have been initiated within public authorities as part of diversity management programmes or recruitment programmes aiming at achieving better representation of ethnicity among staff members. Private companies cannot independently initiate such positive measures. A specific legal basis for positive measures is required by section 9(2) of the Act.

With regard to age and disability, it is possible for private companies to take positive measures according to Section 9(3) of the Act.

In Denmark statistical evidence is permitted to establish indirect discrimination in civil court cases. It is permitted by the general admissibility conditions of such evidence in court according to Chapter 32 of the Administration of Justice Act.<sup>85</sup>

According to the preparatory work to the Act on Ethnic Equal Treatment, the assessment of whether a criterion will place persons of a certain race or ethnic origin at a particular disadvantage can be made on the basis of statistical material which shows that the criteria actually place the group of persons proportionately at a particular disadvantage to other persons. Furthermore, it is stated that if it is not possible to produce statistical material, the assessment can be made in any other way demonstrating that the criteria are likely to have this effect.

The same statement regarding statistical material and indirect discrimination is not found in the preparatory work to the Act on the Prohibition of Discrimination in the Labour Market etc.

## b) Practice

Generally statistical evidence to establish indirect discrimination is used very little in practice in Denmark.

Statistics on the place of birth of immigrants and their descendants have been used to support arguments of indirect discrimination in media coverage of situations where, for example, people living in certain streets or neighbourhoods have been denied access to insurance schemes.

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<sup>84</sup> Publication on Registration of the Ethnic Origin of Employees (14 December 2005) [*CPR-opgørelse af medarbejderstabens oprindelse, Beskæftigelsesministeriet og Institut for Menneskerettigheder*].

<sup>85</sup> Consolidated Act No. 1308 of 9 December 2014 with later amendments.

In court cases statistics have primarily been used in cases of gender and age discrimination. Statistics have not been used in cases of indirect discrimination on account of the other discrimination grounds, except as an argument that a defendant did hire staff with ethnic minority background and thus according to the defendant did not discriminate ethnic minorities.<sup>86</sup> There have been no debates or developments regarding the use and admission in courts of statistical evidence.

Only one published civil court case on discrimination illustrating the use of statistical evidence has been found. In a judgment from 2010 the Eastern High Court established age discrimination in a case where public employees had been relocated to another part of the country.<sup>87</sup> In that case the employees as well as the employer put forward statistics about the age composition of the employees in the relevant departments as relevant evidence material.

In decisions by the Board of Equal Treatment on age discrimination, statistical evidence is often used.

In 2014, a number of complainants used statistical data in an effort to document that age discrimination had taken place in situations of major lay-offs. One example is a case of workforce reduction in which 63 out of 149 employees in a technical department were dismissed.<sup>88</sup> At the time of dismissal 22.8 % of the employees were above 55 years of age corresponding to 1/5 of all employees in the department. Employees above 55 years of age made up 1/3 of the dismissed employees. Thus, according to the Board, the employer had dismissed a relatively large part of the older employees and the employer thus had to prove that discrimination on account of age had not taken place.

## **2.4 Harassment (Article 2(3))**

### **a) Prohibition and definition of harassment**

In Denmark, harassment is defined and prohibited in national law.

Harassment explicitly constitutes a form of discrimination, cf. Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3 (4) of the Act on Ethnic Equal Treatment.

Definition of harassment: Harassment shall be deemed to be discrimination when conduct related to race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. the main Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3 (4) of the Act on Ethnic Equal Treatment.

Furthermore, according to the Act on Work Environment [*Arbejdsmiljøloven*] employers are obligated to secure a healthy physical and psychological work environment.<sup>89</sup> According to this act it is a general responsibility of the employer to work against harassment in general at the individual workplace.

There is very limited case law on harassment.

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<sup>86</sup> Printed in U.2005.1265H.

<sup>87</sup> Printed in U 2010.603 Ø.

<sup>88</sup> Board of Equal Treatment, Decision No. 102/2014 of 7 May 2014.

<sup>89</sup> Consolidated Act Nr. 1072 of 7 September 2010 with later amendments.

In a case for the Board of Equal Treatment the complainant argued that he had experienced discrimination from a bank.<sup>90</sup> The complainant had called the bank several times on the same day to ask questions regarding a particular loan. He argued that the bank advisor had treated him in a racist way by refusing to talk English to him, by refusing to talk more slowly in Danish and by stating that he should learn Danish or move back to his home country. The Board concluded that the complainant had experienced discrimination in the form of harassment. In the case, harassment was substantiated by written explanations by witnesses as well as by a subsequent written apology from the bank.

In Decision No. 53/2011 from the Board of Equal Treatment, a medical doctor with southern European background felt harassed by his colleagues and managers at the hospital because of his lack of Danish language capabilities. In spite of the fact that the complainant without doubt had experienced negative and unwanted behaviour, the Board argued that the behaviour from the colleagues and managers could not be characterized as a gross infringement. The Board thus concluded that the prohibition of harassment in the Act on Prohibition of Discrimination in the Labour Market etc. had not been violated.

#### b) Scope of liability for harassment

According to section 3(4) of the Act on Ethnic Equal Treatment, the prohibition of harassment applies to anybody who performs tasks within the scope of the act.

Where harassment is perpetrated by an employee the main rule is that only the employer is liable.

The prohibition against harassment in Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer is the one exercising the harassment.

The guidelines to section 1(4)<sup>91</sup> state that the employer may also be liable for any harassment or other discriminatory behaviour exercised by employees as the employer has to take the necessary measures to ensure a harassment-free working environment.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of *Danske Lov* [Danish Act], which dates from 1683. According to this principle, an employer is responsible not only for his own negligence and faults, but also for faults committed by his employees acting on his behalf. However, as harassment is not part of performing a job, harassment will not be considered to be included in, or to be part of, the employer's responsibility, unless the employer has neglected his duty to instruct or correct his staff as a good employer should do to avoid harassment among employees.

As described above, only employers are obligated by Provision 3-19-2 of *Danske Lov* and by the Act on Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for harassment by an employee against another employee, the employee who experienced harassment can claim compensation from his or her colleague according to the general legislation on damage liability, and more precisely Section 26 of the Act on Damage Liability [*Erstatningsansvarsloven*].<sup>92</sup>

## 2.5 Instructions to discriminate (Article 2(4))

#### a) Prohibition of instructions to discriminate

In Denmark instructions to discriminate are prohibited in national law. Instruction to discriminate is not defined in detail. The law just prohibits an instruction to discriminate,

<sup>90</sup> Board of Equal Treatment, Decision No. 214/2014 of 10 December 2014.

<sup>91</sup> Vejledning om forskelsbehandlingsloven VEJ nr 9237 af 6 January 2006 - Chapter 5 Page 13.

<sup>92</sup> Consolidated Act No. 266 of 21 March 2014 with later amendments.



cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(5) of the Act on Ethnic Equal Treatment.

In Denmark instructions do explicitly constitute a form of discrimination. An instruction to discriminate against persons on grounds of race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin shall be deemed to be discrimination, cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(5) of the Act on Ethnic Equal Treatment.

b) Scope of liability for instructions to discriminate

In Denmark the instructor is liable for discrimination. The prohibition against instruction in Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer gives an instruction to employees to discriminate, e.g. in a recruitment situation where the employer tells the personnel manager to avoid hiring employees with an ethnic minority background. An employee who instructs a colleague to discriminate another colleague, is not covered by the prohibition, because none of them has the power of an employer to instruct.

The guidelines to the provisions of the Act on the Prohibition of Discrimination in the Labour Market etc.<sup>93</sup> state that the employer is liable for any discriminatory behaviour including instruction to discriminate exercised by employees, as the employer has to take the necessary measures to ensure a working environment without discrimination.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of *Danske Lov*. According to this principle, an employer is responsible not only for his own negligence and faults, but also for faults committed by his employees acting on his behalf. However, as an employee's instruction to discriminate is not part of performing a job, it will not be considered to be included in, or to be part of, the employer's responsibility, unless he has neglected his duty to instruct or correct his employees as a good employer should do to avoid discrimination among employees.

As described above, only employers are obligated by Provision 3-19-2 of *Danske Lov* and by the Act on Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for an instruction to discriminate by an employee, the employee who experienced discrimination can claim compensation from his or her colleagues according to the general legislation on damage liability, more precisely according to Section 26 of the Act on Damage Liability [*Erstatningsansvarsloven*].<sup>94</sup> Compensation can be claimed from the person who instructed the discrimination as well as from the person who actually discriminated.

The prohibition against instruction (discrimination on account of race and ethnic origin) in section 3(5) of the Act on Ethnic Equal Treatment only involves service providers. As in the case of employers, the provision only applies where the person giving the instruction has some authority or right of supervision over the person receiving the instruction. In other words there must be a certain hierarchical relation between the instructor and the person receiving the discriminatory instruction. A situation where a customer encourages a shopkeeper to discriminate against third parties will not be covered by the provision.

## **2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)**

a) Implementation of the duty to provide reasonable accommodation in the field of employment

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<sup>93</sup> Vejledning om forskelsbehandlingsloven VEJ nr 9237 af 6 January 2006 - Chapter 5 Page 13.

<sup>94</sup> Consolidated Act No. 266 of 21 March 2014 with later amendments.

In Denmark the duty to provide reasonable accommodation on the labour market is included in the law through Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Reasonable accommodation is described in the law but not defined in detail. Section 2(a) states that the employer shall take reasonable measure in view of the practical needs to provide a person with disabilities access to employment, to pursue employment or advance in employment, or to give a person with disabilities access to education.

The duty of reasonable accommodation applies only when the applicant with a disability has the necessary qualifications to do the job if accommodations are made. In Decision No. 82/2010 from the Board of Equal Treatment, the Board concluded that discrimination on account of disability had not taken place. The reason was that the claimant did not seem to have the qualifications required for the job in questions and thus it was legitimate for the employer to hire another candidate who was much more qualified.

#### b) Practice

According to Section 2(a) of the Act the duty to provide reasonable accommodation does not apply, if such measures would impose a disproportionate burden on the employer. National law does not define what would be a disproportionate burden. It does, however, follow directly from Section 2(a) that if the burden on the employer is sufficiently eased through public measures, the burden will not be deemed to be disproportionate.

When evaluating whether the burden placed on the employer is disproportionate, it is thus taken into consideration whether public authorities will cover some or all of the expenses. There is no obligation on the employer to apply for public funding to cover such expense. But in a concrete discrimination case before the Board or the courts, it could be detrimental to the employer, if possible funding has not been applied for. This is illustrated in a judgment from the Maritime and Commercial Court.<sup>95</sup> In this case the court concluded that discrimination because of disability had taken place since the employer did not provide for reasonable accommodation. The case dealt with L who had severe permanent backaches. Due to L's illness the employer decided to terminate the training agreement. The employer had refused a proposal by the municipality concerning a personal assistant arrangement paid by the municipality, which presumably could have fulfilled L's need for compensation. Since the court found no reason to assume that the arrangement would impose a disproportionate burden on the employer, the court awarded 97.200 DKK (€ 13.050) in compensation.

The extent of the duty on employers will always depend on a concrete assessment, which creates difficulties for employers when implementing the duty in practice. Case law gives some indications on the criteria to be used when assessing whether an accommodation is "reasonable" and the extent of the duty on employers in general.

A judgment of the Maritime and Commercial Court of 22 December 2014 dealt with a colour blind seaman.<sup>96</sup> According to Danish law, the seaman was not allowed to perform essential tasks on the ship he worked on because of his colour blindness and was therefore dismissed. The Court stated that the seaman had a disability and examined whether the employer should have established reasonable accommodation for the seaman to stay in his job. The Court concluded that the only realistic option would be to hire an extra seaman during the two weeks when the seaman in question was at sea. Such a measure would be unreasonable for the employer being a small shipping company with few employees. The judgment establishes that legal requirements preventing individuals with a particular disorder like colour blindness from performing special jobs does not mean that the disorder

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<sup>95</sup> Printed in U.2009.1948SH.

<sup>96</sup> The Maritime and Commercial Court, Judgments No. F-2-13 of 22 December 2014. Printed in U2015.1053S.

does not constitute a disability. The relevant assessment is whether the required special accommodation is reasonable or not for the employer in question.

A judgment by the Western High Court of 17 December 2014 dealt with a serviceman in a shop.<sup>97</sup> The serviceman had injured his knee during his work and in the following years he had increased sickness absence as well as problems of performing his tasks. He was dismissed and the employer stated that the reason was spending cuts and outsourcing of maintenance resulting in staff reductions. The Court found the serviceman had a disability at the time of dismissal. The Court concluded that a personal assistant paid by the local municipality could not ease the serviceman's lack of competences. Thus, the Court concluded that the differential treatment of the serviceman had been objectively justified by the consideration for the performance of those tasks that remained after the outsourcing.

The Danish Ring and Skouboe Werge cases for the CJEU (C-335/11 and C-337/11) were the basis for two judgments delivered by the Maritime and Commercial Court on 31 January 2014.<sup>98</sup> The Danish court found that the adoption of the workplace with a height-adjustable desk as well as part-time employment constituted reasonable accommodation. The two women in question were each awarded compensation equal to 12 months of salary.

In a decision from 2014 a welding controller had suffered an accident at work and injured his foot.<sup>99</sup> He started working again, had several surgeries and started eventually working part time. After a couple of years he was dismissed because of long illness. The controller argued that the dismissal was based on his disability. In its decision the Board referred to CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and decided that the damage in the complainant's left foot and the resulting functional limitations constituted a disability. The Board found that the employer had offered the complainant a part-time welding controller position, which he performed until the surgery. The Board furthermore took into account that the employer had offered a full-time or a part-time office job in another city and that the complainant had rejected this offer. On that basis the Board concluded that the employer had established facts that they had taken steps to provide reasonable and appropriate accommodation with regard to the complainant's specific needs before deciding the dismissal and that discrimination because of disability had not taken place. The case illustrates that an employer must be able to document that steps to provide reasonable accommodation with regard to an employee's specific needs have been taken before a decision on dismissal has been made.

In a judgment of the Western High Court, the Court concluded that an employer had done a reasonable effort to establish reasonable accommodation.<sup>100</sup> Before the dismissal of an employee with a disability, the employer had worked with the local job centre and labour union for a period of 6 months to find concrete solutions for the employee to operate "his" machine in a more profitable manner. As this was not possible, the dismissal of the employee was not deemed discriminatory.

In a decision from 2013 the complainant was dismissed from her employment as a healthcare assistant working in regular night shifts in a psychiatric hospital.<sup>101</sup> The complainant had been diagnosed with a malposition of her right hand little finger which made handwriting painful and more slow. The Board stated that the employer had not conducted a thorough investigation of the possibility of transferring the complainant to another department. Further, the employers had not considered the possibility of the complainant to perform her documentation tasks by means of electronic aids. All together,

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<sup>97</sup> Western High Court, Judgment No. B-2207-13 of 17 December 2014. Printed in U2015.1169V.

<sup>98</sup> The Maritime and Commercial Court, Judgments No. F-13-06 and No. F-19-06 of 31 January 2014. See U.2014.1223S for the printed judgment No. F-19-06.

<sup>99</sup> Board of Equal Treatment, Decision No. 19/2014 of 29 January 2014.

<sup>100</sup> Judgment by the Western High Court of 17 May 2013. Printed in U.2013.2435V.

<sup>101</sup> Board of Equal Treatment, Decision No. 67/2013.

the Board did not find that the employer had fulfilled the obligation to take the steps to provide reasonable and appropriate accommodation with regard to the complainant's specific needs. The Board concluded that it did not make any difference that the complainant during her employment had not asked for special accommodation herself and underlined the independent obligation of the employer to provide reasonable accommodation. Thus, the complainant was awarded a compensation of DKK 245.000 (euro 33.000).

In another decision from 2013 a teacher was dismissed in connection with a reorganization of schools in a local municipality.<sup>102</sup> The complainant was diagnosed with a paranoid psychosis and through a flex job arrangement, her working hours had been reduced and she had special arrangements to only teach classes with fewer pupils and to teach as few age groups as possible. The municipality argued that the special accommodation requirements of the complainant could not be met in a new school. In the case, the Board stated that the obligation of an employer to provide reasonable accommodation also applies in a situation where dismissals are reasoned by operational and organizational considerations. The Board concluded that the municipality had not justified that reasonable accommodation could not be provided at the new school and that such reasonable accommodation would be unduly burdensome. The Board concluded that the dismissal was a violation of the prohibition of discrimination on account of disability and the teacher was awarded DKK 300.000 (€ 40.220) in compensation (9 months of salary).

In a decision from 2012 the complainant had a serious back-disorder causing the complainant to work reduced hours.<sup>103</sup> She was dismissed after sick leave caused by the fact that she had been moved to another department in another city. The Board concluded that the dismissal constituted discrimination because of disability as the employer had not provided reasonable accommodation to enable the complainant to do her work. The case illustrates that the employer's obligation to provide reasonable accommodation includes an obligation not to move an employee with a disability.

In a judgment the Eastern High Court concluded that discrimination because of disability had taken place since the employer had not taken appropriate measures to eliminate the disadvantages of F in her work.<sup>104</sup> The case dealt with F who had a chronic hearing disability and was dismissed from her job. The reason for dismissing her was bad hearing and sick leave. It was revealed during the case, that the employer had rejected the rebuilding of F's workspace to adapt the workplace to her disability. That rebuilding would cost DKK 40.000 (€ 5375), which the court "did not regard as a disproportional burden". Also the employer did not adapt the distribution of tasks to her disability. In conclusion, F was awarded DKK 150.000 (€ 20.150) in compensation (5 months of salary).

#### c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming reasonable accommodation is the same as for claiming protection from discrimination in general.

#### d) Duties to provide reasonable accommodation outside the field of employment

In Denmark, there is no duty to provide reasonable accommodation for people with disabilities outside the employment field.

#### e) Failure to meet the duty of reasonable accommodation

If an employer denies or does not provide reasonable accommodation and if this is not justified, it will constitute indirect discrimination, cf. Section 2(a) of the Act on the

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<sup>102</sup> Board of Equal Treatment, Decision No. 230/2013.

<sup>103</sup> Board of Equal Treatment, Decision No. 276/2012.

<sup>104</sup> Eastern High Court Judgment in case No. B-2814-10 of 29 June 2011.

Prohibition of Discrimination in the Labour Market etc. referring to Section 1(3) of the Act. The reasonable accommodation case is dealt with as a case of indirect discrimination meaning that the burden of proof will be shifted cf. Section 7(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. The provision does not entail a total shift of burden of proof, but a divided burden of proof.

A victim of indirect discrimination can claim compensation from the employer according to section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. There is no penalty.

f) Duties to provide reasonable accommodation in respect of other grounds

In Denmark there is no general duty to provide reasonable accommodation in respect of other grounds in the public and private sector.

Besides of disability, only the ground of religion can involve a duty to provide reasonable accommodation. Section 81(5) of the Road Traffic Act [*Færdselsloven*]<sup>105</sup> and Paragraph 2 of a government circular (Bkg 1998 No. 518) state that male Sikhs are exempted from wearing a crash helmet when riding a motorbike since they are obliged to wear the turban outside at all times.

In a city court judgment a young Muslim woman was studying for nutrition assistant at a vocational school and had to quit her education because of the fact that the school would not exempt her from the requirement to taste pork.<sup>106</sup> In her case, the court concluded that it would be against her religion to taste dishes of pork. According to the court the vocational school could not document that it was necessary for the complainant to taste pork for her to complete the education as nutrition assistant. The judgment does not illustrate a duty to provide reasonable accommodation in a traditional sense. However, the reasoning of the court in obligating the school to make exceptions for a student like this Muslim woman is similar to the general argumentation of reasonable accommodation.

g) Accessibility of services, buildings and infrastructure

In Denmark national law does not generally require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The Danish building legislation includes a number of rules on physical accessibility that must be respected when building new constructions.<sup>107</sup> According to a regulation from 2004 regarding accessibility in connection with the rebuilding of existing buildings, a number of accessibility measures are to be taken. The regulation covers all publicly accessible buildings and commercial buildings for services and administration.<sup>108</sup>

In a concrete case, the failure of an employer to comply with this regulation could probably be used in support for the point of view that the employer did not fulfil his obligation to provide reasonable accommodation. No such cases have been found.

In Denmark national law does not contain a general duty to provide accessibility by anticipation for people with disabilities.

h) Accessibility of public documents

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<sup>105</sup> Consolidated Act No. 1386 of 11 December 2013 with later amendments.

<sup>106</sup> Holstebro city court judgment in case BS 7-189/2012 of 23 April 2013.

<sup>107</sup> Bygningsreglement 2010. Erhvervs- og Byggestyrelsen, Vejledning til kommunerne om byggesagsbehandling af tilgængelighedsbestemmelser (2008). Signe Sørensen og Pia Justesen, Tilgængelighed til Offentligt Nybyggeri, Institut for Menneskerettigheder (2013).

<sup>108</sup> Regulation no. 1250 of 13 December 2004.

No obligation exists with regard to translation of documents in Braille.

According to Disabled Peoples Organisations Denmark (DPOD) – the national NGO-umbrella for disability organisations – there is no general practice and provision of translation of public documents in Braille.

Persons with a hearing disability have the right to free sign language interpretation. According to the Act on Interpretation [Lov om tolkning til personer med hørehandicap], sign language interpretation is granted for activities that are necessary for the participation in society and in social activities.<sup>109</sup> This includes access to public services where needed.

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<sup>109</sup> Consolidated Act No. 927 of 3 July 2013.

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

##### **3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)**

In Denmark, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

All individuals within Danish jurisdiction regardless of their status, whether they have a permanent or time-limited residence permit or have status as illegal migrants, and irrespective of citizenship and nationality, are protected from discrimination according to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc.

##### **3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)**

###### **a) Natural and legal persons**

In Denmark the personal scope of anti-discrimination law does not cover legal persons for the purpose of protection against discrimination. Only natural persons are protected against direct and indirect discrimination.

On the labour market, it follows from section 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc., which specifically mentions employees and job applicants. Outside the labour market it follows from section 2 of the Act on Equal Treatment that individuals are protected against discrimination on account of their race and ethnic origin.

In Denmark the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

There is no distinction in section 2 of the Act on the Prohibition of Discrimination in the Labour Market etc. between different kinds of employers when it comes to liability for discrimination at the labour market. According to the general Danish labour law concept of employers, both natural and legal persons may be liable for discrimination as employers. The liability covers an even broader group of legal persons than the traditional Danish labour market concept of employers. Thus section 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates that the prohibition of discrimination applies to anybody who runs vocational training and assigns employment, who issues decisions on access to self-employment and who issues decisions on membership and benefits provided by trade unions or employers' associations.

Furthermore, employers can be penalized for discriminatory job advertisements according to section 8(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. (provision of penal law). It is specifically mentioned that legal persons are subject to a fine for such discriminatory job advertisements.

According to section 2 of the Act on Ethnic Equal Treatment there is no distinction between natural and legal persons when it comes to liability for discrimination outside employment.

###### **b) Private and public sector including public bodies**

In Denmark the personal scope of national law does not cover private and public sector including public bodies for the purpose of protection against discrimination. Only natural persons are protected against discrimination.

In Denmark the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination. Section 2, 3 and 8 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates the liability of employers and anybody who runs vocational training and assigns employment etc. According to section 2 of the Act on Ethnic Equal Treatment there is no distinction between the private and public sector when it comes to liability for discrimination outside employment.

### **3.2 Material scope**

#### **3.2.1 Employment, self-employment and occupation**

In Denmark, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds, cf. section 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc.

#### **3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))**

In Denmark, national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.

Section 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. covers all aspects of discrimination in relation to access to employment, to self-employment and to occupation, including selection criteria, recruitment conditions and promotion.

In a decision the complainant had applied for a job as a technician. During the job interview the employer asked the complainant whether he was a Muslim and how he felt about the traditional Danish sense of humour.<sup>110</sup> The employer argued that the question was posed in an attempt to describe the company as a good work place with many employees of different nationalities and with a cantina respecting employees e.g. not eating pork of religious reasons. However, the Board of Equal Treatment concluded that the question constituted discrimination because of religion illustrating that a "good" intention of the employer when asking a question about religion during a job interview does not make the question legal.

Another decision dealt with a woman who had been rejected a licence to run a private day-care centre for children because of her sight disability and because of the alleged importance of eye contact with small children.<sup>111</sup> The Board found that the local administration could not prove that discrimination had not taken place. Thus the woman was awarded a compensation of DKK 25.000 (€ 3360).

In general, the anti-discrimination legislation does not differentiate between the public and the private sector. However, in the public sector Danish citizenship according to the Administration of Justice Act can be a selection criterion for the police, judges etc., while in the private sector such requirements may be considered indirect discrimination due to national or ethnic origin.

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<sup>110</sup> Board of Equal Treatment, Decision No. 227/2012.

<sup>111</sup> Board of Equal Treatment, Decision No. 104/2011.



### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

- Occupational pensions constituting part of pay

In Denmark national legislation covers working conditions, including pay and dismissals, for all five grounds and for both private and public employment. Thus, Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc., prohibits public and private employers from exercising differential treatment in connection with recruitment, dismissal, transferral, promotion, and work and pay conditions.<sup>112</sup>

Occupational pensions are not mentioned specifically in the Act but are covered by the term "pay conditions" in Section 2(1) and Section 2(2) of the Act.

In an Eastern High Court Judgment, the court concluded that the termination of unemployment benefits to persons obtaining the retirement age did not constitute discrimination on account of age.<sup>113</sup> The judgment illustrates that membership of an unemployment fund is not encompassed by the Employment Directive and the Danish Act on the Prohibition of Discrimination in the Labour Market etc. It also illustrates that a forced termination of membership of an unemployment fund at the time of obtaining the retirement age does not constitute age discrimination.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

In Denmark national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

Access to all types, and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, are covered in Section 3(1) and 3(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. This provision covers any training aiming at paid employment. Paid employment must be understood in a very broad sense.

The Act on Ethnic Equal Treatment Section 2(3) states that the Act shall not apply to areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. Education and training outside the labour market - not encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. - is directly covered in Section 2(1) of the Act on Ethnic Equal Treatment.

In a decision by the Board of Equal Treatment a woman of 41 years of age complained to about age discrimination.<sup>114</sup> The reason was that the university had a regulation stating that only persons below 30 years of age could hand in prize papers. The Board found that the university provides education for the improvement of chances for future paid employment. On that background the university was bound by the Act on the Prohibition of Discrimination in the Labour market etc. Especially in this case where the aim of the prize papers was to motivate young people in choosing a research career. The Board concluded that the regulation preventing persons above 30 years of age to hand in prize papers constituted direct discrimination because of age. The decision illustrates that even

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<sup>112</sup> Art. 2(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states: "Discrimination shall be deemed to have occurred in relation to payment conditions if an equal salary is not offered for the same job or for jobs which are regarded as having the same value."

<sup>113</sup> Eastern High Court Judgment of 10 October 2012, Case No. B-3292-11.

<sup>114</sup> Board of Equal Treatment, Decision No. 237/2012.

though Universities do not provide traditional vocational training, they are encompassed by the Act on Prohibition of Discrimination in the Labour Market etc.

In a case of race discrimination at a technical school<sup>115</sup> it was decided by a city court and confirmed by the Eastern High Court that this situation was not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. but rather by the Act on Ethnic Equal Treatment prohibiting unequal treatment in goods and services, education etc. By considering a technical school as education covered by the Act on Ethnic Equal Treatment, race discrimination was covered. However, an implementation problem exists in relation to the other protected grounds: through this decision the High Court excluded students at technical schools from protection against discrimination due to age, disability, sexual orientation, religion and belief (as no provisions exist against discrimination on these grounds in the field of goods and services, education etc.). The judgment appears wrong.<sup>116</sup> It also raises concern that Danish law does not comply with the directives.

### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

In Denmark national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment, cf. 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc.

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

In Denmark national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection only extends to race and ethnic origin.

In a decision by the Board of Equal Treatment, a local municipality excluded foreigners encompassed by the Integration Act from special wage subsidy funds.<sup>117</sup> Public wage subsidies were included in Section 2 of the Act on Ethnic Equal Treatment and the Board concluded that such practice by the local municipality constituted indirect discrimination on account of ethnic origin. In Decision No. 259/2013 of the Board of Equal Treatment, a woman of Turkish origin argued that she had been discriminated against by the local municipality when she applied for early retirement pension / disability pension. The Board concluded that the Act on Ethnic Equal Treatment was applicable but that discrimination on account of ethnic origin had not taken place. In Decision No. 58/2010 by the Board of Equal Treatment, the claimant was discriminated against due to his ethnic origin when he was applying for social security.

- Article 3.3 exception

The exception in Article 3(3) of Directive 2000/78 is not directly repeated or implemented in the Act on the Prohibition of Discrimination in the Labour Market.

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<sup>115</sup> Eastern High Court, Case No. B-4028-05. Judgment of 27 June 2006.

<sup>116</sup> Finn Schwarz and Jens Jakob Hartmann, *Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven* (2011), page 70.

<sup>117</sup> Board of Equal Treatment, Decision No. 112/2014.

### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

In Denmark national legislation includes social advantages as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Complementary to this protection is Section 1 of the criminal Act on the Prohibition of Discrimination due to Race from 1971, according to which penalties are warranted for differential treatment of persons on the ground of race, skin colour, national or ethnic background, belief and sexual orientation in a number of areas of life including social advantages. Any public or private leisure facilities etc. open to the public, whether on a commercial or non-profit basis, must be offered on equal terms. According to the Act on the Prohibition of Discrimination due to Race it is also an offence to refuse admittance on the same terms as others to social centres, or similar facilities open to the public, if the refusal is based on one of the protected grounds.

In Denmark the lack of definition of social advantages does not seem to raise problems.

### **3.2.8 Education (Article 3(1)(g) Directive 2000/43)**

In Denmark national legislation includes education as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin. The protection against discrimination within education covers protection against bullying constituting harassment due to race and ethnic origin.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race from 1971 prohibits discrimination on account of race, skin colour, national or ethnic origin, belief and sexual orientation. The two laws apply to all aspects of education including university education and all types of schools.

- Pupils with disabilities

In Denmark the general approach to education for pupils with disabilities does raise problems.

It has been a goal for the Danish government and local municipalities to increase inclusion in Danish elementary school. An amendment to the Education Act was adopted in 2012 with the aim to include more students with special needs into mainstream education.<sup>118</sup> The amendments entered into force in May 2012 with the school year 2012/2013. It is an ongoing debate whether the changes have caused problems for pupils with disabilities. A report shows that children and young pupils with disabilities are doing worse than other pupils in the Danish schools.<sup>119</sup>

Children with disabilities are increasingly being included in the ordinary primary schools.<sup>120</sup> Children who require special support (for instance children with disabilities) that cannot be achieved by differentiating teaching within the framework of ordinary education are offered special education and other types of special educational assistance.

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<sup>118</sup> Various information is to be found on the website of the Danish Ministry of Education:

<http://uvm.dk/Uddannelser/Folkeskolen/Inklusion-og-specialundervisning/Inklusion/Regler-for-inklusion>.

<sup>119</sup> Epinion, Uddannelsesresultater og -mønstre for børn og unge med handicap – Årgang 1990, November 2014.

<sup>120</sup> Disabled Peoples Organisations Denmark: <http://www.handicap.dk/politik/inklusion-i-uddannelse/øget-trivsel-og-faglighed-for-elever-med-handicap-i-grundskolen/>.

The purpose of special educational assistance is to enhance the development of children with special needs so that the children can, among other things, continue their education or take up employment. It includes, for instance, provision of advice to teachers, parents and other relevant persons, special educational materials and facilities, education specially focusing on the learning ability of the child, personal assistance, special activities focusing on relieving a disability etc., cf. Section 2 of the Administrative Order on Special Education.<sup>121</sup>

- Trends and patterns regarding Roma pupils

In Denmark there are no specific patterns existing in education regarding Roma pupils such as segregation.

The municipality of Elsinore set up segregated classes for Roma children from 2002. The official explanation for these segregated classes was the need to make sure that the children would show up at school in the morning. This was not believed to be an objective justification by the Council of Europe Commissioner for Human Rights<sup>122</sup> and the Complaints Committee for Ethnic Equal Treatment,<sup>123</sup> which consequently stated that the segregation of Roma children was not in accordance with the law. In 2006 the municipality decided to cease the Roma classes and allow the children back into the ordinary classes in state schools in Elsinore. No recent cases regarding Roma have been reported in Denmark.

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

In Denmark national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 1 in the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the ground of race, colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life including the supply of goods and services. The discrimination grounds of age and disability are not covered. Any public or private supply of goods and services open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

It is therefore a criminal offence to refuse a person admittance on the same terms as others to a place, restaurant, shop, or the like that is open to the public, if the refusal is based on one of the grounds protected by the Act on the Prohibition of Discrimination on grounds of Race etc. In practice the Act has been very difficult to use in the area of goods and services, although some doormen have been fined for denying access to restaurants, night clubs etc.

The Board of Equal Treatment has dealt with a number of cases on discotheques and bars dealing with alleged ethnic discrimination in relation to access. In 6 cases from 2014 the Board dismisses the complaints and states that since there is no consensus on what grounds the doormen have refused the complainants, the cases can only be resolved by oral testimonies from parties and witnesses.<sup>124</sup> Even though the Board in principle accepts

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<sup>121</sup> Regulation No. 693 of 20 June 2014 [Bekendtgørelse om folkeskolens specialundervisning og anden specialpædagogisk bistand].

<sup>122</sup> Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

<sup>123</sup> Decisions of 5 December 2005, 730.7.

<sup>124</sup> Examples from 2014 are Decisions from the Board of Equal Treatment No. 64/2014 of 19 March 2014, No. 75/2014 of 2 April 2014, No. 90/2014 of 30 April 2014, No. 122/2014 of 24 June 2014, No. 145/2014 and No. 146/2014 of 20 August 2014.

written testimonies from parties, such written testimonies cannot resolve clear evidence issues of “words against words”.

Only in two discotheque cases from 2014 the complainants were awarded a compensation of each DKK 5.000 (€ 675) for discrimination because of his ethnic origin.<sup>125</sup>

In 2014 the Board adjudicated eight identical cases on the annulment of tickets bought by football supporters in Denmark with foreign sounding names.<sup>126</sup> The complainants had bought a package of tickets for three football games that would be played on the home ground of the Danish football team. They had all bought tickets for the section reserved for supporters of the Danish team. The following day the complainants and around 700 other ticket buyers received an e-mail saying that their tickets had been annulled because of safety reasons. All 700 individuals who received the e-mail had non-Danish sounding names. Eight individuals complained to the Board of Equal Treatment. The Board found that it was a legitimate reason out of safety considerations to make sure that individuals who had bought tickets for the home team sections were not in reality supporters of the visiting teams. However, the Board did not find that the chosen means to obtain this aim were appropriate and proportional. The Board argued that using the criterion of non-Danish sounding names would not result in the requested safety. The conclusion was that the complainants were all victims of indirect discrimination because of ethnic origin. The Board did not award compensation in any of the cases. The complainants all had the possibility to get their tickets back before the Board adjudicated their cases.

These cases illustrates that the criterion of non-Danish sounding names is too broad to constitute an appropriate and proportional means to secure the safety of the audience and football players at a large football game. Earlier in 2014 the Board had decided that a Middle Eastern name – Jihad – in a situation of high security alert was a legitimate reason for rejecting an individual participant to a public meeting.<sup>127</sup>

- Distinction between goods and services available publicly or privately

In Denmark national law distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association). It follows from section 2(1) of the Act on Ethnic Equal Treatment explicating that goods and services available to the public are covered by the provision. The term “publicly available” in the law must be interpreted broadly. Outside falls for example goods and services made available exclusively for family members or close acquaintances.

### **3.2.10 Housing (Article 3(1)(h) Directive 2000/43)**

In Denmark national legislation includes housing as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 1 in the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the ground of race, colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life including housing. The discrimination grounds of age and disability are not covered. Any public or private housing open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

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<sup>125</sup> Decisions from the Board of Equal Treatment No. 108/2014 of 14 May 2014, No. 154/2014 of 27 August 2014.

<sup>126</sup> Board of Equal Treatment Decisions No. 133/2014, 134/2014, 135/2014, 136/2014, 137/2014, 138/2014, 139/2014 and 140/2014 of 13 August 2014.

<sup>127</sup> Board of Equal Treatment, Decision No. 13/2014 of 22 January 2014.

Section 2(1) of the Act on Ethnic Equal Treatment applies to public and private housing companies that rent houses, and to real estate companies. The term "available to the public" should be interpreted in a broad sense, but the Act does not apply to private persons sub-letting a room in their own home.

In a decision from the Board of Equal Treatment a student claimed that he had been discriminated against in connection with renting an apartment because of his ethnic origin.<sup>128</sup> The Board held that it was a violation of the Act of Ethnic Equal Treatment and the prohibition to discriminate on the grounds of race and ethnic origin, when a non-commercial (i.e. private) renter would not rent an apartment to people, who were not of Danish origin. The claimant was awarded compensation of DKK 5.000 (€ 675).

In relation to public housing, discrimination is, moreover, prohibited by the general principle of equality in administrative law.

Various initiatives have been introduced to avoid segregation and promote integration. As a rule, public housing is assigned according a waiting list, but a number of exceptions apply. This means that public housing can use criteria other than length of time on a waiting list. The intention is to attract applicants from a broader segment of the population to troubled areas with high numbers of residents outside the labour market.<sup>129</sup> This approach may result in discrimination against ethnic minorities, since they have a higher unemployment rate than ethnic Danes.

Municipalities are obliged to offer housing which is fit for permanent residence to persons with disabilities who are in need of accommodation, cf. Section 108 of Act on Social Services [*Lov om social service*].<sup>130</sup> Furthermore, they must offer accommodation for older people with a need for housing no later than two months after they have applied, cf. Section 192a of the Act.

- Trends and patterns regarding housing segregation for Roma

In Denmark there are no documented patterns of housing segregation and discrimination against the Roma.

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<sup>128</sup> Board of Equal Treatment, Decision No. 34/2010.

<sup>129</sup> Regulation on rental of public housing [*Udlejningsbekendtgørelse*] No. 1303 of 15 December 2009 with later amendments.

<sup>130</sup> Consolidated Act No. 150 of 6 February 2015 with later amendments.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Denmark national legislation provides for an exception for genuine and determining occupational requirements, cf. Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc.

According to Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., if it is of crucial significance that a person has a particular race, political opinion, sexual orientation or national, social or ethnic origin, has a particular skin colour, age or disability or belongs to a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the work in question, the minister concerned can, after having obtained a statement from the Ministry of Labour, deviate from the prohibition against differential treatment. As an example, a poultry slaughterhouse exporting to the Arab countries has received a dispensation to hire a Muslim to perform halal slaughter.<sup>131</sup>

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

- Exception for employers with an ethos based on religion or belief

In Denmark national law provides for an exception for employers with a special political opinion or an ethos based on religion or belief, cf. Section 6(1), the Act on the Prohibition of Discrimination in the Labour Market etc. None of the other discrimination grounds are covered by the exception.

According to the exemption in section 6(1) the prohibition of discrimination does not apply to employers whose establishments have the aim of promoting a certain political or religious points of view (for example a church that wants to hire a priest can exclude all applicants of another faith, because religion in this case is an occupational requirement). The same applies to organisations with a specific ethos, for example, private schools established on the basis of a specific religion.

The provision explicitly states that the requirement has to be of importance to the particular job in question and as a point of departure organisations with a religious ethos obviously are bound by the Act. Whether the requirement is important to the particular job in question is a concrete assessment, which eventually will have to be done by the Board of Equal Treatment and the courts.

In Decision 216/2012 from the Board of Equal Treatment, a female social worker complained that an organisation in a job advertisement for a position in a shelter required applicants to be members of the Danish National Church. The complainant was Jewish herself and argued that she would not have a problem doing her job with the outset in Christian values. The Board found that the work in the shelter involved work that was within the organization's core area as the complainant would have to do pastoral counselling and conversations. Thus the Board concluded that the requirement for membership of the Danish National Church in this case did not constitute direct discrimination in violation of the Act.

In Decision No. 56/2011 from the Board of Equal Treatment, a Christian organisation had a general requirement that their employees should be members of the Danish national church. The organisation posted a vacant position as an organisational consultant and required that applicants should be members of the Danish national church. The Board found

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<sup>131</sup> Information provided by the website of the Ministry of Employment:  
<http://bm.dk/da/Beskaeftigelsesomraadet/Arbejdsret/Forskelsbehandling/Forskelsbehandlingsloven.aspx>.

that it was a violation of the Act on Prohibition of Discrimination in the Labour Market etc. to have a general requirement of membership of the church. However, with regard to the concrete position as an organisational consultant, the Board stated that it was legal to require membership of the National church. The Board thus concluded that the religious requirement was encompassed by the exception in Section 6(1) of the Act since the organisational consultant should work with the core tasks of the Christian organisation.

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)**

In Denmark national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

According to Section 1(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., the Ministry of Defence can make exceptions for the armed forces in relation to age and disability. The Ministry of Defence has made use of this exception clause and exempted military personnel from the prohibition against discrimination on account of age and disability.<sup>132</sup>

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In Denmark national law includes exceptions relating to difference of treatment based on nationality.

In the public sector "Danish citizenship" is a selection criterion for the police, judges etc.<sup>133</sup> This is established by law as these are functions related to the essence of Danish sovereignty. However, public employees in most sectors are not required to be Danish citizens.

Besides from these particular job categories, requirements of nationality in the private and public sector may be considered indirect discrimination due to national or ethnic origin.

In Denmark nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

The Act on the Prohibition of Discrimination in the Labour Market etc. does not cover discrimination based on nationality, as citizenship is not encompassed by the list of discrimination grounds. Demanding a certain citizenship may constitute indirect discrimination based on ethnic origin.<sup>134</sup> Since specific citizenship is not covered by the Act, it must be assumed that the same goes for stateless persons.

The Act on Ethnic Equal Treatment also does not cover discrimination based on nationality, as citizenship is not encompassed by the list of discrimination grounds.

##### **b) Relationship between nationality and 'race or ethnic origin'**

Demanding a certain citizenship may constitute indirect discrimination based on race, ethnic or national origin.

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<sup>132</sup> Executive Order no. 350 of 30 March 2012.

<sup>133</sup> Regulation No. 210 of 11 December 2000 with later amendments [Cirkulære om anvendelse af tjenestemandsansættelse i staten og folkekirken].

<sup>134</sup> Preparatory work to Act no. 459 of 12 June 1996 on the Prohibition of Discrimination in the Labour Market etc.



An overlap between discrimination on grounds of nationality and ethnicity does not seem to be the case in Denmark. Case law regarding discrimination on grounds of nationality is either dealt with as nationality discrimination (not encompassed by discrimination law) or as indirect discrimination on account of race, ethnic or national origin (encompassed by discrimination law).

In Decision No. 160/2014 of 17 September 2014 from the Board of Equal Treatment the complainant was a EU-citizen temporarily residing in Denmark. He wanted to buy some electronic equipment in a store. The cashier told him that he had to show a valid Danish ID. The complainant showed his passport and drivers-license from another EU country as well as his Danish National Health Insurance Card. The store rejected his identification and told the complainant that he had to present Danish ID if he wanted to buy goods in their store. The complainant argued that it was unlawful discrimination to reject his access to goods because of the fact that he was not a Danish citizen and because of the fact that he could "only" present a passport and a driver's license issued in another EU country. In the case, the Board argued that the Act on Ethnic Equal Treatment prohibits direct and indirect discrimination on account of race and ethnic origin and that the Act does not encompass discrimination because of nationality. The Board found that the complaint in substance dealt with discrimination because of nationality as the complainant was treated differently than other customers solely because of the fact that he could not present a Danish passport. The Board concluded that the case was not covered by the Act on Ethnic Equal Treatment and thus the Board could not hear the case. The case deals with discrimination based on nationality in the area of goods and services. It is puzzling that the Board did not discuss whether indirect discrimination based on ethnic origin could have taken place.

In Decision No. 260/2013 from the Board of Equal Treatment,<sup>135</sup> a university had used a standard scheme in which job applicants for administrative positions among other things should state their "nationality country". The Board stated that if "nationality country" reflects a demand for information about the applicant's citizenship, then it is not covered by the prohibition of discrimination. The Board, however, also stated that if "nationality country" reflects a demand for information about the applicant's ethnic or national origin, then it is a violation of the Act on prohibition of Discrimination on the Labour market etc. On that basis, the Board concludes that "nationality country" is an unclear notion likely to cause confusion as to whether it should be understood as citizenship or ethnic/national origin. According to the Board it was therefore a violation of the Act on prohibition of Discrimination on the Labour market etc. to ask for information about the "nationality country" of applicants.

There is often an overlap between the discrimination grounds of ethnic origin and national origin. In Decision No. 33/2011 by the Board of Equal Treatment, the complainant was of Russian origin and was rejected for a job as teacher and translator in Russian and English. The employer had stated that they only hired Danes or Englishmen as English teachers. The complainant had thereby established sufficient facts from which it could be presumed that the employer had discriminated against her on account of her national origin. The employer could not prove that they had rejected the applicant due to her qualifications and not because of her national origin. The complainant was awarded DKK 25.000 (€ 3360) in compensation.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

##### **a) Benefits for married employees**

In Denmark it might constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

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<sup>135</sup> Decision No. 260/2013 of the Board of Equal Treatment.

Section 1 of the Act on Prohibition of Discrimination in the Labour Market etc. prohibits discrimination on account of sexual orientation in the area of employee benefits.<sup>136</sup> Therefore such a limitation may be unlawful. No case law is known.

b) Benefits for employees with opposite-sex partners

In Denmark it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

Section 1 of the Act on Prohibition of Discrimination in the Labour Market etc. prohibits discrimination on account of sexual orientation in the area of employee benefits.<sup>137</sup> No case law is known.

#### **4.6 Health and safety (Article 7(2) Directive 2000/78)**

a) Exceptions in relation to disability and health/safety

In Denmark there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78). Section 9(3) of the Act on Prohibition of Discrimination in the Labour Market etc. allows for the establishment of positive measures to improve the employment possibilities of individuals with a disability. It does not directly refer to health and safety issues.

With regard to the other discrimination grounds, the only exception is found in Section 81(5) of the Road Traffic Act [Færdselsloven]<sup>138</sup> and § 2 of Regulation on Crash Helmets,<sup>139</sup> which states that male Sikhs are exempted from wearing a crash helmet when riding a motorbike, since they are obliged to wear the turban outside at all times. There are no known exceptions concerning the other discrimination grounds.

In an Eastern High Court judgment a Sikh carried a kirpan knife as a religious symbol in a public space.<sup>140</sup> The Court found that there was no exception in the Act on Small Arms [Våbenloven]<sup>141</sup> in relation to religious symbols. The Court therefore held the kirpan to be a knife and consequently there had been a violation of the Act. The kirpan was confiscated, but a fine was annulled because the Court considered the reason for wearing the kirpan as mitigating circumstances. The Court did not find the sanction to be a violation of Article 9 of the ECHR. The Danish courts made no reference to any ECtHR decisions or judgments. The issue of reasonable accommodation was not as such argued in the case. The judgment illustrates that there are no religious exceptions in relation to the Act on Small Arms.

#### **4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

In Denmark national law provides exceptions for direct discrimination on age. Subsection 3, 4, 5 and 6 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. allow for direct discrimination due to age.

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<sup>136</sup> On 12 June 2012, an Act on marriage between two people of different sexes and between two persons of the same sex was passed to replace the law on same sex unions. See Consolidated Act no. 1096 on Marriage of 7 October 2014 with later amendments.

<sup>137</sup> On 12 June 2012, an Act on marriage between two people of different sexes and between two persons of the same sex was passed to replace the law on same sex unions. See Consolidated Act no. 1096 on Marriage of 7 October 2014 with later amendments.

<sup>138</sup> Consolidated Act No. 1386 of 11 December 2013 with later amendments.

<sup>139</sup> Regulation No. 518 of 3 July 1998.

<sup>140</sup> Weekly Law Journal, U.2007.316Ø.

<sup>141</sup> Consolidated Act No. 1005 of 22 October 2012 with later amendments.

- Justification of direct discrimination on the ground of age

In specified circumstances direct discrimination on the ground of age is justified.

According to Section 1(a), the Minister of Defence can decide to except armed forces in active duty from the prohibition against differential treatment due to age and disability (see Section 3(4) of the Directive).

Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, provided that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary (see Article 6 of the Directive).

A Supreme Court judgment of 27 August 2013 dealt with an employee who was working in a telecommunications company.<sup>142</sup> His employment was covered by an existing collective agreement. The collective agreement contained a provision for retirement without notice at the end of the month in which the employee reached the age of 67. The Supreme Court stated that the main objective of the mandatory retirement age of 67 years was to have a lower average age and thus a more appropriate age distribution among employees in the telephone company. Where possible the aim also was to achieve a necessary reduction of the workforce by age-related departures rather than dismissals. The Supreme Court referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and concluded that a forced retirement age of 67 years constituted appropriate and necessary means to achieve these purposes. The case illustrates that an appropriate age distribution and reduction of the workforce by age-related departures rather than dismissals is a legitimate purpose that justifies the maintaining of the forced retirement age in a collective agreement.

A Western High Court decision of April 12, 2012 dealt with a collective agreement between an airline and a union, which had a compulsory retirement age of 60 years. With reference to C-447/09 *Prigge vs. Lufthansa*, the High Court concluded that a dismissal solely based on the regulation in the collective agreement and the internal safety-regulations constituted discrimination due to age. The reason was that the internal safety-regulations were not found to be objectively and reasonably justified by a legitimate aim.

Section 5(a)(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that individual and collective agreements that prescribe the termination of employment at the age of 70 years can be maintained. Subsection 4 does not mention that such provisions in collective agreements must meet the proportionality test, as is the case in Subsection 3. In other words, direct discrimination due to age before the age of 70 (in existing collective agreements) can be maintained if the proportionality test is met. From the age of 70, direct discrimination does not need to meet the proportionality test, if it is part of a collective agreement. The same applies for a retirement age of 70 agreed upon in an individual employment agreement.

By Act No. 1489 of 23 December 2014, Section 5(a)(4) of the Act on Prohibition of Discrimination on the Labour Market etc. will be repealed. According to this Act neither individual employment contracts nor collective agreements on automatic termination of employment by the age of 70 can be entered into from January 1, 2016. It also follows from this Act that previous individual contracts on automatic termination cannot be enforced after January 1, 2016. Collective agreements on automatic termination are, however, valid until the time when the collective agreement in question can be denounced.

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<sup>142</sup> U.2013.3130H.

With regard to employment, payment and dismissal, Section 5(a)(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination of young people below 18 years of age if their payment and salary is covered by a collective agreement.

A Supreme Court judgment from 14 November 2013 deals with a 16-year old who was appointed in a supermarket.<sup>143</sup> During his employment he received a salary that was significantly lower than the salary that his 18 years old colleagues received. When the young employee turned 18 years, he was dismissed due to the fact that according to the collective agreement in the area, he would now have the right to a higher salary. The parties of the case agreed that the collective agreement in question was in accordance with section 5a(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the issue before the Supreme Court was whether section 5a(a) of the Act on Prohibition of Discrimination in the Labour Market etc. violated EU law by going further than allowed by article 6(1) of Directive 2000/78/EC. The Supreme Court held that section 5a(5) was justified by the need to ensure integration of young people under 18 in the labour market. The reasoning was that employers without this scheme would be less likely to hire young people below 18 years of age. The ability to dismiss the young people when they turned 18 years was seen as an appropriate means to achieve the objective of promoting young people's integration in the labour market. Thus, section 5a(5) of the Act on Prohibition of Discrimination in the Labour Market etc. did not violate EU law.

With regard to employment, payment and dismissal, Section 5(a)(6) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination of young people below 15 years of age if their employment is not covered by a collective agreement.

It is also provided that under certain circumstances, differential treatment is allowed against children below 18 years of age if their employment is regulated by collective agreements. Differential treatment is also allowed against children below 15 years of age even if their employment is not regulated by collective agreement.

Furthermore, Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regards to senior workers to promote the employment of elderly people.

Section 9(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. also allows for age requirements imposed by other legislation, if such requirements are established in order to protect children and young people.

a) Permitted differences of treatment based on age

In Denmark national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

See above.

b) Occupational pension schemes' fixed ages for admission or entitlements

In Denmark national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2). According to Section 6(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., age requirements can be set for admission to occupational pension schemes – such requirements must not, however, result in sex discrimination.

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<sup>143</sup> Supreme Court judgment of 14 November 2013, Case 185/2010. Judgment printed in U2014.470H.

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

In Denmark there are special conditions set by law for older workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regards to senior workers with a view to promoting the employment of elderly people.

According to Section 16(4) of the Act on Equal Treatment of Men and Women regarding Occupation etc. [*Ligebehandlingsloven*], the burden of proof is reversed when a person is dismissed during pregnancy or maternity leave.<sup>144</sup> In these situations the employer must prove that the dismissal was not motivated by these reasons.

There are no special conditions set by law for younger workers.

According to Section 41 of the Act on Social Services, the municipal council is under an obligation to contribute to the reimbursement of additional costs necessary for the homecare of children under the age of 18 with a permanently reduced functional capacity. It is a requirement that the extra costs are caused by the reduced capacity.

According to Section 42 of the Act on Social Services, municipal councils must reimburse a portion of the earnings lost by persons who support an underage child at home with a permanently reduced functional capacity. It is a requirement that it is necessary to take care of the child at home because of the reduced functional capacity and that it is most suitable that the child is cared for by the mother or the father.

According to Section 43 of the Act on Social Services, municipal councils must provide an additional payment for up to three months to unemployed persons who receive a reimbursement under Section 42.

#### **4.7.3 Minimum and maximum age requirements**

In Denmark there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

It is not prohibited to have provisions in collective agreements regarding special rules on payment etc. for young people under the age of 18, cf. Section 5(a)(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. See above (4.7.1) for the Supreme Court judgment of 14 November 2013 on this particular issue in Section 5(a)(5).

According to Section 5(a)(6), the prohibition against differential treatment due to age does not apply in regard to employment, conditions of pay and dismissal for young people under the age of 15. This is also the case, when their employment is not regulated by a collective agreement.

Section 43(a) of the Civil Servants Act [*Tjenestemandsløven*] poses a mandatory retirement for priests when they turn 70 years of age.<sup>145</sup> The provision was dealt with in Decision No. 41/2014 of 5 March 2014 of the Board of Equal Treatment. In the case the complainant was a priest and arguing that it constituted discrimination on account of age that he had to retire when he turned 70 years of age when all the other employees at his workplace (the organist, the verger, the parish clerk etc.) could continue working after

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<sup>144</sup> Consolidated Act No. 645 of 8 June 2011 with later amendments.

<sup>145</sup> Consolidated Act No. 488 of 6 May 2010 with later amendments.

they turned 70 years of age. The Board argued that the Danish parliament amended the Civil Servants Act and the rules on forced retirement in 2008 and by that occasion kept the forced retirement of priests, deans and bishops at their 70 years of age. According to the Board, the Danish parliament at that time must have taken the view that section 43(a) of the Civil Servants Act was not a violation of the prohibition of age discrimination. The Board furthermore argued that the Employment Equality Directive, the Act on Prohibition of Discrimination on the Labour Market etc. as well as case law from Danish courts and the CJEU illustrate that under certain conditions exceptions from the prohibition of age discrimination would be allowed. The Board directly referred to article 6 of the Employment Equality Directive. The Board concluded that it did not find reasons to set aside the assessment of the Danish parliament. The exception from the prohibition of age discrimination in the Civil Servants Act was therefore justified.

There is no minimum age for judges and bailiffs but a maximum age. According to Section 34(2) of the Civil Servants Act judges and bailiffs must also retire when they reach the age of 70 years.<sup>146</sup> There is a minimum age for police officers. Applicants to the National Police College must be 21 years of age.<sup>147</sup>

#### **4.7.4 Retirement**

##### **a) State pension age**

In Denmark there is a state pension age, at which individuals are entitled to begin collecting their state pensions according to the Act on Pensions [*Pensionsloven*].<sup>148</sup> The retirement pension is an age-determined pension payable to women and men of 65 years and over if they are born before 1954. If they are born in or after 1954 the pension age, increases to 67 years of age.

The pension remains payable even if the pensioner works. The pension will, however, be reduced on the basis of the recipient's income.

If a person is entitled to a retirement pension, he or she can postpone the payment of the pension to a time after he or she has turned 65 if retirement is postponed.

##### **b) Occupational pension schemes**

In Denmark there is no fixed age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. Occupational pension schemes and other employer-funded pension arrangements are not legally regulated. They are either a part of collective agreements or individual arrangements. There are different age limits in the different collective agreements and different individual arrangements.

##### **c) State imposed mandatory retirement ages**

There is no general state-imposed retirement age.

However, in some areas retirement ages are set by collective agreements for certain professions, see below under d). Furthermore, for some civil servants there is a state-imposed retirement age, as the Act on Civil Servants sets an age limit for certain civil servants working within the judiciary as well as for priests according to which they are dismissed from the end of the month where they turn 70.<sup>149</sup>

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<sup>146</sup> Consolidated Act No. 488 of 6 May 2010 with later amendments.

<sup>147</sup> Website of the National Police Commissioner's Office:  
[https://www.politi.dk/en/About\\_the\\_police/admission/](https://www.politi.dk/en/About_the_police/admission/).

<sup>148</sup> Section 1a of Consolidated Act No. 10 of 12 January 2015.

<sup>149</sup> See Section 34(2) and section 43(2) of Consolidated Act No. 488 of 6 May 2010 with later amendments.

d) Retirement ages imposed by employers

In Denmark national law to a limited extent permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and by collective bargaining.

According to Section 5(a)(4) of the Act on the Prohibition of Discrimination in the Labour Market etc., the provision regarding differential treatment due to age does not apply to provisions regarding age limits laid down in or agreed upon in collective agreements when the employee has reached the age of 70. Provisions on retirement ages below 70 years of age violate the law unless they are derived from existing collective agreements and are legitimate and proportionate, cf. Section 5(a)(3).

By Act No. 1489 of 23 December 2014, Section 5(a)(4) of the Act on Prohibition of Discrimination on the Labour Market etc. will be repealed. According to this Act neither individual employment contracts nor collective agreements providing for automatic termination of employment by the age of 70 can be entered into from January 1, 2016. It also follows from this Act that previous individual contracts providing for automatic termination cannot be enforced after January 1, 2016. Collective agreements on automatic termination are, however, valid until the time when the collective agreement in question can be re-negotiated.

e) Employment rights applicable to all workers irrespective of age

Protection of employment rights is covered both by legislation and by collective agreements. In general the protection does not depend on age.

For instance, the rights of an employee are not lost because he or she is still employed late in life. If a person fulfils the requirement of the Salaried Employees Act he or she will be covered by the Act no matter how young or old the person is.<sup>150</sup> A person not covered by Salaried Employees Act will often be covered by a collective agreement.

It has been a disputed question whether Section 2(a) of the Salaried Employees Act is in conflict with the Employment Directive and the general EU principle on non-discrimination because of age.<sup>151</sup> According to previous settled Danish case law on Section 2(a), there is no entitlement to a severance allowance where a private pension scheme to which the employer has contributed allows payment of an old-age pension on termination of the employment relationship, even if the employee does not wish to exercise his right to retirement. In CJEU Case C-499/08 Andersen, the Danish provision was found to be in conflict with the Employment Directive. In judgments of 14 January 2014 the Danish Supreme Court ruled on the consequences of the CJEU Andersen judgment.<sup>152</sup> The Supreme Court concluded that a public employer is not allowed to use Section 2(a)(3), if the employee temporarily does not wish to exercise his right to retirement because of the fact that he wants to pursue a professional career. The Supreme Court established that it is illegal to cut off such public employees from their right to severance allowance and further, that employees who have been denied severance allowance must get their severance allowance with interest rate. However, according to the Supreme Court such

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<sup>150</sup> Consolidated Act No. 81 af 3 February 2009 with later amendments.

<sup>151</sup> Paragraph 2a of the Salaried Employees Act contains the following provisions on severance allowances:

1. In the event of dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.
2. The provision laid down in subparagraph (1) shall not apply if the employee is entitled to an old age pension on termination of the employment relationship.
3. No severance allowance shall be payable, if the employee will – on termination of the employment relationship – receive an old age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years.

<sup>152</sup> Supreme Court judgments of 17 January 2014. Printed in U2014.1116H and U2014.1119H.

employees are not entitled to compensation for age discrimination according to Section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. In the concrete cases in question the employers had paid the severance allowance very quickly after it had been established that the employees according to EU law were entitled to the severance allowance. The Supreme Court therefore concluded that there was no basis for requiring the employers to pay compensation for age discrimination according to the Act on the Prohibition of Discrimination in the Labour Market etc.

On 22 September 2014, the Supreme Court issued a decision on reference for a preliminary ruling from the CJEU also regarding Section 2(a)(3) of the Salaried Employees Act. The Supreme Court's request for a preliminary ruling concern the interpretation of the general unwritten EU principle on non-discrimination because of age as well as its possible horizontal direct effect between private parties.<sup>153</sup> In its decision, the Supreme Court states that in a situation - like the Andersen case - where the employee is a public employee, the employee can invoke the Employment Directive directly, which will result in a disregard of Section 2(a)(3) of the Salaried Employees Act. The Supreme Court, however, has asked the CJEU of its opinion when it comes to a private employee who has been cut off his right to severance allowance but who cannot directly invoke the Employment Directive because of the fact that his employer is a private employer.

As illustrated it has been clearly established in case law that Section 2(a)(3) of the Salaried Employees Act did not comply with EU law. In November 2014 the government put forward a Bill to revoke Subsection 2 and 3 of Section 2(a) of the Salaried Employees Act.<sup>154</sup> The Bill was adopted on 27 January 2015 and conflicts with EU law in this area have ceased to exist.<sup>155</sup> All dismissed employees are now entitled to severance allowance if they have been employed in the same undertaking for 12 years or more.

f) Compliance of national law with CJEU case law

In Denmark national legislation is in line with the CJEU case law on age regarding compulsory retirement.

#### **4.7.5 Redundancy**

a) Age and seniority taken into account for redundancy selection

In Denmark national law does not permit age or seniority to be taken into account in selecting workers for redundancy. It follows from Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc., that it constitutes illegal discrimination to take age into consideration in selecting workers for redundancy.

The Board of Equal Treatment in Decision No. 95/2014 from 7 May 2014 dealt with a 62-year-old electrician who was dismissed from his job in a supermarket with more than 60 other colleagues. The Board argued that there was a higher percentage of dismissed employees among the employees who were 55 years old or more. In the end the Board concluded that the man had been discriminated against because of his age. The electrician was awarded a compensation of DKR 270.000 (€ 36.000) corresponding to approximately nine months of salary.

b) Age taken into account for redundancy compensation

In Denmark national law provides compensation for illegal redundancy. If so the amount of compensation is not affected by the age of the worker.

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<sup>153</sup> Supreme Court Decision in Case No. 15/2014 of 22 September 2014.

<sup>154</sup> Ministry of Employment, Bill No. 84 of 26 November 2014.

<sup>155</sup> Act No. 52 of 27 January 2015.



If a redundancy is judged illegal, workers can be awarded compensation according to national law. The Dismissal Board [Afskedigelsesnævnet] adjudicating cases on redundancies covered by collective agreements has developed a 25-year rule in its case law. It follows from this rule that an employer at the outset has an obligation, if possible, to refrain from dismissing a person who has been employed for 25 years or longer. If an employee with seniority of 25 years or more is dismissed, the burden of proof shifts to the employer, who has to prove that there were strong reasons for dismissing this particular person. There is no case law indicating that the age of the worker has an influence on the size of the compensation awarded.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

In Denmark national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

#### **4.9 Any other exceptions**

In Denmark, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

## **5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)**

### **a) Scope for positive action measures**

In Denmark positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law. There is, however, no general provision for special or positive measures in Danish law embracing all the discrimination grounds.

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation or national, social or ethnic origin, age or disability by virtue of other legislation, rules other than legislation and other public measures. Such special measures require legal authority and are primarily to be taken by the minister through public projects. According to the preparatory work, Section 9(2) of the Act is primarily directed at the public sector and general projects improving integration of ethnic minorities.

The right to take special measures does not apply to private employers who want to improve employment opportunities for marginalized groups. Thus legislation makes it difficult for private employers to do active equal opportunity work in practice. The fact is that even simple outreach initiatives can be claimed to discriminate the groups that are not the target for the individual outreach initiatives.

Further, private employers who are interested in doing active equal opportunity work (not conflicting with the prohibition of discrimination) are met with another legal barrier. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. contains a rule on data collection that is much stricter than the general Act on Personal Data. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits employers to ask for, obtain, receive or use information about the race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin of a job applicant or an employee. This rule makes it difficult in practice for private employer to measure the results of their equal opportunity initiatives.

The legislative barriers in the Act on the Prohibition of Discrimination in the Labour Market etc. are assumed to prevent private employers from being active in creating actual equal opportunities on the labour market.

According to Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., it is possible for private employers to take positive measures in relation to older persons and persons with disabilities.

Outside the labour market, section 4 of the Act on Ethnic Equal Treatment allows for the maintenance or adoption of specific and temporary measures to prevent or compensate for disadvantages linked to racial or ethnic origin. Both public authorities and private organisations and entities can initiate such measures.

### **Race and ethnic origin**

In the guidelines to Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., lawful public positive measures encompass projects initiated by the different ministries as part of national integration schemes, including projects with the aim of improving the qualifications of persons with an ethnic minority background. The guidelines underline that only public programmes with the aim of improving access to employment are possible. Preferential treatment of persons belonging to one of the discrimination grounds is not allowed.

The preparatory work to Section 4 of the Act on Ethnic Equal Treatment states that there has to be an *actual* disadvantage linked to racial or ethnic origin in order for specific measures to be initiated. It is also stated that it is possible for public authorities and private organisations and entities to initiate specific measures. The Act only covers equal treatment outside the labour market.

### **Age and disability**

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to disability and age, allowing for a number of legislative or public measures that promote the employment opportunities of the elderly and persons with a disability.

According to Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., it is possible for public and private employers to take concrete positive measures in relation to "older" age and disability. The purpose of the positive action has to be the improvement of employment possibilities for persons with disabilities or for senior employees. If job applicants have the same qualifications, it is thus possible for the employer to prefer the applicant with the disability or the "older" age. It is only if the two applicants are equally qualified, that a private employer may choose the person with the disability instead of the person without.

The Act on Compensation for Persons with Disabilities in the Labour Market<sup>156</sup> promotes the integration of persons with disabilities into the job market. This act focuses on how compensation for impairments in the labour market is best provided and sets out general rules on how to promote and enhance employment for persons with (special) difficulties in finding a job. The general aim of the act is to enhance the integration of persons with disabilities into the labour force by means of affirmative action and various other compensatory measures. Section 2 of the Act provides for preferential treatment of equally qualified job applicants with a disability to positions in the public administration. It also states that job applicants for positions in the public administration who have a disability have the right to a job interview.

### **Religion or faith**

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to religion, allowing for a number of legislative or public measures that promote the employment opportunities of persons from different religions.

Besides of such possible public measures, there are no provisions in Danish law explicitly allowing for positive measures on grounds of religion.

### **Sexual orientation**

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to sexual orientation, allowing for a number of legislative or public measures that promote the employment opportunities of persons with different sexual orientations.

Besides of this, there are no provisions in Danish law explicitly allowing for positive measures on grounds of sexual orientation.

b) Main positive action measures in place on national level

There are no important measures for positive action in Denmark.

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<sup>156</sup> Consolidated Act No. 727 of 7 July 2009 with later amendments.

## 6 REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In Denmark the following procedures exist for enforcing the principle of equal treatment:

#### *Civil courts:*

The lower city courts, the high courts, the Maritime and Commercial Court and the Supreme Court hear cases which involve provisions of the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc., implementing Directive 2000/43 and Directive 2000/78. Judgments and decisions from civil courts are legally binding.

#### *Labour courts:*

The Labour Court and labour arbitration bodies only interpret collective agreements and adjudicate cases concerning violations of collective agreements. They do not deal with cases concerning violations of the legislation on discrimination.<sup>157</sup> Judgments and decisions from labour courts are legally binding.

However, Section 1(6) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not apply if equal protection is provided by a collective agreement. Trade unions engage in judicial procedures before the Labour Court on behalf of their members in cases concerning the violation of a prohibition against discrimination in a collective agreement. In the individual case, it is the trade union deciding whether or not it wishes to bring a case. If an individual person covered by a collective agreement wishes to initiate a case concerning the violation of collective agreements, the case must be tried at the ordinary courts and the individual must provide proof that his or her trade union has no intention of pursuing the matter before the Labour Court.

#### *Board of Equal Treatment:*

In practice most complaints of discrimination are dealt with by the administrative Board of Equal Treatment, which started functioning on 1 January 2009.<sup>158</sup> The Board deals with complaints related to discrimination based on gender, race, colour, religion or belief, political views, sexual orientation, age, disability or national, social or ethnic origin *within* the labour market. In sectors outside the labour market, the Board has the mandate to hear individual cases on discrimination because of gender, race and ethnic origin. The Board of Equal Treatment issues binding decisions and can order compensation to be paid.

The Board of Equal Treatment cannot force the parties to produce documents, give their opinion, or reveal the factual circumstances of a case. The Board secretariat can, however, request that the parties contribute to the elucidation of a case. If a party does not comply with this request within the stated time period, a new deadline will be set. If the party still does not respond, the Board can choose to decide the case based on the existing evidence, cf. Section 5 of the Act on the Equal Treatment Board. The Board can also procure expert evidence for use in specific cases, cf. Section 7 of the Act.

The Board of Equal Treatment cannot deal with a complaint if the situation is covered by a prohibition of discrimination in a collective agreement. In Decision 199/2011, the Board of

<sup>157</sup> Act no. 106 of 26 February 2008 with later amendments on the Labour Court and Labour Arbitration [*Lov om Arbejdsretten og faglige voldgiftsretter*].

<sup>158</sup> Consolidated Act No. 905 of 3 September 2012.

Equal Treatment rejected a complaint from an employee within the postal services because it was dealing with a violation of a collective agreement.

Decisions from the Board of Equal Treatment are legally binding. However, according to Section 12(2) of the Act on the Board of Equal Treatment, the Board is obliged to bring its decisions to the civil courts if they are not followed and the applicants wish to pursue the matter. Both parties to a case can also bring a Board decision to the civil courts.

In the period from January 2009 until the end of 2013 the Board of Equal Treatment issued 893 decisions in total.<sup>159</sup> From January 2009 until February 2014, 145 of these decisions have been brought to the civil courts because the respondents did not follow the decisions.<sup>160</sup> In February 2014 the courts have issued judgments in 59 of these cases. In 41 cases, the courts have sustained the Board decisions while the Board decisions have been changed in 7 cases. The rest of the cases have been settled or discontinued of other reasons. Most of the cases that are brought to the civil courts deal with gender or age. As illustrated, the courts follow the Board decisions in most cases.

#### *Institute of Human Rights – the National Human Rights Institute of Denmark:*

In 2012 the Danish Institute for Human Rights was re-established as a separate and independent institution. The aim was to strengthen and clarify the position of the Institute as a National Human Rights Institute (NHRI) in accordance with the UN Paris Principles. The Act on “The Institute for Human Rights – The National Human Rights Institute of Denmark” was adopted on 29 May 2012 and entered into force on 1 January 2013.<sup>161</sup> The Institute has been accredited as an A-status NHRI since 2001.

DIHR functions as national equality body in accordance with the Racial Equality Directive and the Gender Directives. The mandate as specialised body for the promotion of equal treatment irrespective of gender, racial or ethnic origin is laid down in the founding law of the Institute by replicating the EU-law requirement to establish equality bodies. The mandate of DIHR is to promote equality with regard to gender, race and ethnicity by way of providing assistance to victims of discrimination, making independent surveys as well as publishing reports and recommendations about equality.

DIHR has the following system of assistance to victims of discrimination:

- DIHR provides information about anti-discrimination law as well as give advice on the possibility to complain about discrimination;
- DIHR can take principle cases to court and assist victims where the Board of Equal Treatment is not able to do so;
- DIHR may intervene acting as *amicus curiae* in principle court cases of discrimination.

Finally, DIHR can take up cases on its own initiative about discrimination on account of race and ethnic origin.

#### b) Barriers and other deterrents faced by litigants seeking redress

To initiate a civil court case requires the appointment of a lawyer, which is a financial barrier for many victims of discrimination.

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<sup>159</sup> Statistics are found on the website of the Board: <http://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet>.

<sup>160</sup> Board of Equal Treatment, Annual Report 2013 (August 2014).

<sup>161</sup> Consolidated Act No. 553 of 18. June 2012 on The Institute for Human Rights – The National Human Rights Institute of Denmark.

In theory, it is not necessary to obtain the assistance from a lawyer to file a complaint with the Board of Equal Treatment. In practice many victims cannot manage to file the complaint by themselves.

There is no time limit in the Act on the Board of Equal Treatment within which a procedure must be initiated. However, the Board has rejected a concrete complaint of discrimination on the basis that the complainant had acted passively and thus had lost any claim against the employer.<sup>162</sup> In this case the complainant has signed a resignation agreement on 5 January 2012 and he did not complain to the Board before 19 December 2012. Although there is no time limit in the Act on the Board of Equal Treatment, a complainant must therefore react relatively quickly after for example his or her dismissal, if he or she wants to file a complaint with the Board of Equal Treatment.

Also, no time limit is indicated in the Act on Labour Courts.<sup>163</sup> With regard to the civil courts, there is a 3-year period of limitation meaning that a procedure must be initiated 3 year after the unlawful violation at the latest.<sup>164</sup>

A person can file a complaint even after his or her employment relationship has ended. There is hence no deadline for filing a complaint, but practical difficulties can arise in relation to collecting evidence.

The assistance of DIHR to victims of discrimination primarily deals with the provision of information and with advices on possibilities to complain about discrimination (how and where).<sup>165</sup> DIHR does not file complaints to the Board of Equal Treatment on behalf of a victim, but rather provide information on how the complainant can do it on her/his own. On the website of DIHR, a telephone number and an e-mail address is listed if a person needs assistance and advice on discrimination issues and ways to complain.

There is only one NGO being specialised in assisting victims of discrimination in filing complaints and initiating court proceedings. The NGO is called Documentation and Advisory Centre on Racial Discrimination (DaCoRD) and helps victims of discrimination on account of race and ethnic origin. DaCoRD is located in Copenhagen, which make it difficult for victims of discrimination outside the Copenhagen area to get legal help with their cases.

#### c) Number of discrimination cases brought to justice

In Denmark no official statistics on cases concerning discrimination brought before the Danish courts exist. Statistics on cases brought to the city courts are not available as they are not registered or published in the Weekly Law Journal [Ugeskrift for Retsvæsen]. Only selected judgments from the Supreme Court, the High Courts and the Maritime and Commercial Court are published in the Weekly Law Journal. The Weekly Law Journal is a paid journal not freely available for the public.

#### d) Registration of discrimination cases by national courts

In Denmark discrimination cases are not registered as such by national courts.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

#### a) Standing to act **on behalf** of victims of discrimination (representing them)

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<sup>162</sup> Decision No. 234/2013 by the Board of Equal Treatment.

<sup>163</sup> Act No. 106 on Labour Courts of 26 February 2008 with later amendments.

<sup>164</sup> Section 3 of Act on Limitations (Forældelseslov), Consolidated Act No. 1063 of 28 August 2003 with later amendments.

<sup>165</sup> See: <http://menneskeret.dk/klageguide/klageguide/institut+for+menneskerettigheder>.

In Denmark associations/organisations/trade unions are entitled to act on behalf of individual victims of discrimination under certain conditions.

Trade unions and NGOs are entitled to represent individuals in complaints to the Board of Equal Treatment.

The Danish Institute for Human Rights may assist complainants in bringing legal proceedings by helping the complainant apply to the authorities for free legal aid in court. DIHR did not do so in any cases in 2014 and has only assisted complainants in such matters in few cases in the previous years.<sup>166</sup>

Chapter 31 of the Administration of Justice Act deals with legal aid and free legal proceedings.<sup>167</sup> The Minister of Justice can financially support Legal Aid Offices where individuals can seek free legal advice and representation.<sup>168</sup> No public data is available on the practice of supporting and representing victims of discrimination.

The Danish judicial system is regulated in the Administration of Justice Act.<sup>169</sup> Under Danish procedural rules in Section 260 of the Administration of Justice Act, a person may either go to court herself or authorize a process agent to appear in court on his or her behalf. As a main rule, in Danish procedural law, only jurists authorized to practice law, i.e. certified attorneys, may serve as process agent for a party. As an exception, the minister of Justice may allow for interest groups, labour unions and the like to represent their members in court through an in-house jurist in cases concerning pay and employment conditions. This is the case even when the in-house jurist is not a certified attorney, cf. Section 260(6) of the Administration of Justice Act.

Trade unions and other membership organisations can therefore represent their members in civil court cases dealing with pay and employment conditions. The employees of the trade unions representing the individual member must have a Danish legal bachelor's or master's degree. According to established case law, a trade union may also be allowed to serve a function similar to that of a process agent for its members in the sense that the union files a suit in its own name on behalf of its member (in Danish: mandatar). However, it is still the member and not the union who is a party to the case.

No particular legislation exists regarding the possibility of NGOs and other associations to represent victims of discrimination in civil court proceedings. In comparison with trade unions on questions of pay and employment conditions, NGOs do not have the same general legal standing before domestic courts of law in relation to cases of discrimination. According to Section 260(2) only certified attorneys who have obtained a mandate from the individual victim of discrimination can litigate a case for the civil courts. This means that the NGO can help examining the case but when it comes to representing and promoting the case before the civil courts, the individual victim of discrimination must get legal representation from a certified attorney.

In a report from 2005 on the reform of the Danish civil justice system, it is pointed out that it is difficult to conclude on the basis of case law what the criteria are for acting as an alternative process agent; however, the entities that, in general, have been allowed to act as process agents have had some qualified interest in the issue raised in the case. The report suggests as a guiding rule that an entity may act as an alternative process agent, where it has a "legal interest" in the outcome of the case similar to the "legal interest" required from third parties to intervene in court cases in support of one of the parties to the case. According to the report, the requirement of having a "legal interest" is necessary

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<sup>166</sup> Information provided by DIHR by e-mail from Signe Vesterheden, 13 April 2015.

<sup>167</sup> Consolidated Act No. 1308 of 9 December 2014 with later amendments.

<sup>168</sup> Regulation No. 637 of 11 June 2014. [Bekendtgørelse om tilskud til retshjælpskontorer og advokatvagter].

<sup>169</sup> Consolidated Act No. 1308 of 9 December 2014 with later amendments.

to ensure that the general rule that only certified attorneys may act as process agents is not bypassed.<sup>170</sup>

Some public bodies have been given express statutory power to represent complainants in court. According to Section 12 of the Act on the Board of Equal Treatment, the Board of Equal Treatment is thus obliged to bring a case to the civil courts if the defendant refuses to follow the decision of the Board and the applicant wishes to pursue the matter. In practice, the Board of Equal Treatment is represented by the law firm "Kammeradvokaten" who is the legal adviser to the Danish Government.<sup>171</sup>

There are no formal requirements for giving a mandate to represent ones case. In practice a mandate will always be in writing.

b) Standing to act **in support** of victims of discrimination

In Denmark associations/organisations/trade unions are entitled to act in support of victims of discrimination. According to section 252 of the Act on Administration of Justice bi-intervention is allowed in already existing court proceedings, where the association has a legal interest in the outcome of the case.

As an example, the Danish Institute for Human Rights may intervene in civil court cases in support of a victim of discrimination if the Institute determines that such support may help to clarify the general interpretation of the discrimination law in Denmark. DIHR did not do so in any cases in 2014 or in previous years.<sup>172</sup>

c) Actio popularis

In Denmark there is no law and / or tradition allowing associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

In Decision No. 88/2011 by the Board of Equal Treatment, an NGO working against discrimination because of race and ethnic origin filed a complaint to the Board. The complaint dealt with ethnic discrimination because of a newspaper article. In the article an owner of a campground stated that he would refuse access to the campground for Roma people. The NGO argued that the newspaper article was a violation of the Act on Ethnic Equal Treatment. The Board rejected to adjudicate the complaint because of the fact that the NGO did not file the complaint on behalf of or in support of a concrete individual claiming that his or her rights had been violated.

No court cases on actio popularis exist in relation to discrimination. In individual cases in other fields, the Supreme Court has accepted cases filed on e.g. the constitutional legality of Denmark's membership of the European Union (see U 1996.1300 H and U 1998.800 H). So one could argue that there is an opening towards accepting actio popularis cases within the Danish judicial system.

d) Class action

In Denmark national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

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<sup>170</sup> Reform af den civile retspleje IV – Gruppesøgsmål mv. p.71. Described in Jacobsen, Bjørn Dilou, Assistance to Victims of Discrimination by Equality Bodies of the EU Member States – a Scandinavian Perspective, DJØF Publishing Copenhagen 2010.

<sup>171</sup> As described in Jacobsen, Bjørn Dilou, Assistance to Victims of Discrimination by Equality Bodies of the EU Member States – a Scandinavian Perspective, DJØF Publishing Copenhagen 2010.

<sup>172</sup> Information provided by DIHR by e-mail from Signe Vesterheden, 13 April 2015.



Chapter 23a of the Danish Administration of Justice Act contains rules on collective action.

A collective action is a special type of procedure prepared with a view to join several, and especially a large number, of uniform claims in the same proceedings. The term "collective actions" implies that the action relates to the claims of a group of persons, a representative of this group (not individual members of the group) being regarded as a party to the action.

The rules on collective actions are based on a main rule that the members of the group must opt for the action (the opt-in model). At the request of the group representative, the court may also decide that a collective action must comprise the group members who do not opt out of the collective action (the opt-out model). This is however subject to two additional conditions being satisfied.

First of all, the case must concern claims that are so small that it is evident that they cannot generally be expected to be brought through individual actions, not because the persons concerned do not think that they have a justified claims, but merely because the inconvenience and financial risk of individual litigation are deemed to be disproportionate to the outcome of the individual action.

A number of conditions for bringing collective action have been laid down including that the court must approve the case as being suited for a collective action as well as a number of "control mechanisms", which include that the court must approve the group representative and may decide that the representative must provide security for the legal costs that he/she may have to pay to the other party if he/she loses the case.

As for associations, there are no specific requirements as to age, number of members, financial situation etc., but in order to be appointed as group representative, the association must have sufficient financial means, including e.g. by virtue of insurance to be able to cover legal costs.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

In Denmark national law requires a shift of the burden of proof from the complainant to the respondent.

Section 7 of the Act on Ethnic Equal Treatment and Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc. encompass the principle of a shared burden of proof.<sup>173</sup> This means that if a person who considers him- or herself to be discriminated against is able to establish facts of possible discrimination, then the employer, the shop owner, landlord etc. has to prove that no discrimination has taken place. This shared (and not shifted) burden of proof is in line with the Directives.

The shared burden of proof is to be applied in cases of direct and indirect discrimination, harassment and instruction, but not in cases regarding victimisation.

In a case from the Eastern High Court of 14 October 2014 disability, reasonable accommodation and the shared burden of proof was at stake.<sup>174</sup> An employee had a stroke and was absent for more than 6 months. When she returned she worked fewer hours and were assigned more simple tasks because of her brain damage. After a couple of months she was dismissed and according to her employer the reason was that she was not able to perform her job. The parties of the case agreed that she had a disability. The Court stated that the woman had not been directly discriminated because of disability. She had, however, established such facts that it was the employer who had to prove that indirect discrimination had not taken place. The Court found that the employer had not proved that

<sup>173</sup> The Act on Ethnic Equal Treatment Section 7 and the Act on the Prohibition of Discrimination in the Labour Market etc. Section 7 a.

<sup>174</sup> Eastern High Court, Judgment of 14 October 2014 in case No. B-3774-13. Printed in U2015.315Ø.

it would have been an unreasonable burden to follow the recommendations on having a mentor or supervisor who could give concrete feedback to the employee during a shorter period of time when she was returning to work. The Court also found that the employer had not documented that the employee after a period of time would not be able to perform her previous tasks as a consultant. The Court therefore concluded that the employer had not established reasonable accommodation and that the dismissal constituted indirect discrimination. The employee was awarded a compensation of 6 months' salary.

A judgment from the Western High Court of 16 December 2013 also illustrates the use of a shared burden of proof.<sup>175</sup> The case dealt with an employee A, who had problems with her back after a traffic accident. Back pain resulted in her having higher sickness absence than her colleagues. A was dismissed and the employer argued that the reason was decline in orders and resulting redundancies. The Court referred to the EU cases Ring and Skouboe Werge of the CJEU (C-335/11 and C-337/11) and concluded that A had a disability. Some months after A's dismissal the employer appointed another employee who performed some of the tasks that A had previously performed. The Court stated that the appointment of a new employee constituted facts that gave rise to believe that discrimination had taken place. It was therefore the employer who had to prove that principle of equality had not been violated. The Court concluded that the employer could not lift the burden of proof that discrimination of A had not taken place. In that connection it was underlined by the Court that documentation of order decline only documented the need to make cutbacks – but it did not document that it was necessary to dismiss precisely A.

A judgment from the Supreme Court of 7 December 2011 also illustrates the use of a shared burden of proof.<sup>176</sup> The case dealt with a woman 55 years of age who had applied for a position in the public office of passports and drivers licences. She was rejected from the position and received a letter from the manager of the public office stating among other things the following: "... as a manager I'm obliged to meet the generational change that will come up in the coming years in the current group of – as you know – primarily elderly experienced employees." The Supreme Court stated that this remark established facts from which it could be assumed that the age of A was part of the reasoning for A not being hired. However, according to the Supreme Court, the public office could prove that the rejection of A was not because of her age, but because of the fact that she did not have the requested personal qualifications. Thus, the public office had not violated the Act on Prohibition of Discrimination in the Labour Market.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In Denmark there are legal measures of protection against victimisation.

National law prohibits subjecting a person to any adverse treatment or adverse consequence as a reaction to a complaint or to any type of proceedings aimed at enforcing compliance with the principle of equal treatment.

Section 7(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. as well as Section 8 of the Act on Ethnic Equal Treatment prohibits adverse treatment as a reaction to a complaint concerning discrimination. According to both laws a person who experiences negative treatment or unfavourable consequences because of the fact that he or she has asked for equal treatment can be granted compensation by the court.

The commentary to the Act on the Prohibition of Discrimination in the Labour Market etc. reads: "Protection against victimisation applies in cases where a formal letter of complaint has been filed with a court of justice or another public authority, as well as in cases where

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<sup>175</sup> Western High Court judgment of 16 December 2013 in case No. B-1148-12. Printed in U2014.990V.

<sup>176</sup> Weekly Law Journal U.2012.890 H.

a certain incident is criticised verbally at the place of work, or where the employee has contacted his or her trade union and related the circumstances to the union.”<sup>177</sup>

Both on the labour market as well as outside the labour market, protection applies to a person who files a complaint regarding differential treatment of him or herself as well as to a person who files a complaint of differential treatment of another person.

It is a prior condition that a causal link can be established between the victimisation and the employee's or the complainant's request for equal treatment. Adverse treatment is not considered as a violation of the prohibition against discrimination in the Directives. The burden of proof is therefore not shared in cases of victimisation.

In Decision No. 129/2013 of the Board of Equal Treatment, a student with an ethnic minority background was expelled from his private school after his father had complained that a substitute teacher, in the father's opinion, had uttered racist remarks in the classroom. In the decision, the Board argued that a complaint about discrimination may be submitted orally to the institution that is responsible for the alleged discrimination. The Board also underlined that it is not a precondition for victimization that the prohibition of discrimination in actual fact has been violated. The fact that the student was thrown out of school therefore constituted victimization in violation of section 8 of the Act on Ethnic Equal Treatment. According to the Board it made no difference that the father had stated gross accusations against the substitute teacher and the school. Thus, the complainant was awarded a compensation for victimisation of DKK 10,000 (euro 1.340).

## **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

### **a) Applicable sanctions in cases of discrimination – in law and in practice**

Discrimination in the private and public labour market may result in pecuniary compensation and discriminatory job advertisements may result in a fine, cf. Section 7(1) and Section 8 of the Act on the Prohibition of Discrimination in the Labour Market etc.

In public and private employment as well as in a field outside employment, a person who has been subject to discrimination can be awarded compensation for non-economic damages, as stipulated in section 7(1) in the Act on the Prohibition of Discrimination in the Labour market etc. and section 9 in Act on Ethnic Equal Treatment.

Furthermore, Danish civil courts can award damages for an established economic loss according to the general Danish rules concerning damages. The Danish law of torts is developed through case law at the Danish courts. Damages can be awarded if negligent behaviour has resulted in an economic loss and there is a causal link between the negligent behaviour and the loss. Furthermore the loss has to be foreseeable to the person acting negligently.

Finally, a person who is responsible for an unlawful violation of another person's freedom, honour or integrity is liable to pay compensation, according to section 26 of the Damage Liability Act. There is a 3 year period of limitation meaning that compensation claims must be brought to the courts 3 year after the unlawful violation at the latest.<sup>178</sup>

### **b) Ceiling and amount of compensation**

There is no ceiling on the maximum amount of compensation that can be awarded.

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<sup>177</sup> Preparatory work to Act no. 253 of 7 April 2004 amending the Act on Prohibition against Differential Treatment in the Labour Market.

<sup>178</sup> Section 3 of Act on Limitations (Forældelseslov), Consolidated Act No. 1063 of 28 August 2003 with later amendments.

Typically, the following amounts of compensation will be awarded to victims of discrimination:

- In cases of denials of access to public places like discotheques: from DKK (€ 135) to DKK 10.000 (€ 1350);
- In cases of discriminatory job advertisements: DKK 25.000 (€ 3360);
- In cases of discriminatory denials of employment/new job: DKK 25.000 (€ 3360);
- In cases of discriminatory dismissals: 3 to 9 months of salary.

In the Supreme Court judgment of 13 June 2013<sup>179</sup> a young woman was appointed as a secretary at a law firm. She was dismissed instantaneously only 4 days after she had started working. The woman had a diagnosis of ADHD and the reason of the employer to dismiss her was her "special conditions." The Supreme Court concluded that the dismissal was a violation of the prohibition of discrimination in the labour market and she was awarded DKK 84.000 (€ 11.260) in compensation (6 months of salary). When setting the compensation, the Supreme Court referred to the case law on discrimination on account of gender and stated that in the case in question, there was no reason to depart from the compensation practice in the gender case law.

In the Supreme Court judgment of 1 October 2014<sup>180</sup> the Court dealt with the level of compensation in cases of age discrimination. The Supreme Court referred to case law on gender discrimination on the labour market stating that the pilots in question would be eligible to more than 6 months of salary in compensation. However, according to the Court there were a number of mitigating circumstances, which meant that the compensation in these cases should be determined at a lower level. The result was that the Court granted 4 months of salary in compensation to each of the pilots. According to the court the mitigating circumstances were the following:

- the dismissals were necessary because of work and workforce reductions;
- the criterion for dismissing the pilots (eligibility for retirement benefits) was collectively negotiated with the pilot union;
- this criterion was the most humane and gentle in a situation where – no matter what – a number of pilots had to be dismissed.

Previous case law illustrates varying levels of compensation within different discrimination areas, the tendency being that compensation granted in gender discrimination was higher. The Supreme Court has now established that the level of compensation should be set as in the area of gender discrimination cases. The last judgment from 1 October 2014 establishes more concrete, which factors may constitute mitigating circumstances when it comes to settling the level of compensation in discrimination cases and when it comes to deviating from the case law in the area of gender discrimination. The judgment also illustrates that long seniority is neither the only nor the decisive criterion when deciding on the level of compensation.

#### c) Assessment of the sanctions

Over recent years there has been an increase in the number of employment related discrimination cases. There is no doubt that the knowledge among employers on the prohibition of discrimination has increased. The level of compensation in discrimination cases is higher than in traditional cases of unfair dismissals. The higher sanctions combined with the increased knowledge among employers are likely to have a dissuasive effect when it comes to discrimination on the labour market.

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<sup>179</sup> U.2013.2575 H.

<sup>180</sup> Supreme Court judgment of 1 October 2014 in Case No. 322/2012. Printed in U2015.1H.

The Supreme Court has made a clear statement on the level of compensation in discrimination cases on the labour market. There has previously been a tendency to award lower amounts of compensation in cases on discrimination on account of ethnic origin, age, disability etc. than in cases on discrimination because of gender. But this should not be the case anymore

Outside employment within the realm of the Act on Ethnic Equal Treatment sanctions are so mild that it must be questioned whether they are sufficiently effective, proportionate and dissuasive. This is the situation when it comes to nightlife and discotheques where discrimination is a large problem. The risk of only having to pay a very low compensation does not seem sufficiently, to prevent discrimination in nightlife. Almost every third young person have experienced or witnessed abuse, pushes and condescending jokes because of ethnic origin, disability or sexual orientation in the Copenhagen nightlife.<sup>181</sup>

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<sup>181</sup> Rådgivende sociologer, Unges syn på diskrimination i det københavnske natteliv – en kvalitativ og kvantitativ afdækning (2014). See: <http://www.dkr.dk/kamp-mod-diskrimination-nattelivet>.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

The Institute for Human Rights – The National Human Rights Institute of Denmark (DIHR) is designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive.<sup>182</sup> In accordance with the requirements of Article 13 of the Directive, the Institute has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination.

The Board of Equal Treatment adjudicates individual complaints of discrimination.<sup>183</sup> The Board deals with individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin while outside the labour market the Board only deals with complaints related to discrimination based on race, ethnic origin or gender.

The Board of Equal Treatment can only adjudicate complaints if the complainant allegedly has been discriminated himself or if he belongs to a group that has been discriminated against. In Decision No. 163/2013 of the Board of Equal Treatment, a man complained to the Board that a supermarket according to newspaper articles would allow Muslim female employees to wear headscarves. He argued that it constituted discrimination on account of religion as Jewish employees were not allowed to wear a kippah and Sikh employees were not allowed to wear a turban in the supermarket. The Board dismissed the case because the man was not entitled to complain (no locus standi). He was not an employee of the supermarket and had not applied for a position at the supermarket. Thus he had no individual legal interest in the question of discrimination on account of religion on the labour market.

The Board consists of a president, two vice-presidents and nine additional members. When handling a complaint, the president or a vice-president participates together with two additional members. In complaints concerning matters of principle, the president can decide that four additional members participate instead of two. The president of the Board must be a High Court judge and the vice-presidents must be city court judges. Both genders must be represented in the presidency.<sup>184</sup> Although the Board “only” adjudicates individual cases of complaints of discrimination, it considers itself as a national equality body in accordance with the EU directives supplementing the work of DIHR.

- b) Status of the designated body/bodies – general independence

The DIHR assists victims of discrimination and has a unit responsible for giving advice relating to individual cases of discrimination. Persons can call for advice and counselling every Tuesday and Thursday or they can send an email.

DIHR has been allocated DKK 6 million as a fixed amount (EUR 800 000) on a yearly basis to perform its duties as a specialised equality body. DIHR is established by law as an independent institution working with human rights in general and has around 160 employees. The board members of DIHR are appointed by various institutions: 1 member is appointed by the University of Copenhagen, 1 member is appointed by the University of Aarhus, 1 member is appointed by the University of Southern Denmark, 1 member is

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<sup>182</sup> Consolidated Act No. 553 of 18. June 2012 with later amendments on The Institute for Human Rights – The National Human Rights Institute of Denmark.

<sup>183</sup> Consolidated Act No. 905 of 3 September 2012.

<sup>184</sup> Consolidated Act No. 905 of 3 September 2012.

appointed by the University of Aalborg, 2 members are appointed by the Danish Conference of Rectors [Rektorkollegiet], 1 member is appointed by the employees of the DIHR and 6 members are appointed by the Danish Council for Human Rights [Rådet for Menneskerettigheder]. The Board of Equal Treatment is not represented on the DIHR's board.

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. The Board is part of the public administration and is funded by public funds. The secretariat of the Board consists of three fulltime caseworkers, one chief consultant and two students each working 15 hours a week in the secretariat.<sup>185</sup> The Board consists of one president and two vice-presidents, who are judges, as well as nine members, who are lawyers with specific expertise in discrimination law. The Board members are independent of the ministries that have nominated and appointed them. The Board members do not represent any specific political or organizational views.

c) Grounds covered by the designated body/bodies

The Act on the Institute for Human Rights – The National Human Rights Institute of Denmark establishes the Institute as a separate and independent institution.<sup>186</sup> The act also clarifies the role of the Danish Institute for Human Rights with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute as a Specialised Equality Body on race and ethnic origin as well as on gender under the EU-Directives.

The Board of Equal Treatment adjudicates individual complaints of discrimination. The Board deals with individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin while outside the labour market the Board only deals with complaints related to discrimination based on race, ethnic origin or gender.

d) Competences of the designated body/bodies – and their independent exercise

According to Section 2(3) of the Act, the Institute of Human Rights must issue a yearly report to the Parliament on the human rights situation in Denmark as well as publish the report. This includes the situation of persons with disabilities. According to a Parliament Decision B15 from December 17, 2010, the Institute also has the responsibility to monitor the Danish implementation of the UN Convention on Rights of Persons with Disabilities.

The duties and powers of the Institute are specified in the Act on The Institute for Human Rights. According to Section 2(2) of the Act the Institute must promote equal treatment of all persons without discrimination on grounds of gender, race or ethnic origin, including by:

- 1) assisting victims of discrimination in pursuing their complaints about discrimination in the light of the rights of victims, associations, organisations and other legal entities;
- 2) conducting independent surveys concerning discrimination; and
- 3) publishing reports and making recommendations on discrimination issues.

Besides being a specialised body according to Directive 2000/43, DIHR is also an "A" accredited national human rights institution according to the UN Paris Principles – hence it is independent, which means that the published reports and recommendations are independent. Employees with the Institute provide independent assistance to victims of discrimination and publish reports on issues such as the risk of ethnic profiling by police

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<sup>185</sup> Email from the chief consultant of the Board secretariat of 8 June 2015.

<sup>186</sup> Consolidated Act No. 553 of 18. June 2012 with later amendments.

and reports on hate crimes, as well as promote equal treatment via campaigns on diversity in cooperation with key stakeholders such as municipalities and private companies.

More generally the Institute provides general information to the public on human rights, it holds courses, seminars and other promotional activities as well as undertakes surveys, reports and analyses on all grounds of discrimination.<sup>187</sup>

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. The competence of the Board is limited to adjudicating complaints about discrimination.

e) Legal standing of the designated body/bodies

In Denmark the designated bodies have some legal standing to initiate court cases on discrimination and to intervene in existing court cases concerning discrimination.

The DIHR has no explicit legal standing. However, in principle DIHR may intervene in a case on discrimination because of race or ethnic origin, gender and disability being heard by the courts if a legal interest in the matter at issue can be proven.

DIHR may intervene in principle court cases on racial and ethnic discrimination, gender and disability acting as *amicus curiae*. However, like previous years DIHR but did not do so in 2014.<sup>188</sup> DIHR can also take up discrimination cases on its own initiative, which DIHR did one time in 2012 but did not in neither 2013 nor 2014.<sup>189</sup> Lawyers working at DIHR are not attorneys authorized to litigate in the civil court system, which may constitute a barrier for the intervention of DIHR in individual court cases.

The Board of Equal Treatment hears cases concerning discrimination. If a decision by the Board is not respected, the Board must bring the case before the courts at the request of the complainant pursuant to Section 12 of the Act on the Board of Equal Treatment.

f) Quasi-judicial competences

The Board of Equal Treatment is a quasi-judicial institution. The decisions of the Board of Equal Treatment are legally binding and generally well respected. According to Section 2 of the Act of the Board of Equal Treatment, the Board has the power to award financial compensation. A decision by the Board cannot be appealed to another administrative body but may be taken to the civil courts.

The Board does not have the power to take up cases on its own initiative or to allow for oral proceedings in individual cases.

DIHR is not a quasi-judicial institution but a specialised body to assist victims of discrimination.

g) Registration by the body/bodies of complaints and decisions

In Denmark the Board of Equal Treatment registers the number of complaints and decisions. These data are available to the public on the website of the Board of Equal Treatment as well as in the annual reports. On the website it is possible to get an overview of decisions from 2014 separated by the following three categories of cases:

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<sup>187</sup> Publications of The Institute on equality issues, see:

<http://menneskeret.dk/udgivelser/publikationer+efter+emne?emrk=Ligebehandling&lang=da>.

<sup>188</sup> Information provided by DIHR by email from Signe Vesterheden, 13 April 2015.

<sup>189</sup> Information provided by DIHR by email from Sofie Büniger, 11 March 2014. Information provided by DIHR by email from Signe Vesterheden, 13 April 2015.



- 108 decisions regarding gender;
- 41 decisions regarding ethnic origin;
- 76 decisions regarding age, disability, sexual orientation, political opinion, social origin, religion or belief.

The decisions of the Board of Equal Treatment are not generally organized by field of discrimination or by type of discrimination. However, in the group of decisions regarding gender and ethnic origin, the decisions are categorized within the areas of access to employment, dismissal, harassment, language etc.

The DIHR assists victims of discrimination and has a unit responsible for giving advice relating to individual cases of alleged discrimination. In 2014 DIHR received 27 inquiries on discrimination because of race or ethnic origin and 1 inquiry about multi-discrimination because of race, ethnic origin and gender.<sup>190</sup> The data from DIHR is not generally available to the public.

#### h) Roma and Travellers

The bodies do not treat Roma and Travellers as a priority issue.

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<sup>190</sup> Information provided by DIHR by email from Signe Vesterheden, 13 April 2015.

## **8 IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

In January 2014 a National Anti-discrimination Unit focussing on discrimination against ethnic minorities and on discrimination against persons with disabilities was established.<sup>191</sup> The task of the unit is to examine the extent and nature of discrimination against persons with disabilities and against ethnic minorities. The unit does not deal with individual complaints of discrimination on account of ethnic origin or disability. The unit is embedded in the National Appeals Board in connection with the secretariat of the Board of Equal Treatment.

In 2014 the unit has been active on the social media informing about the right to non-discrimination and has also started planning a national campaign against discrimination. In 2014 the unit launched a mapping out of case law and board decisions on discrimination. The results will be published in mid-2015.

DIHR serves as a specialised equality body disseminating information about discrimination and equal treatment. In the Annual Report, DIHR deals with selected human rights issues and provides recommendations to promote the protection of human rights in Denmark. In the Status Report 2014, DIHR describes that Denmark has a number of challenges in terms of implementing the principle of equal treatment and non-discrimination when it comes to race and ethnic origin, including the high number of ethnic minorities in Denmark who experience discrimination.<sup>192</sup>

No recent actions have taken place when it comes to measures to encourage dialogue with NGOs.

No recent actions have taken place when it comes to measures to promote dialogue between social partners.

With regard to the situation of Roma and Travellers in December 2011, the Danish government presented its National Roma Inclusion Strategy to the European Commission.<sup>193</sup> The National Roma Contact Point is the Ministry of Children, Gender Equality, Integration and Social Affairs – the Department for Law and International Relations. In Spring 2014, the European Commission adopted its assessment on the progress made in the implementation of the Danish National Roma Inclusion Strategy in four key areas of education, employment, healthcare and housing as well as in the fight against discrimination and the use of funding.<sup>194</sup> In general the European Commission recommends monitoring of the different policies. Awareness raising campaigns to tackle prejudices and stereotypes on Roma should also be carried out according to the European Commission.

### **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

#### **a) Mechanisms**

The rules of *lex specialis* and *lex posterior* apply as part of Danish law.

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<sup>191</sup> National Anti-discrimination Unit. See: <https://ast.dk/om-ankestyrelsen/organisation/antidiskriminationsenheden>.

<sup>192</sup> DIHR, Status 2014. See: <http://menneskeret.dk/nyheder/institut-menneskerettigheder-goer-status-2014>.

<sup>193</sup> See: [http://ec.europa.eu/justice/discrimination/files/roma\\_denmark\\_strategy\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_denmark_strategy_en.pdf).

<sup>194</sup> National Strategy for Roma Integration - Denmark: [http://ec.europa.eu/justice/discrimination/roma-integration/denmark/national-strategy/national\\_en.htm](http://ec.europa.eu/justice/discrimination/roma-integration/denmark/national-strategy/national_en.htm).

Moreover, it is a general principle of Danish anti-discrimination law as well as most employment law that a person cannot sign away or agree to be placed in a less favourable position than that prescribed by law. A person cannot waive his or her right not to be subjected to differential treatment through a contract or agreement with his/her employer.

b) Rules contrary to the principle of equality

A general non-discrimination assessment of all relevant legislation has never been implemented in Denmark. However, to the knowledge of the author there are no laws contrary to the principle of equality.

## **9 COORDINATION AT NATIONAL LEVEL**

The Ministry of Employment is responsible for issues of discrimination at the labour market.<sup>195</sup>

The Ministry of Children, Gender Equality, Integration and Social Affairs is responsible for integration issues as well as for ethnic and gender equality.<sup>196</sup>

The new anti-discrimination unit under the Ministry of Children, Gender Equality, Integration and Social Affairs focus on discrimination against ethnic minorities and on discrimination against persons with disabilities. The purpose of the unit is to work for equality and against discrimination. The unit examines the extent and nature of discrimination against persons with disabilities and against ethnic minorities. It also organizes efforts that prevent and reduce discrimination. The work of the unit will run from 2014 to 2016. DKK 10 million (1.3 million euro) is allocated to the operation and activities of the unit.

The previous government published the "Action Plan on Ethnic Equal Treatment and Respect for the Individual" in July 2010. The Action Plan included support for local community initiatives, local help for victims of discrimination, a campaign on the respect for the fundamental rights; and research projects on the extent of discrimination.

No recent National Action Plan on Anti-discrimination has been published.

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<sup>195</sup> See: <http://www.bm.dk/Beskaeftigelsesomraadet/Arbejdsret/Forskelsbehandling.aspx>.

<sup>196</sup> See: <http://sm.dk/arbejdsomrader/integration-og-demokrati/etnisk-ligebehandling>.

## **10 CURRENT BEST PRACTICES**

- New government anti-discrimination unit focussing on discrimination against ethnic minorities and on discrimination against persons with disabilities;
- Annual Status report from DIHR documenting discrimination and providing recommendations to promote the protection of human rights and equality rights in Denmark.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

- Protection against indirect discrimination because of ethnic origin

The headscarf judgment (U.2005.1265H) seems to accept a very wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities. The same approach also seems to be taken by the Board of Equal Treatment. The wish to appear politically and religiously neutral to the customers has been accepted by the courts as a legitimate purpose. It can be questioned whether such a wide interpretation of "legitimate purpose" in the head scarf cases is compatible with the Directives.

- Technical school education

In a case of race discrimination at a technical school (Eastern High Court, Case No. B-4028-05. Judgment of 27 June 2006) it was decided that this education was not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. but rather by the Act on Ethnic Equal Treatment. By considering a technical school as education covered by the Act on Ethnic Equal Treatment, discrimination because of race and ethnic origin was covered. However, an implementation problem exists in relation to the other protected grounds: age, disability, sexual orientation, religion and belief. The judgment raises concern that Danish case law does not comply with the directives.

- Sanctions

Outside the area of employment, e.g. in the discotheque cases, sanctions are so mild that it can be questioned whether they are sufficiently effective, proportionate and dissuasive as required by the directives.

- Specialised equality body

The Danish Institute for Human Rights (DIHR) serves as a specialised equality body. However, like previous years DIHR did not act as *amicus curae* to intervene in principle court cases in 2014. DIHR also did not take up discrimination cases in 2014 on its own initiative or filed applications for free legal aid. Lawyers working at DIHR are not attorneys authorized to litigate in the civil court system, which may constitute a barrier for the intervention of DIHR in individual court cases. The DIHR also has a unit responsible for giving advice relating to individual cases of alleged discrimination. In 2014 DIHR received 27 inquiries on discrimination because of race or ethnic origin and 1 inquiry about multi-discrimination. It can be questioned whether DIHR is an effective specialised equality body when it comes to its tasks on assisting victims of discrimination.

### **11.2 Other issues of concern**

Denmark faces challenges and barriers for minorities to take part in society on an equal footing. Research should be undertaken to examine institutional barriers preventing minorities from achieving access to the labour market and achieving in jobs that match their education.

There is a profound lack of recognition that discrimination takes place in Danish society. Also there is a serious lack of statistics and general research about discrimination.

Positive and special measures to promote non-discrimination and real equality should be undertaken. Section 4 of the Act on Prohibition of Discrimination in the Labour Market etc. contains a strict rule prohibiting employers to ask for, obtain, receive or use information

about the race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin of a job applicant or an employee. This prohibition makes it very difficult for companies to establish positive measures and to monitor whether diversity management programmes or recruitment programmes aiming at achieving better representation of ethnicity among staff members are succeeding. It is problematic that employers are so limited in their access to establish special measures to improve the equality for ethnic, religious and sexual minorities etc.

In Denmark prohibition of multiple discrimination is not included in the law. To enhance the legal protection and raise awareness in this area, it would be preferable that multiple discrimination was encompassed directly by the anti-discrimination legislation.

The Danish legislation prohibiting discrimination consists of several acts offering different degrees of protection depending on the discrimination ground in question. The result is insufficient protection against discrimination targeted at certain groups, an unequal approach to combating discrimination, a complex legal basis for practitioners of law to apply and lack of predictability for ordinary citizens. For example, it is illegal but also criminalised for restaurants to refuse admittance based on the ethnic origin of a person. But it is not a violation of Danish law to refuse admittance because of a person's disability or age. Another example is that discrimination of homosexuals within commercial or non-profit services is criminalised, but homosexuals are unable to bring such a complaint to the Board of Equal Treatment.

With regard to the Board of Equal Treatment a number of issues and problems should be raised:

- Although there has been a general rise in the number of complaints to the Board, the visibility of the Board among possible victims is too little. This is especially the case for ethnic minority groups.
- It is not possible to present a complaint to the Board in person.
- Only very few complaints of discrimination because of race or ethnic origin end up with a decision by the Board that discrimination has taken place.
- The Board of Equal Treatment does not have the mandate to take up cases on its own initiative.
- The Board of Equal Treatment cannot demand the parties to disclose material, produce documents, give their opinion, and reveal factual circumstances of a case in order to elucidate a case.
- The Board of Equal Treatment is not empowered to hear oral testimonies.
- Civil organisations and NGO's are not allowed to present complaints of discrimination to the Board without representing an individual victim of discrimination, which for example excludes NGO's from filing complaints of discriminatory job advertisements.

Monitoring case law of Danish courts is severely hindered due to lack of free public access to case law. All Judgments from the Supreme Court and selected cases from the High Courts and City Courts are posted on the internet. Cases not posted can be obtained by paying a fee. Case law in the Court systems is however sorted without reference to the legislation applied. A complete list of case law concerning specific legislation is not available through public registers. It is possible to subscribe to an expensive private database (the Weekly Law Journal), which contains all Supreme Court cases and selected High Court cases. City Court cases are only rarely published, which constitute a problem especially for monitoring discrimination cases since these cases rarely are appealed and therefore often remain unknown.

There is only one NGO being specialised in assisting victims of discrimination in filing complaints and initiating court proceedings. The NGO is called Documentation and Advisory Centre on Racial Discrimination (DaCoRD) and helps victims of discrimination on account

of race and ethnic origin. DaCoRD is located in Copenhagen, which make it difficult for victims of discrimination outside the Copenhagen area to get legal help with their cases.



## 12 LATEST DEVELOPMENTS

### 12.1 Legislative amendments

Section 5a (4) of the Act on Prohibition of Discrimination on the Labour Market etc. has been repealed.<sup>197</sup> According to the amendment neither individual employment contracts nor collective agreements on automatic termination of employment by the age of 70 can be entered into in the future. Previous individual contracts on automatic termination also cannot be enforced. The amendments enter into force on 1 January 2016.

Section 2a(3) of the Salaried Employees Act regarding severance allowance has not been in compliance with EU law. In November 2014 the government put forward a Bill to revoke Subsection 2 and 3 of Section 2a(3) of the Salaried Employees Act.<sup>198</sup> The Bill was adopted on 27 January 2015.<sup>199</sup>

### 12.2 Case law

#### *Race and ethnic origin*

**Name of the court:** Board of Equal Treatment

**Date of decision:** 22 January 2014

**Reference number:** Decision No. 13/2014

**Address of the webpage:**

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1353&type=Afgoerelse>

**Brief summary:** The complainant had bought a ticket to a public seminar on "Freedom of speech after the attack on Hedegaard". A few days later the complainant received an e-mail stating: "due to security reasons we have decided to reject your participation in the seminar..." A member of the board of the association explained in a newspaper article that the reason for rejecting the complainant was a combination of his name "Jihad" and his Palestinian/Egyptian background. On that basis the Board found that the complainant had established facts that gave rise to suspect that he had been indirectly discriminated against because of his ethnic origin. The Board emphasized, however, that a number of participants of the seminar had ethnic minority background. Furthermore, the presence of journalist Lars Hedegaard in the seminar meant that the association had to seriously take the security of the meeting into account. The Board also took the view that at the time of the rejection, the Board only knew the name of the complainant. On that basis the Board concluded that the rejection of the complainant did not constitute discrimination on account of his ethnic origin.

**Name of the court:** Board of Equal Treatment

**Date of decisions:** 13 August 2014

**Reference number:** Decisions No. 133/2014, 134/2014, 135/2014, 136/2014, 137/2014, 138/2014, 139/2014 and 140/2014

**Address of the webpage:**

<http://ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1474&type=Afgoerelse>

**Brief summary:** The Board adjudicated 8 similar cases on the annulment of tickets bought by football supporters in Denmark with foreign sounding names. The complainants had bought a package of tickets for three football games that would be played on the home ground of the Danish football team. They had all bought tickets for the section reserved for supporters of the Danish team. The following day the complainants and around 700 other ticket buyers received an e-mail saying that their tickets had been annulled because of safety reasons. The more than 700 individuals who received the e-mail all had non-

<sup>197</sup> Act No. 1489 of 23 December 2014.

<sup>198</sup> Ministry of Employment, Bill No. 84 of 26 November 2014.

<sup>199</sup> Act No. 52 of 27 January 2015.

Danish sounding names. 8 individuals complained to the Board of Equal Treatment. The Board found that it was a legitimate reason out of safety considerations to make sure that individuals who had bought tickets for the home team sections were not in reality supporters of the visiting teams. However, the Board did not find that the chosen means to obtain this aim were appropriate and proportional. The Board argued that using the criterion of non-Danish sounding names would not result in the requested safety. The conclusion was that the complainants were all victims of indirect discrimination because of ethnic origin. They were not awarded any compensation.

**Name of the court:** Board of Equal Treatment

**Date of decision:** 10 December 2014

**Reference number:** No. 214/2014 of 10 December 2014

**Address of the webpage:**

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1555&type=Afgoerelse>

**Brief summary:** The complainant had called a bank several times on the same day to ask questions regarding a particular loan. He argued that the bank advisor had treated him in a racist way by refusing to talk English to him, by refusing to talk more slowly in Danish and by stating that he should learn Danish or move back to his home country. The Board concluded that the complainant had experienced discrimination in the form of harassment. In the case, harassment was substantiated by written explanations by witnesses as well as by a subsequent written apology from the bank. The complainant was awarded a compensation of DKK 10.000 (€ 1350) according to Section 3(4) and 9 of the Act on Ethnic Equal Treatment.

### ***Disability***

**Name of the court:** Board of Equal Treatment

**Date of decision:** 29 January 2014

**Reference number:** Decision No. 19/2014

**Address of the webpage:**

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1359&type=Afgoerelse>

**Brief summary:** A welding controller suffered an accident at work and injured his foot. He started working again, had several surgeries and started working part time. After a couple of years he was dismissed because of long illness. The controller argued that the dismissal was based on his disability. In its decision the Board referred to CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and decided that the damage in the complainant's left foot and the resulting functional limitations constituted a disability. The Board found that the employer had offered the complainant a part-time welding controller position, which he performed until the surgery. The Board furthermore took into account that the employer had offered a full-time or a part-time office job in another city and that the complainant had rejected this offer. On that basis the Board concluded that the employer had established facts that they had taken steps to provide reasonable and appropriate accommodation with regard to the complainant's specific needs before deciding the dismissal and that discrimination because of disability had not taken place.

**Name of the court:** Maritime and Commercial Court

**Date of decisions:** 31 January 2014

**Name of the parties:** HK as mandatar for A v. Pro Display A/S, HK as mandatar for A v. Dansk Almennyttigt Boligselskab

**Reference number:** F-13-06 and F-19-09. F-19-06 is printed in U2014.1223S

**Brief summary:** On behalf of two women a Danish union claimed compensation because of discrimination on account of disability. The case was referred for a preliminary ruling and the CJEU delivered its judgment on 11 April 2013 in the joined cases C-335/11 and C-337/11 (Skouboe Werge and Ring). Based on the judgment of the CJEU, the Danish

Maritime and Commercial Court delivered its judgment in the two cases on 31 January 2014.

The first case dealt with Mrs. Ring who had been absent from her job in several periods of time because of chronic back pain, caused by degenerative changes in her lumbar vertebrae. The doctors had concluded that there was no further treatment in her case. The other case dealt with Mrs. Werge who had been involved in a traffic accident in which she suffered a whiplash injury. More than a year later she still suffered from persistent pains and had several absence periods of sickness. In both cases the women were dismissed with reference to a special rule – section 5(2) of the Danish Salaried Employees Act entitling the employer to dismiss an employee with a shortened notice period when the employee has been sick for 120 days within a period of 12 consecutive months.

Judgment:

1. The Court quoted the definition of disability in C-335/11 and C-337/11 and stated that both women had a disability.
2. The Court observed that the employer in one of the cases could have adapted the workplace by a height-adjustable desk and part-time employment. According to the Court, the employer had not established that such accommodation would have been unreasonable. With regard to the question of a part-time position, the Court observed that the employer has advertised a vacant part-time position immediately after the woman in the case had been fired. In the other case the employer had not initiated any adaptations to accommodate the disability of the woman. Thus, in both cases the Court stated that the disability-related sickness absence was based on the fact that the employer had not established reasonable accommodation.
3. The Court concluded in both cases that the dismissals with a shortened notice period (one month) for sick employees according to section 5(2) of the Danish Salaried Employees Act constituted direct discrimination on account of disability. The Court did not explain why it dealt with the case as possible direct discrimination instead of indirect discrimination like the CJEU had done. Both women were awarded compensation equal to 12 months of salary.

**Name of the court:** Supreme Court

**Date of decision:** 12 September 2014

**Name of the parties:** FOA as mandatar for A v. Region Sjælland

**Reference number:** Case No. 163/2013

**Address of the webpage:**

<http://www.hoejesteret.dk/hojesteret/nyheder/Afgorelser/Pages/Omgodtgoerelseefterforskelsbehandlingsloven.aspx>

**Brief summary:** The case dealt with a nursing assistant who had incapacities in her arm and worked in a flexible job at a large public psychiatric hospital. The parties of the case agreed that the nursing assistant had a disability. In the case the hospital had closed down open psychiatric units and dismissed a large number of employees based on a prioritisation of employees according to a number of general criteria. The Court found that the dismissal criteria of psychical strength and flexibility put the nursing assistant in a worse of situation than other employees. However, the court concluded that the differential treatment was legitimate because of the actual change in working tasks after the reorganization. The Court also stated that the dismissal could not have been avoided by establishing reasonable accommodation according to section 2(a) of the Act on Prohibition of Discrimination in the Labour Market etc. The Court concluded that the dismissal was a necessary means and that it did not constitute indirect discrimination because of disability.

**Name of the court:** Supreme Court

**Date of decision:** 8 October 2014

**Name of the parties:** FOA as mandatar for A v. Bornholms Regionskommune

**Reference number:** U2015.16H

**Brief summary:** The Supreme Court referred to the Coleman case (C-303/06) and stated that protection against discrimination and harassment covers an employee with a child who has a disability. In the case the employer had refused to grant additional leave of absence to A. However, there was no information to suggest that A had been rejected leave because of her daughter's health situation. The Supreme Court concluded that A had not been discriminated against or harassed because of disability.

**Name of the court:** Eastern High Court

**Date of decision:** 14 October 2014

**Name of the parties:** SIMAC v. HK as mandatar for A

**Reference number:** U2015.315Ø

**Brief summary:** The case dealt with an employee who had a stroke and was absent for more than 6 months. When she returned she worked fewer hours and were assigned more simple tasks because of her brain damage. After a couple of months she was dismissed and according to her employer the reason was that she was not able to perform her job. The parties of the case agreed that she had a disability. The Court stated that the woman had not been directly discriminated because of disability. She had, however, established such facts that it was the employer who had to prove that indirect discrimination had not taken place. The Court found that the employer had not proved that it would have been an unreasonable burden to follow the recommendations on having a mentor or supervisor who could give concrete feedback to the employee during a shorter period of time when she was returning to work. The Court also found that the employer had not documented that the employee after a period of time would not be able to perform her previous tasks as a consultant. The Court therefore concluded that the employer had not established reasonable accommodation and that the dismissal constituted indirect discrimination. The employee was awarded compensation equal to 6 months of salary.

**Name of the court:** Danish Maritime and Commercial Court

**Date of decision:** 1 December 2014

**Name of the parties:** HK as mandatar for A v. Dansk Industri as mandatar for Fortitech Europe ApS

**Reference number:** U2015.1041S

**Brief summary:** The Court referred to CJEU C-335/2011 and C-377/2011 (Ring and Skouboe Werge) and concluded that according to the definition in Ring and Skouboe Werge, the woman in the case who had tenosynovitis in her right hand did not have a disability. The Court referred to medical records stating that the woman would be completely healthy again and that she would not need to take special account of her condition in her future job search - except for making sure that her future workplace was arranged in a reasonable ergonomic way. The Court stated that the woman had not demonstrated that she at the time of the dismissal suffered from a medically diagnosed curable or incurable latent disorder.

**Name of the court:** Western High Court

**Date of decision:** 17 December 2014

**Name of the parties:** Fagforeningen Danmark as mandatar for A v. Inreco A/S

**Reference number:** Judgment No. B-2207-13. Printed in U2015.1169V

**Brief summary:** The case dealt with a serviceman in a shop who had injured his knee during his work. In the following years he had increased sickness absence as well as problems of performing his tasks. He was dismissed and the employer stated that the reason was spending cuts and outsourcing of maintenance resulting in staff reductions. The Court found the serviceman had a disability at the time of dismissal. The Court concluded that a personal assistant paid by the local municipality could not ease the serviceman's lack of competences. Thus, the Court concluded that the differential treatment of the serviceman had been objectively justified by the consideration for the performance of those tasks that remained after the outsourcing.

**Name of the court:** Maritime and Commercial Court

**Date of decision:** 22 December 2014

**Name of the parties:** Union Denmark as mandatar for A v. Dansk Bjergrning og Bugsering A/S

**Reference number:** U2015.1053S

**Brief summary:** The case dealt with a colour blind seaman. According to Danish law, the seaman was not allowed to perform essential tasks on the ship he worked on because of his colour blindness. He was therefore dismissed. The Court stated that the seaman had a disability and examined whether the employer should have established reasonable accommodation for the seaman to stay in his job. The Court concluded that the only realistic option would be to hire an extra seaman during the two weeks that the seaman in question was at sea. Such a measure would be unreasonable for the employer being a small shipping company with few employees. Thus, the dismissal was not against the Act on Prohibition of Discrimination on the Labour Market etc.

## **Age**

**Name of the court:** Supreme Court

**Date of decisions:** 17 January 2014

**Name of the parties:** Slagelse Kommune v. FOA and Region Syddanmark v. Socialpædagogernes Landsforbund as mandatar for A and B

**Reference number:** U2014.1116H and U2014.1119H

**Brief summary:** In these cases the Supreme Court issued decisions on a dispute whether Section 2(a) of the Salaried Employees Act was in conflict with the Employment Directive and the general EU principle on non-discrimination because of age. According to previous settled case law on Section 2(a), there was no entitlement to a severance allowance where a private pension scheme to which the employer had contributed allowed payment of an old-age pension on termination of the employment relationship, even if the employee did not wish to exercise his right to retirement. In CJEU Case C-499/08 Andersen, the Danish provision in Section 2(a) was found to be in conflict with the Employment Directive. In judgments of 14 January 2014 the Danish Supreme Court ruled on the consequences of the CJEU Andersen judgment. The Supreme Court concluded that a public employer is not allowed to use Section 2a(3), if the employee temporarily does not wish to exercise his right to retirement because of the fact that he wants to pursue a professional career. The Supreme Court established that it is illegal to cut off such public employees from their right to severance allowance.

**Name of the court:** Board of Equal Treatment

**Date of decision:** 5 March 2014

**Reference number:** Decision No. 41/2014

**Address of the webpage:**

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1382&type=Afgoerelse>

**Brief summary:** Section 43(a) of the Civil Servants Act poses a mandatory retirement for priests when they turn 70 years of age. In this case the complainant was a priest. He claimed that it constituted discrimination on account of age that he had to retire when he turned 70 years of age when all the other employees at his workplace (the organist, the verger, the parish clerk etc.) could continue working after they turned 70 years of age. The Board argued that the Danish parliament amended the Civil Servants Act and the rules on forced retirement in 2008 and by that occasion kept the forced retirement of priests, deans and bishops at their 70 years of age. According to the Board, the Danish parliament at that time must have taken the view that section 43(a) of the Civil Servants Act was not a violation of the prohibition of age discrimination. The Board furthermore argued that the Employment Equality Directive, the Act on Prohibition of Discrimination on the Labour Market etc. as well as case law from Danish courts and the CJEU illustrate that under certain conditions exceptions from the prohibition of age discrimination would be allowed. The Board directly referred to article 6 of the Employment Equality Directive. The Board

concluded that it did not find reasons to set aside the assessment of the Danish parliament. The exception from the prohibition of age discrimination in the Civil Servants Act was therefore justified.

**Name of the court:** Supreme Court

**Date of decision:** 22 September 2014

**Name of the parties:** Dansk Industri as mandatar for Ajos A/S v. the estate after A

**Reference number:** Decision by the Supreme Court in Case No. 14/2015

**Brief summary:** The Supreme Court issued a decision on reference for a preliminary ruling from the CJEU concerning the interpretation of the general unwritten EU principle on non-discrimination because of age as well as its possible horizontal direct effect between private parties. In its decision, the Supreme Court states that in a situation - like the Andersen case - where the employee is a public employee, the employee can invoke the Employment Directive directly, which will result in a disregard of Section 2a(3) of the Salaried Employees Act. In this decision the Supreme Court has asked the CJEU of its opinion when it comes to a private employee who has been cut off his right to severance allowance but who cannot directly invoke the Employment Directive because of the fact that his employer is a private employer.

**Name of the court:** Supreme Court

**Date of decision:** 1 October 2014

**Name of the parties:** Board of Equal Treatment as mandatar for P1, P2, P3, P4, P5 and P6 v. Scandinavian Airlines

**Reference number:** U2015.1H

**Brief summary:** The Supreme Court dealt with the level of compensation in these cases of age discrimination. The Supreme Court referred to case law on gender discrimination on the labour market stating that the pilots in question would be eligible to more than 6 months of salary in compensation. However, according to the Court there were a number of mitigating circumstances, which meant that the Court only granted 4 months of salary in compensation to each of the pilots. According to the court the mitigating circumstances were the following:

- the dismissals were necessary because of work and workforce reductions;
- the criterion for dismissing the pilots (eligibility for retirement benefits) was collectively negotiated with the pilot union;
- this criterion was the most humane and gentle in a situation where – no matter what – a number of pilots had to be dismissed.

There are no found 2014 cases brought by Roma and Travellers.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country: Denmark**

**Date: 13 April 2015**

<b>Act on the Prohibition of Discrimination in the Labour Market etc.</b>	<p>Title of the law: Act on the Prohibition of Discrimination in the Labour Market etc.  Date of adoption: 24 May 1996  Entry into force: 1 July 1996  Latest amendments: 1 January 2015  Web link:  <a href="https://www.retsinformation.dk/Forms/R0710.aspx?id=122522">https://www.retsinformation.dk/Forms/R0710.aspx?id=122522</a>  Grounds protected: race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin</p> <p>Civil law</p> <p>Material scope: employment</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate</p>
<b>Act on Ethnic Equal Treatment</b>	<p>Title of the law: Act on Ethnic Equal Treatment  Date of adoption: 28 May 2003  Entry into force: 1 July 2003  Latest amendments: 1 January 2013  Web link:  <a href="https://www.retsinformation.dk/forms/r0710.aspx?id=141404">https://www.retsinformation.dk/forms/r0710.aspx?id=141404</a>  Grounds protected: Race and ethnic origin</p> <p>Civil law</p> <p>Material scope: access to social protection, including social security and health care, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession</p> <p>Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate</p>
<b>Act on the Prohibition of Discrimination due to Race etc.</b>	<p>Title of the law: Act on the Prohibition of Discrimination due to Race etc.  Date of adoption: 9 June 1971  Entry into force: 1 August 1971  Latest amendments: 31 May 2000  Web link:  <a href="https://www.retsinformation.dk/forms/r0710.aspx?id=59249">https://www.retsinformation.dk/forms/r0710.aspx?id=59249</a>  Grounds protected: race, skin colour, national or ethnic background, belief or sexual orientation</p> <p>Criminal law</p> <p>Material scope: the provision of goods or services and access to public places or events</p> <p>Principal content: direct discrimination ("deny service on the same conditions as other")</p>
<b>Act on The Board of Equal Treatment</b>	<p>Title of the law: Act on the Board of Equal Treatment  Date of adoption: 27 May 2008  Entry into force: 1 January 2009  Latest amendments: 3 September 2012  Web link:  <a href="https://www.retsinformation.dk/Forms/R0710.aspx?id=143051">https://www.retsinformation.dk/Forms/R0710.aspx?id=143051</a></p>

	Grounds covered: gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin
	Civil law
	Material scope: <ul style="list-style-type: none"> <li>- Within labour market: all protected discrimination grounds</li> <li>- Outside labour market (access to social protection, including social security and health care, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession): gender, race and ethnic origin</li> </ul>
	Principal content: Creation of a specialised body
<b>Act on The Institute for Human Rights – The National Human Rights Institute of Denmark</b>	Title of the law: Act on The Institute for Human Rights – The National Human Rights Institute of Denmark Date of adoption: 18 June 2012 Entry into force: 1 January 2013 Latest amendments: 19 December 2013 Web link: <a href="https://www.retsinformation.dk/forms/r0710.aspx?id=142116">https://www.retsinformation.dk/forms/r0710.aspx?id=142116</a>
	Grounds protected: Race, Ethnic origin, Disability, Gender
	Civil law
	Material scope: Overall
	Principal content: Creation of a specialised body



## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: Denmark**

**Date: 13 April 2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	04.11.1950	13.04.1953	No	Yes	Yes
Protocol 12, ECHR	Not signed	Not ratified			
Revised European Social Charter	05.1996	Not ratified		Not signed collective complaints protocol	
International Covenant on Civil and Political Rights	20.03.1968	06.01.1972	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	22.09.1997	Only recognised minority: Germans in southern Jutland	No	Yes
International Convention on Economic, Social and Cultural Rights	20.03.1968	06.01.1972	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	21.06.1966	09.12.1971	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	17.07.1980	21.04.1983	No	Yes	Yes
ILO Convention No. 111 on Discrimination	05.06.1958	22.06.1960	No	No	Yes
Convention on the Rights of the Child	26.01.1990	19.07.1991	No	No (on 10.11.2014 the Danish government decided that it will accede the	Yes

<b>Instrument</b>	<b>Date of signature (if not signed please indicate)</b>	<b>Date of ratification (if not ratified please indicate)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
				complaints protocol)	
Convention on the Rights of Persons with Disabilities	30.03.2007	24.07.2009	No	Yes (acceded complaints protocol on 23.09.2014)	Yes

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