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Country report

Non-discrimination

Denmark

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Country report

Non-discrimination

Denmark

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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 and 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 had 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.

Up until the 1960s and 1970s the Danish population was 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 been born in another country or have parents born in other countries 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 implement 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 have traditionally been taken seriously and monitored quite closely by the central administration – even if Denmark is not a party in a particular case. However, the Danish Supreme Court Ajos-judgment might indicate a change in this regard.¹ The judgment constitutes a fundamental ruling with regard to the demarcation between the competence of the Court of Justice of the European Union and the Danish courts. The Danish Supreme Court did not follow the guidance of the CJEU in the Ajos-case (C-441/14). In other words, the Danish Supreme Court did not follow any of CJEU's two suggested solutions of the "contra legem" problem. This is a violation of EU law and a possible outcome could be for the EU Commission to initiate infringements proceedings against Denmark.

The domestic debate on whether and to what extent other international human rights recommendations should be followed can be quite fierce. Many politicians are sceptical about the limitations of international obligations on their legislative power.

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 amendments of the anti-discrimination laws have dealt with the discrimination ground of age as well as the functioning of the Board of Equal

¹ Supreme Court, judgment in case No. HR-15/2014 of 6 December 2016.

Treatment. The previous 70-year rule was nullified on 1 January 2016.² In other words, section 5a (4) of the Act on Prohibition of Discrimination on the Labour Market etc. was repealed and 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. Furthermore section 2a (3) of the Salaried Employees Act regarding severance allowance was revoked in 2015.³ Also in 2015 the Institute for Human Rights was given the authority to bring in complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest.⁴

The most important 2016 case law on anti-discrimination has dealt with the discrimination grounds of disability and age.

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 when international and EU-obligations have 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.⁵

In May 2003 the Act on Ethnic Equal Treatment was adopted.⁶ 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 in the labour market based on race, skin colour, religion or faith, political conviction, sexual orientation, age, disability

² Act No. 1489 of 23 December 2014.

³ Act No. 52 of 27 January 2015.

⁴ Act No. 1570 of 15 December 2015.

⁵ Consolidated Act No. 626 of 29 September 1987 with later amendments.

⁶ Consolidated Act No. 438 of 16 May 2012 with later amendments.

and national, social or ethnic origin.⁷ The Act prohibits discrimination in connection with recruitment, dismissal, transfer and promotion as well as discrimination with regard to pay and working conditions 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:

1. Employers whose establishments have the aim of promoting a certain political or religious ethos are exempted from the Act's prohibition of discrimination in situations where a certain political or religious requirement is of importance to the particular job in question, cf. Section 6(1).
2. 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 concrete work in question, the employer can apply for a dispensation from the relevant government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition against differential treatment, cf. Section

⁷ Consolidated Act No. 1349 of 16 December 2008 with later amendments.

6(2). Subsequently, the employer in question can legally make a requirement that the future employee for the job in question has a particular ethnic origin etc.

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 Supreme Court stated that the employer did not have an obligation to provide for a part-time position of 20 hours a week, which would have met the claimant's needs for accommodation. The Court argued that for the employer to provide for such a position, a current full-time position would have to be divided into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of 3 employees would constitute a disproportionate burden to the employer.⁸

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 concrete case, the Supreme Court stated that the son of a claimant "suffered from Asperger's syndrome to such a degree that he was encompassed by the concept of disability" in the Act on Prohibition of Discrimination in the Labour Market etc.⁹ The Court, however, argued that the claimant had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability. The Court also argued that the complainant had not experienced indirect discrimination. In this regard, the Court underlined that it did not need to discuss whether the prohibition of indirect discrimination encompass a situation where an employee does not have a disability herself but is affected by an action because of a disability of a child or another close relative. The Court referred to rulings from the Court of Justice of the European Union in case C-303/06 of 17 July 2006 (Coleman) and in case C-83/14 of 16 July 2015 (CHEZ Razpredelenie Bulgaria) and argued that the correct understanding of the Employment Directive in this regard is neither clear nor settled. As the question of whether indirect discrimination because of the association of an employee to a child with a disability is encompassed by the non-discrimination legislation was not decisive to the case in question, the Supreme Court concluded that it did not need to ask for a preliminary ruling on the issue from the Court of Justice of the European Union.

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.

⁸ Supreme Court judgment in case No. HR-98/2015 of 13 April 2016.

⁹ Supreme Court, judgment in case No. HR-151/2015 of 27 April 2016.

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 Institution 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

Trade unions and other membership organisations can represent their members in civil court cases dealing with pay and employment conditions. No particular legislation exists regarding the possibility of NGOs 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. 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.

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 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.¹⁰

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. In a 2015 ruling from the Supreme Court, the Court concluded that statistical information - if authentic and sufficiently significant - can by itself establish an assumption for

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

discrimination because of age.¹¹ 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 Institution of Denmark¹²

Legal basis

The Institute for Human Rights – The National Human Rights Institution 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. The DIHR act from 2012 clarified the role of the institute 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 ethnic minorities and persons with disabilities. Finally, in 2015 DIHR was given the authority to bring in complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest.¹³

The Board of Equal Treatment¹⁴

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.¹⁵

Functioning and competences

In 2015 the Act on the Board of Equal Treatment was amended to establish that the Board might reject a complaint if the complainant does not have an individual and current interest in the case in question.¹⁶ 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.

¹¹ Supreme Court, judgment No. 28/2015 of 14 December 2015.

¹² Consolidated Act No. 553 of 18. June 2012 with later amendments.

¹³ Act No. 1570 of 15 December 2015.

¹⁴ Consolidated Act No. 1230 of 2 October 2016.

¹⁵ Consolidated Act No. 1230 of 2 October 2016.

¹⁶ Act No. 1570 of 15 December 2015.

7. Key issues

Like previous years there was a profound lack of recognition that discrimination took place in the Danish society. The government, the ministries and other public authorities did not seem to prioritize efforts and initiatives for equality and non-discrimination. On the contrary, the Ministry of Immigration and Integration seems to boast about the number of times that the government has tightened various rules on foreigners and immigrants by having a picture on its website of a running meter counting restrictions.

There was a serious lack of statistics and general research about discrimination.

There was no obligation and very limited access to the establishment of positive action measures by employers. Legal barriers made it very difficult in practice for employers to initiate genuine positive measures.¹⁷

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

Regarding the concept of disability, Danish courts and the Board of Equal Treatment seem to focus very much on the need for a medical impairment to establish a disability. Rulings indicate that for a condition to be considered a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. it is critical that the condition is caused by a medically diagnosed illness.¹⁸ This makes it questionable whether discrimination because of perceived disability is illegal according to Danish non-discrimination law. In other words, the courts and the Board do not seem to sufficiently consider the role that environmental factors can play in creating a disability. It seems that the out-dated medical model of disability is still being applied in practice when it comes to cases of disability discrimination in Denmark.

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

There has been a general rise in the number of complaints to the Board since the Board was established in 2009. However, the number of complaints have decreased the last couple of years and the visibility of the Board among possible victims of discrimination is still relatively low. This is especially the case for ethnic minority groups and people with disabilities.

The Danish Institute for Human Rights (DIHR) served as a specialised equality body.¹⁹ However, DIHR assisted few victims of discrimination in 2016 (18 inquiries on race/ethnicity, 2 on multiple discrimination, 13 on disability and 2 on age). Thus it could be questioned whether DIHR was an effective specialised equality body when it comes to the tasks of assisting victims of discrimination.

However, in 2015 DIHR was given the authority to bring in complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest. DIHR used that competence in one case dealing with discrimination based on ethnic origin. Furthermore DIHR acted as *amicus curiae* in three civil court cases dealing with discrimination because of disability. DIHR may thus be more effective in promoting equality-issues by concrete legal actions in the future.

¹⁷ Section 4 of the Act on Prohibition of Discrimination in the Labour Market etc.

¹⁸ Eastern High Court, Judgment in case No. B-523-15 of 31 May 2016.

¹⁹ Section 2(2) of the Act on The Institute for Human Rights – The National Human Rights Institution 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 et 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 traditionnellement, 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.

Jusqu'aux années 1960 et 1970, la population danoise était 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 mettre en œuvre la directive sur l'égalité raciale ou 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) ont été traditionnellement pris au sérieux et suivis de très près par l'administration centrale danoise, même lorsque le pays n'était pas partie à une affaire particulière. L'arrêt de la Cour suprême danoise dans l'affaire Ajos pourrait toutefois signaler un changement à cet égard.²⁰ L'arrêt constitue une décision de principe quant à la frontière entre la compétence de la Cour de justice de l'Union européenne et les juridictions danoises. La Cour suprême danoise n'a pas suivi les orientations données par la CJUE dans l'affaire Ajos (C-441/14). En d'autres termes, elle n'a opté pour aucune des deux solutions suggérées par la CJUE pour résoudre le problème du «contra legem». Il s'agit d'une violation du droit de l'UE qui pourrait donner lieu à l'engagement par la Commission européenne d'une procédure d'infraction à l'encontre du Danemark.

Le débat national sur la question de savoir si, et dans quelle mesure, d'autres recommandations internationales en matière de droits de l'homme devraient être suivies peut être assez animé. Nombreux sont en effet les politiciens qui expriment des réserves quant aux limites imposées à leur 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

²⁰ Cour suprême, arrêt du 6 décembre 2016 dans l'affaire n° HR-15/2014.

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.

Les principaux amendements récemment apportés à la législation antidiscrimination danoise concernent la discrimination fondée sur l'âge ainsi que le fonctionnement de la Commission pour l'égalité de traitement. La règle des 70 ans antérieurement en vigueur a été supprimée au 1^{er} janvier 2016.²¹ En d'autres termes, l'article 5a, paragraphe 4, de la loi de la loi sur l'interdiction de discrimination sur le marché du travail etc. a été abrogé et aucun contrat individuel de travail ni aucune convention collective prévoyant la résiliation automatique du contrat de travail à l'âge de 70 ans ne peut être conclu(e) à l'avenir. Les contrats individuels antérieurs prévoyant cette résiliation automatique ne sont désormais plus applicables. De surcroît, l'article 2a, paragraphe 3, de la loi relative aux salariés portant sur l'indemnité de départ a été abrogé en 2015.²² En 2015 également, l'Institut national des droits de l'homme a été habilité à introduire une plainte auprès de la Commission pour l'égalité de traitement lorsque l'affaire en cause relève d'une question de principe ou de l'intérêt public général.²³

La jurisprudence de 2016 en matière de non-discrimination porte principalement sur les motifs du handicap et de l'âge.

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 lorsqu'un débat public ou des engagements internationaux/européens 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 faisceau 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.²⁴

La loi danoise sur l'égalité de traitement sans distinction ethnique a été adoptée en mai 2003.²⁵ 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

²¹ Loi n° 1489 du 23 décembre 2014.

²² Loi n° 52 du 27 janvier 2015.

²³ Loi n° 1570 du 15 décembre 2015.

²⁴ Loi coordonnée n° 626 du 29 septembre 1987 avec amendements ultérieurs.

²⁵ Loi coordonnée n° 438 du 16 mai 2012 avec amendements ultérieurs.

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 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 sur le marché du travail 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.²⁶ 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.

²⁶ Loi coordonnée n° 1349 du 16 décembre 2008 avec amendements ultérieurs.

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

1. les employeurs dont les établissements ont pour objectif de promouvoir une certaine philosophie politique ou religieuse sont exemptés de l'interdiction de discrimination visée par ladite loi lorsqu'une exigence politique ou religieuse déterminée revêt de l'importance pour le poste concerné (voir article 6, paragraphe 1);
2. s'il est particulièrement important qu'une personne soit d'une certaine race, opinion politique, orientation sexuelle, origine nationale, sociale ou ethnique, qu'elle ait une couleur de peau, un âge ou un handicap particulier, ou qu'elle appartienne à une certaine religion ou croyance, et que cette caractéristique est raisonnable par rapport au travail concrètement concerné, l'employeur peut demander une dérogation au ministre compétent. Après avoir obtenu une déclaration de la part du ministre du Travail, le ministre peut délivrer une dérogation à l'interdiction de traitement différencié (voir article 6, paragraphe 2). L'employeur concerné peut légalement exiger par la suite que le salarié engagé pour le poste en question ait une origine ethnique particulière, etc.

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 Cour suprême a déclaré que l'employeur n'était pas tenu d'offrir un poste à temps partiel de 20 heures par semaine, ce qui aurait répondu aux besoins d'aménagement de la partie plaignante, faisant valoir que l'offre d'un tel poste obligerait l'employeur à diviser un poste à plein temps existant en deux postes à temps partiel – et que, pour des raisons objectives, un tel changement organisationnel au sein d'un petit département de trois personnes constituerait une charge disproportionnée pour l'employeur.²⁷

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. Elle 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 une affaire dont elle a été saisie, la Cour suprême a déclaré que le fils d'une plaignante «souffrait du syndrome d'Asperger au point d'être couvert par la notion de handicap» visée dans la loi sur l'interdiction de discrimination sur le marché du travail etc.²⁸ mais elle a néanmoins fait valoir que la plaignante n'avait pas été licenciée en raison du handicap de son fils, mais en raison de sa longue absence du travail – et que son licenciement ne constituait pas dès lors une discrimination directe fondée sur le handicap. La Cour a également fait valoir que la plaignante n'avait fait pas l'objet d'une discrimination indirecte en soulignant à cet égard qu'elle n'a pas à examiner si l'interdiction de discrimination directe couvre ou non une situation dans laquelle une salariée ne souffre pas elle-même d'un handicap mais où elle est affectée par une action découlant du handicap d'un enfant ou d'un autre proche. La Cour a fait référence aux arrêts de la Cour de justice de l'Union européenne dans les affaires C-303/06 du 17 juillet 2006 (Coleman) et C-83/14 du 16 juillet 2015 (CHEZ Razpredelenie Bulgaria) et soutenu que l'interprétation correcte de la directive «Emploi» n'est ni claire ni fixée à cet égard. La question de savoir si la discrimination indirecte résultant de l'association d'un travailleur à un enfant handicapé est

²⁷ Cour suprême, arrêt du 13 avril 2016 dans l'affaire n° HR-98/2015.

²⁸ Cour suprême, arrêt du 27 avril 2016 dans l'affaire n° HR-151/2015.

visée ou non par la législation antidiscrimination n'étant pas déterminante en l'espèce, la Cour suprême a conclu qu'elle n'avait pas à demander à la CJUE de décision préjudicielle sur ce point.

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.

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

Les syndicats et autres organisations associatives peuvent représenter leurs membres dans des affaires au civil portant sur les conditions de rémunération et de travail. Il n'existe aucune législation visant spécifiquement la possibilité pour des ONG de représenter des victimes de discrimination dans des procédures civiles. Les ONG ne jouissent pas auprès des juridictions nationales pour ce qui concerne les cas de discrimination de la même habilitation générale d'ester en justice que celle accordée aux syndicats pour ce qui concerne les questions de rémunération et d'emploi. Seuls des avocats certifiés titulaires d'un mandat de la part d'une victime individuelle de discrimination peuvent plaider une affaire devant des juridictions civiles. Autrement dit, une ONG peut aider à l'examen du cas mais lorsqu'il s'agit de représenter et de plaider l'affaire devant une juridiction civile, la victime de discrimination doit se faire représenter juridiquement par un avocat certifié.

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, 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.²⁹

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. Dans un arrêt rendu en 2015, la Cour suprême conclut que l'information statistique – à condition d'être authentique et suffisamment significative – peut établir en soi une présomption de discrimination fondée sur l'âge.³⁰ 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*³¹

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. La loi relative à l'Institut, adoptée en 2012, précise son rôle 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 minorités ethniques et des personnes handicapées. Enfin, l'Institut est habilité depuis 2015 à introduire une plainte auprès de la Commission pour l'égalité de traitement lorsque l'affaire en cause relève d'une question de principe ou de l'intérêt public général.³²

*La Commission pour l'égalité de traitement*³³

Base juridique

La Commission pour l'égalité de traitement est opérationnelle depuis le 1^{er} janvier 2009. Elle traite l'ensemble des motifs protégés (genre, race, couleur de peau, religion ou

²⁹ Voir: <http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fra-ligebehandlingsnaevnet>.

³⁰ Cour suprême, arrêt n° 28/2015 du 14 décembre 2015.

³¹ Loi coordonnée n° 553 du 18 juin 2012 avec amendements ultérieurs.

³² Loi n° 1570 du 15 décembre 2015.

³³ Loi coordonnée n° 1230 du 2 octobre 2016.

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.³⁴

Fonctionnement et compétences

La loi relative à la Commission pour l'égalité de traitement a été amendée en 2015 afin d'établir que la Commission peut rejeter un recours lorsque la partie plaignante n'a pas d'intérêt personnel et actuel dans l'affaire en question.³⁵ 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.

7. Points essentiels

On observe, comme les années précédentes, un manque profond de reconnaissance quant à l'existence de discriminations au sein de la société danoise. Le gouvernement, les ministères et d'autres autorités publiques ne semblent pas donner la priorité à des actions et initiatives en faveur de l'égalité et de la non-discrimination. Au contraire, le ministère de l'Immigration et de l'intégration se vante apparemment du nombre de fois où le gouvernement a resserré les diverses règles relatives aux étrangers et aux immigrants en représentant en temps réel sur son site web un compteur affichant les mesures restrictives.

On constate manque préoccupant de statistiques et d'études générales concernant le phénomène discriminatoire.

Il n'existe aucune obligation pour les employeurs en matière de mesures d'action positives et l'accès de ceux-ci à leur mise en place s'avère très limité: des entraves juridiques ne leur permettent effectivement pas d'instaurer dans la pratique de véritables mesures de cette nature.³⁶

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 qu'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 ce qui concerne le concept du handicap, les juridictions danoises et la Commission pour l'égalité de traitement semblent se focaliser sur la nécessité d'une invalidité médicale pour établir l'existence d'un handicap. Les arrêts prononcés montrent qu'il est essentiel, pour qu'un état soit considéré comme un handicap visé par la loi sur l'interdiction de discrimination sur le marché du travail etc., que l'origine de l'état en question soit une maladie médicalement diagnostiquée³⁷ – ce qui conduit à s'interroger sur le point de savoir si la discrimination fondée sur un handicap perçu est illégale aux yeux de la législation antidiscrimination danoise. Autrement dit, les juridictions et la Commission pour l'égalité de traitement semblent ne pas prendre suffisamment en compte le rôle que des facteurs environnementaux peuvent jouer dans la création d'un handicap. Il semble donc que ce

³⁴ Loi coordonnée n° 1230 du 2 octobre 2016.

³⁵ Loi n° 1570 du 15 décembre 2015.

³⁶ Article 4 de la loi sur l'interdiction de discrimination sur le marché du travail.

³⁷ Cour régionale de l'Est, arrêt du 31 mai 2016 dans l'affaire n° B-523-15.

soit le modèle médical – obsolète – du handicap qui continue d’être utilisé dans la pratique danoise pour ce qui concerne les cas de discrimination fondée sur ce motif.

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

La Commission pour l’égalité de traitement a connu une hausse générale du nombre de plaintes qui lui sont adressées depuis sa création en 2009. Ce nombre est toutefois en recul depuis quelques années et la visibilité de la Commission parmi les victimes éventuelles de discrimination reste relativement faible. Tel est plus particulièrement le cas auprès des groupes minoritaires et des personnes handicapées.

L’Institut national danois des droits de l’homme a rempli sa fonction d’organisme spécialisé pour l’égalité de traitement.³⁸ Il n’a cependant prêté assistance qu’à un très petit nombre de victimes en 2016 (18 enquêtes sur des plaintes liées à la race/l’origine ethnique, 2 sur des plaintes liés à une discrimination multiple, 13 sur des plaintes liées au handicap et 2 sur des plaintes liées à l’âge). La question peut donc se poser de savoir s’il remplit efficacement la dite fonction lorsqu’il s’agit d’aider des victimes de discrimination.

L’Institut est habilité depuis 2015 à introduire une plainte auprès de la Commission pour l’égalité de traitement lorsque l’affaire en cause relève d’une question de principe ou de l’intérêt public général, et il a fait usage de cette compétence dans une affaire de discrimination fondée sur l’origine ethnique. Il a par ailleurs agi en qualité d’amicus curiae dans trois affaires civiles portant sur une discrimination fondée sur le handicap. Il se pourrait donc que l’Institut national danois des droits de l’homme se montre plus efficace à l’avenir lorsqu’il s’agit de promouvoir des questions d’égalité au moyen d’actions judiciaires concrètes.

³⁸ 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 Diskriminierung auf dem Arbeitsmarkt aufgrund von Rasse, Religion und 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.

Bis in die 1960er und 1970er Jahre war die dänische Bevölkerung 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 in einem anderen Land geboren wurden oder Eltern haben, die in einem anderen Land als Dänemark geboren wurden. 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 sowie die Urteile des Gerichtshofs der Europäischen Union (EuGH) und des Europäischen Gerichtshofs für Menschenrechte (EGMR) sind in der Regel ernst genommen und von der Zentralverwaltung sehr genau überwacht worden, auch in Fällen, in denen Dänemark nicht betroffen war. Das *Ajos*-Urteil des dänischen Obersten Gerichtshofs könnte diesbezüglich jedoch eine Änderung signalisieren.³⁹ Das Urteil stellt eine grundlegende Entscheidung bezüglich der Abgrenzung zwischen der Zuständigkeit des Gerichtshofs der Europäischen Union und den dänischen Gerichten dar. Der dänische Oberste Gerichtshof folgte den Orientierungshilfen des EuGH im *Ajos*-Fall (C-441/14) nicht. Anders ausgedrückt: Er befolgte keine der beiden vom EuGH vorgeschlagenen Lösungen des *contra-legem*-Problems. Dies ist ein Verstoß gegen das EU-Recht, und in der Folge könnte es dazu kommen, dass die EU-Kommission ein Vertragsverletzungsverfahren gegen Dänemark einleitet.

Es kommt mitunter zu ziemlich heftigen innenpolitischen Debatten darüber, ob und in welchem Umfang andere internationale Menschenrechtsempfehlungen befolgt werden sollen. Viele Politiker stehen Einschränkungen ihrer gesetzgeberischen Befugnisse durch internationale Verpflichtungen skeptisch gegenüber.

Ein besonderer Schwerpunkt lag darin, Einwanderer aus Drittstaaten darin zu bestärken, sich explizit für Grundwerte auszusprechen (z.B. Gleichstellung der Geschlechter und

³⁹ Oberster Gerichtshof, Urteil in der Rechtssache HR-15/2014 vom 6. Dezember 2016.

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 wichtigsten Änderungen der dänischen Antidiskriminierungsgesetze der letzten Zeit betrafen das Diskriminierungsmerkmal Alter und die Arbeitsweise des Gleichbehandlungsausschusses. Die bisherige 70-Jahre-Regelung wurde zum 1. Januar 2016 abgeschafft.⁴⁰ Anders ausgedrückt: Artikel 5a Absatz 4 des Gesetzes über das Verbot von Diskriminierung am Arbeitsplatz usw. wurde aufgehoben, was dazu führt, dass zukünftig weder Einzelarbeitsverträge noch kollektivrechtliche Vereinbarungen geschlossen werden dürfen, die eine automatische Beendigung des Arbeitsverhältnisses bei Erreichen des 70. Lebensjahres vorsehen. Auch können frühere Arbeitsverträge, die eine automatische Beendigung vorsehen, nicht durchgesetzt werden. 2015 wurde außerdem Artikel 2a Absatz 3 des Angestelltengesetzes, in dem es um Abfindung geht, abgeschafft.⁴¹ Ebenfalls 2015 wurde dem Institut für Menschenrechte die Befugnis erteilt, in Fällen, die von grundsätzlicher Bedeutung oder von allgemeinem öffentlichem Interesse sind, Beschwerden an den Gleichbehandlungsausschuss zu richten.⁴²

Die wichtigsten Urteile, die 2016 im Bereich Antidiskriminierung gefällt wurden, bezogen sich auf die Diskriminierungsmerkmale Behinderung und Alter.

2. Wichtigste Gesetze

Die Antidiskriminierungsgesetzgebung in Dänemark besteht nicht aus einem einzigen Rechtsakt. Es handelt sich vielmehr um eine Kombination mehrerer Rechtsakte, die eingeführt oder abgeändert wurden, wenn die öffentliche Debatte oder internationale und unionsrechtliche Verpflichtungen einen bestimmten Geltungsbereich oder eine bestimmte besonders schutzbedürftige Gruppe in den Fokus rückten. 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 von 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.⁴³

⁴⁰ Gesetz Nr. 1489 vom 23. Dezember 2014.

⁴¹ Gesetz Nr. 52 vom 27. Januar 2015.

⁴² Gesetz Nr. 1570 vom 15. Dezember 2015.

⁴³ Konsolidiertes Gesetz Nr. 626 vom 29. September 1987 mit späteren Änderungen.

Im Mai 2003 wurde das Gesetz über ethnische Gleichbehandlung verabschiedet.⁴⁴ 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 beinhaltet ein Verbot von 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 von Diskriminierung auf dem Arbeitsmarkt usw., das erstmals im Jahr 1996 verabschiedet wurde, verbietet unmittelbare und mittelbare Diskriminierung am Arbeitsplatz aufgrund der Rasse, Hautfarbe, Religion oder des Glaubens, der politischen Überzeugung, sexuellen Orientierung, des Alters, einer Behinderung und der nationalen, sozialen oder ethnischen Herkunft.⁴⁵ 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.

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 unmittelbare 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 mittelbare Diskriminierung, Belästigung und Viktimisierung vom Strafrecht nicht erfasst werden.

Dänemark hat alle wichtigen Menschenrechtskonventionen ratifiziert mit Ausnahme der UN-Konvention über Wanderarbeitnehmer und das Protokoll 12 zur Europäischen Menschenrechtskonvention (EMRK). Dänemark hat die revidierte Europäische Sozialcharta des Europarats 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 Art. 1 Abs. 2 Gesetz über das Verbot von Diskriminierung auf dem Arbeitsmarkt und Art. 3 Abs. 2 Gesetz über ethnische Gleichbehandlung).

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, außer die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges

⁴⁴ Konsolidiertes Gesetz Nr. 438 vom 16. Mai 2012 mit späteren Änderungen.

⁴⁵ Konsolidiertes Gesetz Nr. 1349 vom 16. Dezember 2008 mit späteren Änderungen.

Ziel sachlich gerechtfertigt und die Mittel zur Erreichung dieses Ziels sind angemessen und erforderlich (vgl. Art. 1 Abs. 3 Gesetz über das Verbot von Diskriminierung auf dem Arbeitsmarkt und Art. 3 Abs. 3 Gesetz über ethnische Gleichbehandlung).

Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind nach Artikel 1 Absatz 4 und 5 sowie Artikel 7 Absatz 2 des Gesetzes über das Verbot von Diskriminierung auf dem Arbeitsmarkt sowie nach Artikel 3 Absatz 4 und 5 sowie Artikel 8 des Gesetzes über ethnische Gleichbehandlung ebenfalls verboten.

Das Gesetz über das Verbot von Diskriminierung auf dem Arbeitsmarkt enthält zwei wichtige Ausnahmen vom Verbot der Diskriminierung:

1. Arbeitgeber, deren Unternehmen den Zweck verfolgen, einen bestimmten politischen oder religiösen Ethos zu fördern, sind in Situationen, in denen eine bestimmte politische oder religiöse Anforderung für die jeweilige Tätigkeit von Bedeutung ist, vom Diskriminierungsverbot des Gesetzes ausgenommen (Art. 6 Abs. 1).
2. Wenn es von entscheidender Bedeutung ist, dass eine Person eine bestimmte Rasse, politische Überzeugung, sexuelle Orientierung oder nationale, soziale oder ethnische Herkunft, eine bestimmte Hautfarbe, Behinderung oder ein bestimmtes Alter hat oder einer bestimmten Religion oder Glaubensrichtung angehört, und wenn die Anforderung des jeweiligen Merkmals in Bezug auf die konkrete Tätigkeit, um die es geht, angemessen ist, kann der Arbeitgeber beim zuständigen Regierungsminister eine Befreiung beantragen. Nach Erhalt einer entsprechenden Stellungnahme des Arbeitsministers kann der Minister eine konkrete Befreiung vom Verbot der unterschiedlichen Behandlung erteilen (Art. 6 Abs. 2). Damit ist der betreffende Arbeitgeber gesetzlich befugt zu verlangen, dass der künftige Beschäftigte für die betreffende Tätigkeit zum Beispiel eine bestimmte ethnische Herkunft usw. hat.

In Bezug auf angemessene Vorkehrungen für Menschen mit Behinderungen verpflichtet Artikel 2(a) des Gesetzes über das Verbot von Diskriminierung auf dem Arbeitsmarkt den Arbeitgeber, den Arbeitsplatz für Menschen mit Behinderungen entsprechend anzupassen, es sei denn, dies würde für den Arbeitgeber eine unverhältnismäßige Belastung darstellen. In einem konkreten Fall kam der Oberste Gerichtshof zu dem Ergebnis, dass der Arbeitgeber nicht verpflichtet war, eine Teilzeitstelle von 20 Wochenstunden anzubieten, die den Bedürfnissen des Antragstellers gerecht geworden wäre. Das Gericht argumentierte, dass der Arbeitgeber, um eine solche Stelle einzurichten, gezwungen gewesen wäre, eine damalige Vollzeitstelle in zwei Teilzeitstellen aufzuteilen. Aus objektiven Gründen, so das Gericht, hätte diese organisatorische Veränderung in einer kleinen Abteilung, die drei Beschäftigte umfasste, eine übermäßige Belastung des Arbeitgebers bedeutet.⁴⁶

Die dänischen Gesetze zum Schutz vor Diskriminierung unterscheiden zwischen natürlichen und juristischen Personen und legen fest, dass einzig natürliche Personen vor unmittelbarer bzw. mittelbarer Diskriminierung geschützt sind.

Diskriminierung aufgrund der Assoziierung mit einer Person wird durch das Gesetz über ethnische Gleichbehandlung ausdrücklich abgedeckt. Diskriminierung aufgrund von Assoziierung ist im Wortlaut des Gesetzes über das Verbot von Diskriminierung auf dem Arbeitsmarkt nicht enthalten, nach der einschlägigen Rechtsprechung jedoch abgedeckt. In einem konkreten Fall stellte der Oberste Gerichtshof fest, dass der Sohn einer Klägerin „in einem solchen Grad unter dem Asperger-Syndrom litt, dass er unter den Begriff der Behinderung fiel“, wie er im Gesetz zum Verbot von Diskriminierung auf dem Arbeitsmarkt usw. definiert ist.⁴⁷ Allerdings, so die Argumentation des Gerichts, sei die Klägerin nicht aufgrund der Behinderung ihres Sohnes, sondern aufgrund ihrer langen Abwesenheit vom

⁴⁶ Oberster Gerichtshof, Urteil in der Rechtssache HR-98/2015 vom 13. April 2016.

⁴⁷ Oberster Gerichtshof, Urteil in der Rechtssache HR-151/2015 vom 27. April 2016.

Arbeitsplatz entlassen worden. Die Kündigung stelle also keine unmittelbare Diskriminierung aufgrund von Behinderung dar. Die Klägerin, so das Gericht weiter, sei auch nicht mittelbar diskriminiert worden. Diesbezüglich hob das Gericht hervor, es bestehe keine Notwendigkeit zu erörtern, ob das Verbot mittelbarer Diskriminierung eine Situation umfasse, in der eine Arbeitnehmerin selbst keine Behinderung hat, aufgrund der Behinderung eines Kindes oder eines anderen nahen Verwandten aber von einer Handlung betroffen sei. Das Gericht verwies auf die Urteile des Gerichtshofs der Europäischen Union in der Rechtssache C-303/06 vom 17. Juli 2006 (*Coleman*) und in der Rechtssache C-83/14 vom 16. Juli 2015 (*CHEZ Razpredelenie Bulgarien*) und erklärte, dass das korrekte Verständnis der Beschäftigungsrichtlinie in dieser Hinsicht weder klar noch entschieden sei. Da die Frage, ob mittelbare Diskriminierung aufgrund der Assoziierung eines Arbeitnehmers oder einer Arbeitnehmerin, der/die ein Kind mit Behinderung hat, von den Nichtdiskriminierungsvorschriften erfasst wird, für den in Rede stehenden Fall nicht entscheidend war, schloss der Oberste Gerichtshof, dass es nicht erforderlich sei, den Gerichtshof der Europäischen Union in dieser Frage um eine Vorabentscheidung zu ersuchen.

Mehrfachdiskriminierung wird durch Rechtsvorschriften nicht direkt abgedeckt. In Fällen von Mehrfachdiskriminierung werden die verschiedenen Diskriminierungsgründe individuell behandelt. Diskriminierung aus mehreren Gründen führt nicht zu höheren Ausgleichszahlungen.

4. Sachlicher Geltungsbereich

Auf dem öffentlichen und privaten Arbeitsmarkt ist 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 von Diskriminierung auf dem Arbeitsmarkt usw. verboten. Im Zivilrecht für Bereiche außerhalb des Arbeitsmarktes ist nach dem Gesetz über ethnische Gleichbehandlung lediglich die Diskriminierung aus Gründen der Rasse und der ethnischen Herkunft verboten.

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 Gleichbehandlungsausschuss;
- 5) das Institut für Menschenrechte - Die Nationale Menschenrechtsinstitution Dänemarks (DIMR) (für Beratung/Unterstützung);
- 6) den in einigen Gemeinden zur Verfügung stehenden Bürgerberatungsdienst (Beratung/Unterstützung);
- 7) NROs;
- 8) den dänischen Presserat (*Pressenævnet*), den Rundfunk- und Fernsehrat in Sachen Werbung (*Radio- og TV-Nævnet*), den Verbraucherombudsmann (*Forbrugerombudsmanden*).

A. Nichtregierungsorganisationen

Gewerkschaften und andere Mitgliederorganisationen können ihre Mitglieder in Zivilverfahren, in denen es um Bezahlung oder Arbeitsbedingungen geht, vertreten.

Spezielle Rechtsvorschriften bezüglich der Möglichkeit von NROs, Diskriminierungsoffer in Zivilverfahren zu vertreten, existieren nicht. NROs haben in Diskriminierungsverfahren vor den innerstaatlichen Gerichten nicht dieselbe rechtliche Position wie Gewerkschaften in Fragen der Bezahlung und der Arbeitsbedingungen. Nur zugelassene Anwälte, die von dem jeweiligen Diskriminierungsoffer ein Mandat erhalten haben, können vor den Zivilgerichten prozessieren. Dies bedeutet, dass NROs Unterstützung leisten können, indem sie den jeweiligen Fall prüfen; wenn es jedoch um die Betreibung des Verfahrens vor den Zivilgerichten und die Vertretung in dem Verfahren geht, muss die betroffene Person sich von einem zugelassenen Anwalt vertreten lassen.

B. Teilung der Beweislast

Das Gesetz über ethnische Gleichbehandlung und das Gesetz über das Verbot von Diskriminierung auf dem Arbeitsmarkt umfassen Bestimmungen über die Teilung der Beweislast, wodurch sichergestellt wird, dass der Grundsatz der Gleichbehandlung wirksam angewandt wird. Die geteilte Beweislast bedeutet, dass, sobald ein glaubhafter Anschein der Diskriminierung besteht, die Beweislast auf die beklagte Partei übergeht.

C. Höhe der Sanktionen und Überwachung der Beschwerdezahlen

Statistiken über die Zahl der dem Gleichbehandlungsausschuss vorliegenden Beschwerden können auf der Website sowie im Jahresbericht des Ausschusses eingesehen werden.⁴⁸

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. Testing-Verfahren und statistische Beweise in der Praxis

Statistische Beweise wurden in einigen Fällen der Diskriminierung auf Grund von Alter und Geschlecht verwendet. In einem Urteil von 2015 entschied der Oberste Gerichtshof, dass statistische Daten – sofern glaubwürdig und hinreichend signifikant – an sich die Vermutung einer Diskriminierung aufgrund des Alters begründen können.⁴⁹ Testing-Verfahren sind in den dänischen Rechtsvorschriften nicht geregelt und werden vor allem von Journalisten und NROs verwendet, um ihre Vermutungen zu bestätigen, dass Diskriminierung in einem bestimmten Sektor existiert.

6. Gleichbehandlungsstellen

*Das Institut für Menschenrechte - Die Nationale Menschenrechtsinstitution Dänemarks*⁵⁰

Rechtsgrundlage

Das *Institut für Menschenrechte - Die Nationale Menschenrechtsinstitution Dänemarks* (DIMR) 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 festgelegt ist. Das DIMR-Gesetz von 2012 definierte die Rolle des Instituts als eigenständige, unabhängige Einrichtung. In dem Gesetz ist des Weiteren die Rolle des DIMR im Hinblick auf die Förderung der Gleichbehandlung und der Nichtdiskriminierung beschrieben und das Mandat des Instituts als Gleichbehandlungsstelle für die Diskriminierungsgründe Rasse und ethnische Herkunft sowie Geschlecht im Rahmen der EU-Richtlinien verankert.

⁴⁸ Siehe: <http://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/publikationer-fra-ligebehandlingsnaevnet>.

⁴⁹ Oberster Gerichtshof, Urteil Nr. 28/2015 vom 14. Dezember 2015.

⁵⁰ Konsolidiertes Gesetz Nr. 553 vom 18. Juni 2012 mit späteren Änderungen.

Mandat und Zuständigkeiten

Das DIMR 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 DIMR dem Parlament einen jährlichen Bericht über die Menschenrechtssituation in Dänemark vor, der die Situation von ethnischen Minderheiten und Menschen mit Behinderungen einbezieht. 2015 erhielt das Institut schließlich die Befugnis, in Fällen, die von grundsätzlicher Bedeutung oder von allgemeinem öffentlichem Interesse sind, Beschwerden an den Gleichbehandlungsausschuss zu richten.⁵¹

*Der Gleichbehandlungsausschuss*⁵²

Rechtsgrundlage

Der Gleichbehandlungsausschuss konstituierte sich am 1. Januar 2009. Der Ausschuss deckt alle geschützten Diskriminierungsgründe ab (Geschlecht, Rasse, Hautfarbe, Religion oder Weltanschauung, politische Überzeugung, sexuelle Orientierung, Alter, Behinderung oder nationale, soziale oder ethnische Herkunft).

Mandat

Der Gleichbehandlungsausschuss 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.⁵³

Funktionsweise und Kompetenzen

2015 wurde im Zuge einer Änderung des Gesetzes zur Regelung des Gleichbehandlungsausschusses festgelegt, dass der Ausschuss eine Beschwerde zurückweisen kann, wenn die beschwerdeführende Partei kein persönliches, gegenwärtiges Interesse an dem fraglichen Fall hat.⁵⁴ 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. Schlüsselprobleme

Wie schon in früheren Jahren wurde in keiner Weise anerkannt, dass in der dänischen Gesellschaft Diskriminierungen stattfanden. Bemühungen und Initiativen zugunsten von Gleichheit und Nichtdiskriminierung schienen bei der Regierung, den Ministerien und anderen öffentlichen Stellen keine Priorität zu haben. Im Gegenteil scheint sich das Ministerium für Immigration und Integration damit zu brüsten, wie oft die Regierung die Vorschriften zum Thema Ausländer und Einwanderer verschärft hat: Auf ihrer Webseite ist ein Zähler abgebildet, der Beschränkungen anzeigt.

Es herrschte ein großer Mangel an Statistiken und allgemeiner Forschung im Bereich der Diskriminierung.

Es gab keine Pflicht und nur sehr begrenzte Möglichkeiten zur Umsetzung positiver Maßnahmen seitens der Arbeitgeber. Rechtliche Hürden erschwerten es Arbeitgebern in der Praxis, ernstzunehmende positive Maßnahmen zu ergreifen.⁵⁵

⁵¹ Gesetz Nr. 1570 vom 15. Dezember 2015.

⁵² Konsolidiertes Gesetz Nr. 1230 vom 2. Oktober 2016.

⁵³ Konsolidiertes Gesetz Nr. 1230 vom 2. Oktober 2016.

⁵⁴ Gesetz Nr. 1570 vom 15. Dezember 2015.

⁵⁵ Art. 4 Gesetz zum Verbot der Diskriminierung auf dem Arbeitsmarkt usw.

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

Was das Konzept von Behinderung betrifft, so scheinen die dänischen Gerichte und der Gleichbehandlungsausschuss sehr viel Wert darauf zu legen, dass für die Feststellung einer Behinderung eine medizinische Beeinträchtigung erforderlich ist. Urteile zeigen, dass entscheidend dafür, ob ein Zustand als Behinderung im Sinne des Gesetzes zum Verbot von Diskriminierung auf dem Arbeitsmarkt usw. angesehen wird, ist, ob der Zustand durch eine ärztlich festgestellte Krankheit verursacht wurde.⁵⁶ Es ist daher fraglich, ob Diskriminierung aufgrund einer wahrgenommenen Behinderung nach dem dänischen Antidiskriminierungsrecht unzulässig ist. Anders ausgedrückt: Die Gerichte und der Gleichbehandlungsausschuss scheinen die Rolle, die Umweltfaktoren bei der Entstehung einer Behinderung spielen können, nicht ausreichend zu berücksichtigen. Es scheint, dass in Dänemark in Verfahren wegen Diskriminierung aufgrund von Behinderung in der Praxis nach wie vor das überholte medizinische Modell von Behinderung zur Anwendung kommt.

Außerhalb des Beschäftigungsbereichs, z. B. in den Diskothek-Verfahren, fielen Sanktionen so gering aus, dass bezweifelt werden kann, ob sie ausreichend wirksam, verhältnismäßig und abschreckend waren, wie in den Richtlinien gefordert.

Seit Gründung des Gleichbehandlungsausschusses im Jahr 2009 ist die Zahl der Beschwerden, die dem Ausschuss zugeleitet wurden, insgesamt gestiegen. In den letzten Jahren ist die Zahl der Beschwerden allerdings zurückgegangen, und die Bekanntheit des Ausschusses unter eventuellen Diskriminierungsopfern ist nach wie vor relativ gering. Dies gilt insbesondere für ethnische Minderheiten und Menschen mit Behinderungen.

Das dänische Institut für Menschenrechte (DIMR) fungierte als spezialisierte Gleichbehandlungsstelle.⁵⁷ 2016 leistete das DIMR allerdings nur wenigen Diskriminierungsopfern Beistand (18 Untersuchungen wegen Rasse/ethnischer Zugehörigkeit, 2 wegen Mehrfachdiskriminierung, 13 wegen Behinderung und 2 wegen Alter). Es war daher zu bezweifeln, dass das DIMR, was die Unterstützung von Diskriminierungsopfern betraf, eine effiziente spezialisierte Gleichbehandlungsstelle war.

Seit 2015 ist das DIMR jedoch befugt, in Fällen, die grundsätzliche Fragen betreffen oder von allgemeinem öffentlichem Interesse sind, Beschwerden an den Gleichbehandlungsausschuss zu richten. Das DIMR hat diese Möglichkeit in einem Fall, in dem es um Diskriminierung aufgrund der ethnischen Zugehörigkeit ging, genutzt. In drei Zivilprozessen, in denen es um Diskriminierung aufgrund von Behinderung ging, trat das DIMR außerdem als *Amicus Curiae* auf. In der Zukunft könnte das DIMR durch konkrete rechtliche Schritte die Gleichbehandlung somit wirkungsvoller fördern.

⁵⁶ Östliches Landgericht, Urteil in der Rechtssache B-523-15 vom 31. Mai 2016.

⁵⁷ Art. 2 Abs. 2 Gesetz über das Institut für Menschenrechte – Die Nationale Menschenrechtsinstitution 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, as well as 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 has traditionally been based on the so-called "Danish model", that is, the labour market is to a large extent 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 Institution 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.⁵⁸

⁵⁸ 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 constitute 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 of discrimination: race, skin colour, national or ethnic origin, belief and sexual orientation.⁵⁹ 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 9 June 1971 and entered into force on 1 August 1971. The last amendments entered into force on 1 July 2001.⁶⁰

Act on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*] is a civil law.⁶¹ 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 24 May 1996 and entered into force on 1 July 1996. The last amendments nullifying the previous Danish 70-year rule entered into force on 1 January 2016.⁶² According to the amendments 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.

Act on Ethnic Equal Treatment [*Lov om etnisk ligebehandling*] is a civil law.⁶³ 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 28 May 2003 and entered into force on 1 July 2003. The last amendments entered into force on 1 January 2013.⁶⁴

Act on The Board of Equal Treatment [*Lov om ligebehandlingsnævnet*] is a civil law.⁶⁵ 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 and gender. The act was adopted on 27 May 2008 and entered into force on 1 January 2009. The last amendments entered into force on 1 January 2016 and among other things established that individuals making complaints to the Board of Equal Treatment must have an individual and current interest in the case in question.⁶⁶

Act on The Institute for Human Rights – the National Human Rights Institution of Denmark [*Lov om Institut for Menneskerettigheder – Danmarks Nationale Menneskerettighedsinstitution*] is a civil act.⁶⁷ 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.⁶⁸ In addition the institute monitors the Danish implementation of the UN Convention on Rights

⁵⁹ Consolidated Act No. 626 of 29 September 1987 with later amendments.

⁶⁰ Act No. 433 of 31 May 2000.

⁶¹ Consolidated Act No. 1349 of 16 December 2008 with later amendments.

⁶² Act No. 1489 of 23 December 2014.

⁶³ Consolidated Act No. 438 of 16 May 2012 with later amendments.

⁶⁴ Act No. 553 of 18 June 2012.

⁶⁵ Consolidated Act no. 1230 of 2 October 2016.

⁶⁶ Act no. 1570 of 15 December 2015.

⁶⁷ Act No. 553 of 18 June 2012 with later amendments.

⁶⁸ Section 2(2) of the Act No. 553 of 18 June 2012 with later amendments.

of Persons with Disabilities in accordance with article 33 of the Convention.⁶⁹ The act was adopted on 18 June 2012 and entered into force on 1 January 2013. The last amendments were adopted on 19 December 2013.⁷⁰

⁶⁹ 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.

⁷⁰ 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. The Danish Constitution only encompasses one discrimination ground listed in the directives, namely religion.

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 and equality provisions are directly applicable and can be enforced against private actors as well as against the state.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The Constitution

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

Criminal law

Section 266b of the Criminal Code [*Straffeloven*]⁷¹ prohibits hate speech. It covers the following grounds of discrimination: 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 of discrimination: 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 of discrimination: 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 a principle of equality [*lighedsgroundsætningen*] 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 differential 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 stated⁷² that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant who is the most qualified, thus in principle 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.

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.

⁷¹ Consolidated Act No. 1052 of 4 July 2016 with later amendments.

⁷² Annual report of the Parliamentary Ombudsman 1987 p. 107 ff. (FOB 1987, s. 107) [*Folketingets Ombudsmand – Årsrapport 1987*].

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

i) race

There is no definition of race in the Act on Ethnic Equal Treatment or in the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive.

The explanatory notes / travaux préparatoires to the above two acts describe race in the following way: The term shall be understood in accordance with usual terminology, as specified in national and international law, as well as case law from the CJEU in relation to the Directive. Race is understood as a general belonging to a group of people being defined on the basis of physical criteria, including color.

Furthermore, 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 also relevant in a Danish legal context, courts cases, public administration etc.

On that background race must be understood in accordance with international human rights law as a social construct in contrary to a biological concept.

ii) ethnic origin

The only legislative recognised ethnic minority is the German minority in the Southern Jutland parts of Denmark.⁷³

Like race, ethnic origin is not defined in the laws implementing the Racial Equality Directive. The explanatory notes / travaux préparatoires to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive describe ethnic origin the following way: The term is generally understood as the belonging to a group of people, who are defined on the basis of shared history, traditions, culture or cultural background, language, geographical origin etc.⁷⁴

There are court cases dealing with clothing requirements for employees including prohibitions of headgear, which have a discriminatory effect on Muslim women wearing headscarves. Such cases have not been adjudicated as possible discrimination cases based on ethnic origin but as cases of possible indirect discrimination because of religion.⁷⁵

iii) religion

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.⁷⁶ A definition may thus be found indirectly through the Danish authorities' practice of

⁷³ Regulation No. 24 of 7 June 1955 on the general rights of the German minority (Bekendtgørelse nr. 24 af 7/6/1955 angående det tyske mindretals almindelige rettigheder).

⁷⁴ Ministry of the Interior, Committee on implementation in Danish law of Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Report No. 1455 (2002), page 264.

⁷⁵ See for example Supreme Court ruling in UfR 2005.1265 H.

⁷⁶ Vejledning om forskelsbehandlingsloven nr. 9237 af 6 January 2006: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

approving “religious communities”. The Ministry of Church 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*].⁷⁷

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.⁷⁸ 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.⁷⁹

Since religion in the non-discrimination legislation is therefore understood as formally approved or recognized religions, there is a theoretical link between the recognition as a religious community and the possibility to avail oneself of the non-discrimination rules on the ground of religion. In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice.

iv) *belief*

“Belief” is not defined in the legislation but generally assumed to protect a wider area than religion.⁸⁰ Thus, belief includes religions that are not formally recognized. In short, belief is considered to be a more defined conviction covering something different than formally recognised religions. Examples of belief are atheism and other philosophical orientations.

v) *disability*

Is it necessary to demonstrate a need for compensation of the impairment in order to be encompassed by the concept of disability in the Act on the Prohibition of Discrimination on the Labour Market etc.?

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 audiotope.⁸¹ However the preparatory work also states: “it

⁷⁷ Since 28 June 2015 the Ministry of Church Affairs has had the competence to approve religious communities. See: <http://www.km.dk/andre-trossamfund/>. For select information in English, see: <http://eng.andretrossamfund.dk/>.

⁷⁸ 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://www.km.dk/andre-trossamfund/det-raadgivende-udvalg-vedr-trossamfund/>.

⁷⁹ Vejledende retningslinjer udarbejdet af Det Rådgivende Udvalg vedr. Trossamfund, 6. rev. udgave, den 18. august 2011 (opdateret 20. marts 2014).

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

⁸¹ Handicap og Ligebehandling – et refleksionspapir, Det Centrale Handicapråd (2001) p. 11.

is not a requirement for protection against differential treatment on the grounds of disability that there is a *specific* need for compensation.”⁸²

As mentioned above 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. In the early years of the disability anti-discrimination legislation, the meaning of the disability concept was ambiguous and arguably too narrow as it adopted this rather strict disability concept of the social legislation. Since the landmark decision by the Supreme Court of 13 June 2013, the meaning of disability has been clearer in Danish law.⁸³ 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. Since this Supreme Court ruling the legal position with regard to the interpretation of the concept of “disability” has been the following: to be encompassed by the concept of disability does not require a need for compensation or a need for special accommodation.

Burden of proof and the importance of medical information

In a judgment of 23 June 2015 the Supreme Court referred to the understanding of the concept of disability in CJEU C-335/11 and C-337/11 (Ring and Skouboe Werge).⁸⁴ In this case the Court stated that the burden of proof rested with the employee; in other words the employee had to prove that she had an illness causing a disability encompassed by the Act on Prohibition of Discrimination on the Labour Market etc. In a later Supreme Court judgment of 11 August 2015, the Court reiterated that the burden of proof rests with the employee – the employee has to prove that he or she has a disability.⁸⁵

In a judgment of 6 December 2016, the Eastern High Court dealt with the issue of sequelae/complications stemming from the same disorder (in this case diabetes).⁸⁶ The court found that sequelae must be regarded as individual illnesses that cannot be considered together resulting in one long lasting limitation. The case dealt with a cleaner at a public hospital who was dismissed due to illness after 17 years of employment. The claimant had been diagnosed with diabetes type 2. Because of various sequelae to her diabetes she had been sick and absent from her job a number of times. At the time of dismissal the prognosis from her doctor stated that she would be fit for duty in 3 months. The Court stated that diabetes by itself does not constitute a disability. The Court argued that because of the character and the variations of the different complications related to diabetes, the diverse sequelae did not constitute an overall course of an illness, but had to be considered individually. The Court also argued that because of the prognosis from the claimant’s doctor that she could be back at her workplace in 3 months, the illness at the time of dismissal did not constitute a disability. Thus, the employer was acquitted.

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).⁸⁷ The court concluded that according to the definition in Ring and Skouboe Werge, the woman in this case who had tenosynovitis in her right hand did not have a disability. The Court referred

⁸² Proposal L92 of 11 November 2004, ‘4.1. Handicapkriteriet’ and ‘Bemærkninger til de enkelte bestemmelser’, ‘Til nr. 2’.

⁸³ Judgment printed in U2013.2575H.

⁸⁴ The Supreme Court, Case 25/2014, judgment delivered on 23 June 2015. Judgment printed in U2015.3301H. This was an appeal of the judgment delivered by 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.

⁸⁵ The Supreme Court, Case 104/2014, judgment delivered on 11 August. Judgment printed in U2015.3827H.

⁸⁶ Judgment by Eastern High Court in Case B-2828-15 of 6 December 2016.

⁸⁷ The Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014. Judgment printed in U2015.1041S.

to medical records stating that the woman would be completely healthy again. The judgment established that a latent disorder does not constitute a disability if its manifestation can be prevented by the reasonable ergonomic design of a workplace.

In a judgment of 31 March 2016, the City Court of Kolding decided on the issue of obesity. The case dealt with a child minder who had been dismissed and claimed that he was dismissed because of obesity. The question for the City Court was whether obesity could be deemed a disability covered by the Act on Prohibition of Discrimination in the Labour Market etc.⁸⁸ Previously, the City Court had requested a preliminary ruling from the Court of Justice of the European Union. A judgment was issued in case C-354/13 on 18 December 2014. The City Court referred to this ruling and stated that EU law cannot be interpreted to lay down a general principle of non-discrimination on grounds of obesity in employment and occupation. The City Court also referred to a statement by the CJEU that obesity in itself does not constitute a disability within the meaning of Directive 2000/78. However, in concrete cases obesity may constitute a disability. In the case in question, the City Court argued that according to medical information, the obesity of claimant did not constitute a disability because of the fact that it did not entail a limitation, which in interaction with various barriers hindered the full and effective participation of claimant in his professional life on an equal basis with other child minders. On that basis the employer was acquitted.

In a decision by the Board of Equal Treatment of 25 March 2015, the Board concluded that an illness of podagra (gout) did not constitute a disability.⁸⁹ Four months after the complainant A got his diagnosis he was dismissed. In a memorandum A's doctor had described that in the future, A should expect attacks of podagra that would cause impairments. The doctor wrote that it was impossible to say how often such attacks would occur and whether the illness would be a short term one or lifelong. The decision illustrates that the opinion from a doctor that an illness cannot be certain to be long term will prompt the Board to conclude that the illness does not constitute a disability.

Most judgments and decisions deal with physical disabilities. However, there are examples of psychosocial disabilities as well. In one case for the Board of Equal Treatment, a physiotherapist had a depression and was dismissed from her job.⁹⁰ She argued that the dismissal constituted discrimination on account of disability. In June 2015 the Board of Equal Treatment concluded that the depression was not a disability. The Board argued that the "depression did not have such a scope and nature that for a longer period of time she was limited in fully and effectively carrying out her job as a physiotherapist on an equal footing with her colleagues." Except for a couple of weeks of part-time work, the physiotherapist had been absent because of illness from March 2013 to her dismissal at the end of September 2013.

As illustrated by the above case law, Danish courts still focus very much on medical information to establish a disability. The courts do not seem to consider the role that environmental factors can play in creating a disability. It seems that the medical model of disability is still being applied in practice when it comes to cases of disability discrimination in Denmark.

Is the person competent, capable and available to perform the job?

Recital 17 of the Employment Equality Directive is not directly reflected in the 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. Thus, the duty of reasonable accommodation only applies when the applicant with a disability has the

⁸⁸ Judgment of 31 March 2016 described on the website of the City Court of Kolding. See <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsagtden31marts2016.aspx>.

⁸⁹ Board of Equal Treatment, Decision No. 39/2015 of 25 March 2015.

⁹⁰ Board of Equal Treatment, Decision No. 107/2015 of 24 June 2015.

necessary qualifications to do the job if accommodations are made. In a case for the Board of Equal Treatment, a dyslectic social worker was dismissed after four months of employment at a residential accommodation facility.⁹¹ The employer was not satisfied with the performance of the social worker and referred to the social worker's lack of initiative, lack of interest as well as criticizable mistakes that he had made in the general files and medical files of residents. The Board stated that the dyslexia of the social worker constituted a disability in the Act on the Prohibition of Discrimination in the Labour Market etc. The Board also stated that it could not be excluded that the various criticisms of the employer to some extent had a relation to the dyslexia. The Board concluded that the social worker - in spite of relevant accommodations (including a computer program acquired to assist the social worker with his writing tasks) - was not competent, capable and available to perform the essential functions of the job.⁹²

In another and older case 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 question and thus it was legitimate for the employer to hire another candidate who was more qualified.⁹³

When comparing qualifications of job applicants and evaluating whether a person is competent, capable and available, the person with a disability is to be judged according to his or her capacity to carry out the essential functions of the position **after** reasonable accommodation is made.

vi) 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.⁹⁴ It goes to young age and old age - all ages are protected discrimination grounds. For the various exceptions, see section 4.7.

In a 2016 judgment from the Western High Court, the Court ruled that an employee was discriminated against because of her age.⁹⁵ The employee did not want to go into early retirement when she turned 62, which the employer had otherwise expected her to do. She was dismissed when she was 61 years old. Although the employer claimed that various financial issues constituted the reasons for dismissing her, the Court argued that the employer had not conducted an individual evaluation of the vocational skills of the employee in question. On that background the Court concluded that the employer had failed to prove that age was not part of the reasoning for dismissing the woman. The employee was awarded a compensation of DKK 223.000 (€ 30.000) constituting 6 months of salary.

vii) sexual orientation

Sexual orientation is not defined in the legislation implementing the directives. The core area for this criterion is the prohibition of discrimination against homosexuals (gays and lesbians). However, the concept is also generally in Denmark understood to mean other kinds of lawful sexual orientation such as bisexuals, transsexuals, masochists etc.⁹⁶

⁹¹ Board of Equal Treatment, Decision No. 10099 of 24 August 2016.

⁹² Board of Equal Treatment, Decision No. 10099 of 24 August 2016.

⁹³ Board of Equal Treatment, Decision No. 82/2010.

⁹⁴ Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

⁹⁵ Western High Court, judgment in Case No. B-1149-15 of 1 July 2016. Printed in U.2016.3632V.

⁹⁶ Finn Schwarz and Jens Jakob Hartmann, Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven (2011), page 178.

There is very little case law on sexual orientation. The only relevant case dealing with the concept of sexual orientation is from 2012. In this case, the Board of Equal Treatment dealt with a female job applicant who complained about discrimination because of sexual orientation.⁹⁷ In a telephone conversation, the manager had told her, that she had reminded them of an earlier colleague with the same sexual orientation. The manager told the job applicant, "to be honest with you, we have previously not been lucky with such kind of a person." The complainant withdrew her application and filed a complaint to the Board. The Board concluded that the employer did not manage to prove that the sexual orientation of the complainant had not been given weight while her job application was processed. Thus, the complainant received a compensation of DKK 25.000 (€ 3.360) for discrimination based on sexual orientation.

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.

In one case, a 58-year-old electrician was dismissed from his job in a supermarket.⁹⁸ Because of a long-term depression he had a flexible job with reduced working hours. The Board separately assessed the claims of age discrimination and of disability discrimination almost as if two different cases existed. The Board concluded that the man had been discriminated against because of both his age and his disability. The electrician was awarded a compensation corresponding to nine months of salary.

In another decision the claimant also argued that discrimination had taken place due to both to age and disability.⁹⁹ The case dealt with the dismissal of a 58 year old woman who was diagnosed with rheumatoid arthritis as well as deafness on her one ear. Again, the Board adjudicated the claims of discrimination individually but concluded that no discrimination had taken place.

Another decision dealt with a woman who was dismissed from her flexible job as a support worker.¹⁰⁰ The Board considered that the woman 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 demonstrated facts that gave rise to suspect that her age and gender had been influential in the dismissal. The Board therefore concluded that the woman had been discriminated against because of her disability only.

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

⁹⁷ Board of Equal Treatment, Decision No. 10307 of 10 October 2012. (Decision was not made public before 2015).

⁹⁸ Board of Equal Treatment, Decision No. 222/2014 of 17 December 2014.

⁹⁹ Board of Equal Treatment, Decision No. 192/2013 of 11 September 2013.

¹⁰⁰ Board of Equal Treatment, Decision No. 26/2013 of 6 February 2013.

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 section 3 of 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 section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc.

Case law on the issue is not clear. In a ruling by the City Court of Kolding regarding whether obesity should be regarded as a disability, the City Court directly stated that an employee can be protected by the Act on Prohibition of Discrimination in the Labour Market etc. if the employer perceives the employee as having a disability – whether or not the individual in question is encompassed by the group of people or not.¹⁰¹

However, in another ruling by the Eastern High Court, the Court stated that even though the claimant's symptoms had been mentioned in several medical records, it had not been proven that the condition of the employee was caused by a medically diagnosed illness.¹⁰² In conclusion, it had not been documented that the employee had a disability at the time of dismissal. The ruling indicates that for a condition to be considered a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. it is critical that the condition is caused by a medically diagnosed illness. The ruling thus makes it questionable whether discrimination because of perceived disability by third-party is illegal according to Danish non-discrimination law.

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 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.¹⁰³ 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.¹⁰⁴ In that case, the Court did

¹⁰¹ Judgment of 31 March described at the website of the City Court of Kolding. See <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsagtden31marts2016.aspx>.

¹⁰² Eastern High Court, judgment in case No. B-523-15 of 31 May 2016.

¹⁰³ Supreme Court Judgment of 8 October 2014. Printed in U2015.16H.

¹⁰⁴ Western High Court Judgment of 22 June 2010. Printed in U2010.2610V.

not directly refer to C-303/06 – Coleman. In a decision by the Board of Equal Treatment, the Board stated that the protection against discrimination is not limited to persons who have a disability.¹⁰⁵ The Board concluded that a mother being dismissed because of absence due to the disability of her child is discriminated against because of disability.

The most recent case on discrimination by association is a Supreme Court ruling from May 2016.¹⁰⁶ The case dealt with a woman who claimed that she had been discriminated against due to the disability of her son who had Asperger's syndrome. She was dismissed from her job as a child minder at a time when she had been on leave to care for her son for around 14 months. The Supreme Court concluded that the son "suffered from Asperger's syndrome to such a degree that he was encompassed by the concept of disability" in the Act on Prohibition of Discrimination in the Labour Market etc. The Court, however, argued that the child minder had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability. The Court then assessed whether the child minder had experienced indirect discrimination. The local municipality had to cut the budget because of a declining number of children. According to the Court, it was both objective and proportional that the local municipality did not move children to the child minder whom the children did not know because of the fact that the claimant had been away from her work for a long period of time. On that basis, the Supreme Court concluded that the dismissal of the child minder in question did not constitute indirect discrimination in violation of the Act on Prohibition of Discrimination in the Labour Market etc.

In the case, the Supreme Court underlined that it did not need to discuss whether the prohibition of indirect discrimination encompass a situation where an employee does not have a disability herself but is affected by an action because of a disability of her child or another close relative. The Court referred to rulings from the Court of Justice of the European Union in case C-303/06 of 17 July 2006 (*Coleman*) and in case C-83/14 of 16 July 2015 (*CHEZ Razpredelenie Bulgaria*) and argued that the correct understanding of the Employment Directive in this regard is neither clear nor settled. As the question of whether indirect discrimination because of the association of an employee to a child with a disability is encompassed by the non-discrimination legislation was not decisive to the case in question, the Supreme Court concluded that it did not need to ask for a preliminary ruling on the issue from the Court of Justice of the European Union. On that background the local municipality was acquitted.

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.

¹⁰⁵ Board of Equal Treatment, Decision No. 101/2011 of 24 June 2011.

¹⁰⁶ Supreme Court, judgment in Case HR-151/2015 of 27 April 2016.

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.¹⁰⁷ 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.

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.

In a judgment of 8 July 2015 the Eastern High Court concluded that an employee has to experience an actual disadvantage to claim that he or she has been discriminated against.¹⁰⁸ The case dealt with a woman who had been dismissed from her job with 18 other employees. All dismissed employees had all been granted a term of notice of 6 months - independent of their length of service. The woman argued that she had been indirectly discriminated against due to her age because she was already entitled to a notice period of 6 months according to her contract and seniority. This was not the case for some of the other dismissed employees who had not been employed as many years as the woman and thus had only earned shorter notice periods in case of dismissal. The court stated that discrimination presupposes that a person is treated less favourably than others. The court referred to a case of the Court of Justice of the European Union (C-132/11 – Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH) stating that differential treatment based on seniority constitutes neither direct nor indirect discrimination on account of age. The court opined that all dismissed employees had been treated equally regardless of their age and seniority and that no one had been given a shorter notice period than they were

¹⁰⁷ Board of Equal Treatment, Decision No. 22/2011.

¹⁰⁸ Eastern High Court, judgment of 8 July 2015 in Case No. B-3983-13.

entitled to according to their contract and seniority. In conclusion no one had been treated less favourably than others and discrimination had not taken place.

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.¹⁰⁹

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. On the other hand, there are only few rulings from the Supreme Court clarifying the state of the law with regard to indirect discrimination.

The scope of the prohibition of indirect discrimination has been somewhat clarified by a recent ruling from the European Court of Human Rights. On May 24th 2016, the European Court of Human Rights found that the refusal to grant family reunion to a Ghanaian couple in Denmark violated Article 14 ECHR in conjunction with Article 8 ECHR.¹¹⁰ More specifically, the Court held that Danish laws on family reunification in part constituted indirect discrimination on the basis of ethnic origin. In its ruling, the Court described how the Danish law on family reunification in practice created a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life and how this differential treatment also amounted to indirect discrimination on the basis of race or ethnic origin.¹¹¹

In a decision from 6 May 2016, the Board of Equal Treatment evaluated whether it constituted discrimination to reject a job applicant for a position as an organ player in a church due to lack of Danish language skills.¹¹² The organ player originated from Taiwan. She was a graduate from the academy of music in Vienna and had a degree from the Danish church music school of Zealand. She had lived in Denmark since 2006. The Board stated that the requirement of special Danish language capabilities could constitute indirect discrimination based on ethnic origin if the requirements were unjustified with reference to the nature of the position in question. According to the Board, the church had rejected the organ player because of her lack of Danish language skills. On that basis, the organ player had established facts of possible discrimination. The Board did not find that the church could prove that a language barrier was a hindrance to the woman's handling of the position as an organ player. Thus, the Board decided in favour of the organ player and awarded a compensation of DKK 25.000 (€ 3360) for indirect discrimination because of ethnic origin.

In another case, a man of Polish origin claimed that he had been discriminated against because of his national origin when he applied for a position as a caretaker in an educational institution.¹¹³ It was stated in the job advertisement that the employer was looking for a caretaker who could speak and write Danish fluently. The Board stated that such a language requirement was unnecessary in relation to the kind of work that the caretaker should perform. The Board therefore concluded that it was a violation of the Act on Prohibition of Discrimination in the Labour Market etc. to post such a language requirement in a job advertisement. However, with regard to the actual complainant, the Board argued that the complainant in his job application had not provided any information about his national origin or his language qualifications. The Board also stated that the rejection by the employer did not refer to the language requirement. Thus, it did not

¹⁰⁹ Vejledning om forskelsbehandlingsloven nr. 9237 af 06 January 2006. See: <https://www.retsinformation.dk/Forms/R0710.aspx?id=30653>.

¹¹⁰ Grand Chamber case, *Biao v. Denmark* (ECtHR, 24 May 2016, Application No. 38590/10).

¹¹¹ *Biao v. Denmark*, page 39, par. 102.

¹¹² Board of Equal Treatment, Decision No. 9505 of 6 May 2016.

¹¹³ Board of Equal Treatment, Decision No. 10118 of 12 September 2016.

constitute discrimination that the complainant did not get the position as a caretaker as the language requirement was not included in the employer's evaluation.

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.¹¹⁴ 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 hospital had dismissed a large number of employees. 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. The Court concluded that the dismissal did not constitute indirect discrimination because of disability.

In a landmark judgment from 2004, 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 indirect discrimination. The Court recognised that the prohibition of wearing a headscarf would mainly affect Muslim women but found that differential treatment was objectively justified in the performance of the work.¹¹⁵ 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 a decision the Board of Equal Treatment 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.¹¹⁶ 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.

The complainants did not argue that direct discrimination based on religion had taken place in these cases.

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

In a decision from 2015 the Board of Equal Treatment concluded that it was a violation of the law to require that a job applicant shake hands.¹¹⁷ In the case, the employer had argued that one of the reasons for the complainant not to get the job was the fact that he did not want to shake hands with female customers. The Board held that the employer had not established a legitimate purpose of the requirement to shake hands and concluded that indirect discrimination based on religion had taken place.

c) Comparison in relation to age discrimination

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

¹¹⁴ Supreme Court, judgment of 12 September 2014 in Case No. 163/2013.

¹¹⁵ Printed judgment in U2005.1265H.

¹¹⁶ Board of Equal Treatment, Decision No. 259/2012.

¹¹⁷ Board of Equal Treatment, Decision No. 149/2015 of 23 September 2015.

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 the Act on Personal Data¹¹⁸ 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.

In decision No. 163/2015 the Board of Equal Treatment concluded that it constituted discrimination to ask for information about a person's ethnic and national origin during a job interview.¹¹⁹ During the interview the employer had looked at the CV of the complainant and stated: "From your name I can see that you are not from Denmark." The resume from the complainant was written in Danish and it described that he was a Danish born Indian. The complainant argued that the atmosphere during the interview was unfavourable because he had to reply the question and explain that he was not an immigrant. The employer contested this explanation. The Board concluded that regardless of the actual conversation and atmosphere during the job interview, it was against the law to ask for information about the ethnic and national origin of a job applicant. The complainant was awarded a compensation of DKR 5.000 (€ 670).

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 and individual number consisting of birth-date and a four digit code. This approach allows Statistics Denmark [*Danmarks Statistik*] to collect data on country of birth, parents' country of birth and citizenship.¹²⁰ 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.

¹¹⁸ 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.

¹¹⁹ Board of Equal Treatment, Decision No. 163/2015 of 7 October 2015.

¹²⁰ Publication on Registration of the Ethnic Origin of Employees (14 December 2005) [*CPR-opgørelse af medarbejderstabens oprindelse, Beskæftigelsesministeriet og Institut for Menneskerettigheder*]. See: <http://bm.dk/da/Aktuelt/Publikationer/Arkiv/2005/CPR-opgoerelse.aspx>.

With regard to age and disability, it is possible for private companies to take positive measures according to Section 9(3) of the Act. Also, section 4 of the Act on Prohibition of Discrimination in the Labour Market etc. does not prohibit employers to ask for, obtain, receive or use information about age and disability.

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.¹²¹

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.

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 against ethnic minorities.¹²²

The Supreme Court clarified the legal situation with regard to statistical evidence in a judgment of 14 December 2015.¹²³ The case dealt with A and B who had been dismissed with three other colleagues from their positions in a government agency because of workforce reduction. The dismissed employees were all above 50 years of age. A and B claimed that they had been discriminated against because of their age. The Board of Equal Treatment had previously issued a decision in the case stating that the percentage of elderly employees who had been dismissed constituted a disproportionately high percentage of the overall number of employees. On that basis the Board concluded that the complainants had established facts of possible discrimination and that the employer could not prove that no discrimination had taken place.¹²⁴ The government agency declined to follow the decision and the Board brought the case against the government agency to the civil courts. The Eastern High Court in a judgment of 23 January 2015 acquitted the government agency and held that documentation by statistical information was not by itself sufficient to establish facts from which it can be assumed that discrimination has taken place.¹²⁵ According to this judgment from the Eastern High Court more

¹²¹ Consolidated Act No. 1257 of 13 October 2016 with later amendments.

¹²² Printed in U.2005.1265H.

¹²³ Supreme Court, judgment in Case No. 28/2015 of 14 December 2015. Printed in U.2016.1168H.

¹²⁴ Board of Equal Treatment, Decisions No. 401/2012 and No. 402/2012.

¹²⁵ Eastern High Court, judgment in Case No. B-2951-13 of 23 January 2015.

documentation was necessary for the burden of proof to be reversed and fall upon the employer. The Court didn't describe what other documentation that would be necessary. The Court simply stated that "the Board of Equal Treatment had not identified any other circumstances than the age distribution of the dismissed employees to support their claim that the government agency had put emphasis on the age of the dismissed employees."

The Eastern High Court ruling was appealed to the Supreme Court and the legal situation has now been clarified. The Supreme Court stated that statistical information about the age and the age distribution of dismissed employees can be included when assessing whether an assumption for discrimination has been established. The Supreme Court referred to a case of the Court of Justice of the European Union (C-127/92 – Enderby) and emphasized that statistical information - if reliable and sufficiently significant - by itself can establish such presumption for discrimination. In the case in question the Court held that there was an overrepresentation of elderly employees among the dismissed employees and that none of the dismissed employees were younger than 53 years of age. The Court however also held that there were a number of employees in the government agency who were older than A and B, and who did not get dismissed during the workforce reduction. The Court concluded that the information about the age of A and B as well as the information about the age distribution in the government agency did not establish facts of possible discrimination. Thus the Supreme Court acquitted the government agency.

In cases for the Board of Equal Treatment, statistical evidence is often used in an effort to document that age discrimination has 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.¹²⁶ 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.

Harassment within the labour market is 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. Section 1 (4) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Harassment outside the labour market is deemed to be discrimination when conduct related to race 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. Section 3 (4) of the Act on Ethnic Equal Treatment. Outside the labour market refers to 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.

¹²⁶ Board of Equal Treatment, Decision No. 102/2014 of 7 May 2014.

Furthermore, according to the Act on Work Environment [*Arbejdsmiljøloven*] employers are obligated to secure a healthy physical and psychological work environment.¹²⁷ According to this act it is a responsibility of the employer to work against harassment in general at the individual workplace.

There is very limited case law on harassment.

In a recent decision, the Board of Equal Treatment evaluated whether the use of the word "Negro" by a public social worker constituted discrimination or harassment.¹²⁸ The complainant argued that the social worker had acted in a racist way by writing the words "Negro" in the notes of file of the complainant. The Board stated that the complainant had established facts of possible discrimination because the word "Negro" after a subjective assessment could be regarded as insulting towards the complainant. On the other hand, the Board argued, the use of the term "Negro" in the context in question was not found to have either the purpose or effect of violating the dignity of the complainant and of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In this regard, the Board emphasized that there was no evidence to suggest that the social worker's writings in the file influenced the proceedings of the case. Thus, the Board stated that the complainant was not treated differently because of her own or her child's ethnic origin. On that background the Board concluded that no discrimination or harassment had taken place. In the opinion of the author, it seems wrong that the Board emphasizes that the proceedings of the case have not been influenced by the social worker's use of the word "Negro". Harassment does not depend on whether a statement in actual fact has influenced the proceedings of a case. To constitute harassment, a statement must violate the dignity of the complainant in both a subjective and objective way. There is no doubt that the statement fulfilled the subjective criterion as the complainant felt harassed. But instead of evaluating actual effects of the statement, the Board should have evaluated the objective criterion. In other words, the Board should have evaluated whether the use of the word "Negro" in the file from an objective perspective was likely to violate the dignity of a person in a similar situation as the claimant.

In another case for the Board of Equal Treatment the complainant argued that he had experienced discrimination from a bank.¹²⁹ 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 held that the behaviour from the colleagues and managers could not be characterized as a gross infringement. The Board thus concluded that harassment had not taken place.

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.

¹²⁷ Consolidated Act Nr. 1072 of 7 September 2010 with later amendments.

¹²⁸ Board of Equal Treatment, Decision No. 9506 of 6 May 2016.

¹²⁹ Board of Equal Treatment, Decision No. 214/2014 of 10 December 2014.

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)¹³⁰ 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.

Thus, where harassment is perpetrated by an employee the main rule is that only the employer is liable.

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*].¹³¹

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, 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 explicitly constitute a form of discrimination.

On the labour market, 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.

Outside the labour market, an instruction to discriminate against persons on grounds of race or ethnic origin shall be deemed to be discrimination, cf. Section 3(5) of the Act on Ethnic Equal Treatment. Outside the labour market refers to 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.

b) Scope of liability for instructions to discriminate

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

¹³⁰ Vejledning om forskelsbehandlingsloven VEJ nr 9237 af 6 January 2006 - Chapter 5 Page 13.

¹³¹ Consolidated Act No. 266 of 21 March 2014 with later amendments.

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.¹³² 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*. However, as an employee's instruction to discriminate is not part of performing a job, it will not be part of the employer's responsibility, unless the employer has neglected the duty 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 according to Section 26 of the Act on Damage Liability [*Erstatningsansvarsloven*].¹³³ 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 for people with disabilities in the area of employment

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. Practice

- b) Practice

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.

¹³² Vejledning om forskelsbehandlingsloven VEJ nr 9237 af 6 January 2006 - Chapter 5 Page 13.

¹³³ Consolidated Act No. 266 of 21 March 2014 with later amendments.

Relevance of public funding and level of costs when evaluating the reasonability of an accommodation

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 otherwise possible funding has not been applied for.

This is illustrated in a 2015 decision from the Board of Equal Treatment.¹³⁴ In the case the complainant had been dismissed from her position in a government agency due to sickness absence. The complainant argued that her absence was due to stress since she had had a hard time doing her work because of her vision impairment. When the complainant was originally hired the employer had been told that she would need a personal assistant and that the local municipality would pay for the personal assistant. The employer, however, did not arrange for a personal assistant. On that basis the Board concluded that discrimination based on disability had taken place.

The same approach is illustrated in an older landmark ruling from the Maritime and Commercial Court.¹³⁵ The case dealt with an employee who had severe permanent backaches. Due to his illness the employer decided to terminate the training agreement. The employer had refused a proposal from the municipality concerning a personal assistant arrangement paid by the municipality. The court concluded that discrimination based on disability had taken place.

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.¹³⁶ The case dealt with F who had a chronic hearing disability and was dismissed from her job. 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".

Part time-positions as reasonable accommodation

In a ruling from the Supreme Court from April 2016, the Court evaluated the extent of an employer's obligation to provide a part time position as reasonable accommodation.¹³⁷ The Court argued that for the employer to provide for a 20 hour a week position, the employer would have to divide a current full-time position into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of 3 employees would constitute a disproportionate burden to the employer. In conclusion, the employer was acquitted. The case illustrates that an employer is not obliged to divide a full-time position into two part-time positions if there are objective reasons (like the small size of the company/department) for a current position to be full-time. It also illustrates that employers are given a wide discretion when it comes to expedient organization of their operations and services.

¹³⁴ Board of Equal Treatment, Decision 117/2015 of 12 August 2015.

¹³⁵ Printed in U.2009.1948SH.

¹³⁶ Eastern High Court, judgment in case No. B-2814-10 of 29 June 2011.

¹³⁷ Supreme Court, judgment in Case No. HR-98/2015 of 13 April 2016.

In 2016, the Eastern High Court also dealt with the extent of the employer's obligation to provide reduced working hours as a reasonable accommodation.¹³⁸ This ruling illustrates that if an employee needs reduced working hours because of her disability, the employer must show a willingness to look into possible accommodations like flexible jobs, part-time jobs etc. In the case in question, the claimant had undergone a serious brain surgery. After the surgery she experienced abnormal tiredness and was on sick leave for about 2 month. Thereafter she was on partial sick leave for 8 months. She wanted to go back to her full-time position in the bank where she had been employed for 18 years. The hospital had recommended a "flexible job" with reduced working hours but the employer rejected this. After this rejection the claimant called in sick again. She was dismissed 3 weeks after. The court argued that based on the medical records of the claimant, there were no prospects for her getting back to a full time position in the bank as she experienced a "diagnosed disabling fatigue", which constituted a disability. With regard to reasonable accommodation, the court stated that the employer knew about the disability of the employee and thus had an obligation to provide reasonable accommodation. Based on the fact that the employer had refused the complainant a "flexible job" without examining the options more closely, the court concluded that the employer had not provided reasonable accommodation and thus that the dismissal constituted discrimination based on disability. The court awarded DKK 503.000 constituting 12 months of salary in compensation (€ 67.550). The court referred to her long employment as well as the "coarseness" (in the meaning of seriousness of the violation) when determining the amount of compensation.

Relevance of the size of the employer's business when evaluating the reasonability of an accommodation

In a decision from the Board of Equal Treatment, it is illustrated that the obligation to establish reasonable accommodation is "softer" for a smaller firm and that the size of the business is therefore relevant.¹³⁹ The case dealt with A who was a fulltime electrician in a small firm with 8 employees. During work hours, the complainant was in a car accident causing a whiplash in his neck. He worked fulltime after the accident but had several periods of sickness absence. The employer offered another position in the stockroom. The complainant declined the offer and was dismissed. The Board concluded that the employer had fulfilled the obligation to provide reasonable accommodation. It was part of the assessment that the employer was a small one-man business.

A judgment of the Maritime and Commercial Court of 22 December 2014 dealt with a colour-blind seaman.¹⁴⁰ 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. 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.

Burden of proof is on the employer

Case law illustrates that when the complainant has established facts that indirect discrimination because of disability has taken place, the burden will be on the employer to prove that the necessary reasonable accommodation has been established. In concrete terms the employer must look into and evaluate various possibilities of accommodation, including a part time position.

¹³⁸ Eastern High Court, judgment in Case No. B-477-15 of on 30 June 2016.

¹³⁹ Board of Equal Treatment, Decision 125/2015 of 26 August 2015.

¹⁴⁰ The Maritime and Commercial Court, Judgment in case No. F-2-13 of 22 December 2014. Printed in U2015.1053S.

A decision by the Board of Equal Treatment illustrates the extent of the employer's obligation to evaluate various relevant accommodations.¹⁴¹ In the case in question, a business consultant in a local municipality was involved in a traffic accident that resulted in fractures and subsequent complications of infection, depression, anxiety and PTSD. At times she was absent from her job owing to illness and she required reduced working hours and changed tasks when she was working. She was following a plan for stepping up the number of working hours at the time of her dismissal. The Board of Equal Treatment found that her health issues, particularly in relation to her mental illness kept her from fully and effectively participating in the work on equal terms with her colleagues. The Board stated that the impairments were long term and concluded that the consultant had a disability. The Board argued that it had not been tested if the consultant with permanently reduced working hours and opportunities for rest and on-going recovery would have been able to perform her duties. Thus, according to the Board the municipality had not complied with its obligation to make reasonable accommodation in view of the specific needs of the consultant. The consultant was awarded compensation.

In a decision from 2014 a welding controller had suffered an accident at work and injured his foot.¹⁴² 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 discrimination because of disability had not taken place.

In a judgment of the Western High Court, the Court concluded that an employer had taken such steps and done a reasonable effort to establish reasonable accommodation.¹⁴³ 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.¹⁴⁴ 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 or to provide her with electronic aids. The Board concluded discrimination based on disability and underlined the independent obligation of the employer to provide reasonable accommodation. It did not make any difference that the complainant had not asked for special accommodation herself.

As illustrated by the above cases, 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.

Case law also illustrates that the burden is on the employer to prove that accommodations would impose a disproportionate burden. If the employer in such cases manages to lift this burden of proof, he or she will be cleared of illegal indirect discrimination because of disability.

¹⁴¹ Board of Equal Treatment, Decision 34/2016 of 2 March 2016.

¹⁴² Board of Equal Treatment, Decision No. 19/2014 of 29 January 2014.

¹⁴³ Western High Court Judgment of 17 May 2013. Printed in U.2013.2435V.

¹⁴⁴ Board of Equal Treatment, Decision No. 67/2013.

This is the case in a judgment from the Danish Maritime and Commercial Court regarding an engineer in a municipality.¹⁴⁵ Shortly after the engineer was appointed, she had an accident and injured her right arm. She was partly absent owing to illness for more than a year. Her request for a part time position was rejected by the municipality because of a general practice not to employ engineers in her kind of job in part time positions. She was dismissed due to her sickness absence. The court emphasized that the engineer was dismissed because of sickness absence and that the question to be resolved in the case dealt with indirect discrimination on account of disability. The Court held that the municipality did not look into and concretely evaluate whether a part time position or other solutions would be possible. The municipality just referred to a general policy and rejected her request. On that background, the Court stated that the municipality did not prove that it would constitute a disproportionate burden to appoint A in a part time position and concluded that the dismissal constituted indirect discrimination because of disability.

The fact that the burden of proof is on the employer was also the case in a decision by the Board of Equal Treatment. This decision deals with a fulltime specialist in a government agency who had been involved in a traffic accident causing severe neck and back injuries.¹⁴⁶ After half a year of sick leave the specialist A still had chronic pain, concentration difficulty and fatigue. He was not able to work fulltime and for more than a year he was on partial sick leave. During that period of time his employer had adjusted A's working tasks, had allowed him to work from home and had exempted him from office meetings. Nearly two years after the accident the employer recommended the dismissal and after negotiations the fulltime position was changed to a part time position. Nine month later A filed a complaint to the Board about disability discrimination. The Board held that A was in reality dismissed because of sickness absence, which was caused by his neck and back injury. The Board held that A had established facts that he had been indirectly discriminated against because of his disability. Subsequently the Board concluded that the employer had established adequate adjustments to ease the concrete needs of A, so that A could perform his job. On that basis the Board found that discrimination had not taken place.

Relevance of the employer's knowledge about the disability of an employee

A judgment from the Supreme Court illustrates that it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability of the employee.¹⁴⁷ In the case in question, the employee told her employer when she got the diagnosis of arthritis and she also informed about the need for modifying her tasks. Furthermore, there was a meeting between the local municipality, the employer and the employee about ways to adjust her tasks so that she could keep her job. However, reasonable accommodation was not actually provided. On that basis, the Court found that the employer knew about the disability and was obliged to establish reasonable accommodation.

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 2014.¹⁴⁸ The Danish court found that the adaption 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 a compensation equal to 12 months of salary. The Werge case was appealed and the Supreme Court delivered its judgment on 23 June 2015.¹⁴⁹ The Supreme Court observed that it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or

¹⁴⁵ The Maritime and Commercial Court, Judgment in case No. F-9-12 of 29 April 2015.

¹⁴⁶ Board of Equal Treatment, Decision No. 34/2015 of 11 March 2015.

¹⁴⁷ Supreme Court, Judgment in case No. 104/2014 of 11 August 2015. Printed in U2015.3827H.

¹⁴⁸ 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.

¹⁴⁹ Supreme Court, Judgment in case No. 25/2014 of 23 June 2015. Printed in U2015.3301H.

ought to know about the disability. The parties of the case had been e-mailing each other during the sickness absence of the employee, but the note from the specialist doctor with the long-term prognosis was not sent to the employer. On that background the Court did not find that the employer at the time of the dismissal knew or ought to have known about the fact that the illness had caused a disability. In conclusion there was no basis for ascertaining that the employer had failed to establish reasonable accommodation and the employer was acquitted.

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 in areas other than employment for people with disabilities

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 for people with disabilities

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 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 discrimination 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*]¹⁵⁰ and a government circular (Cirkulære No. 17133 of 21 April 1997) 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.

A Western High Court judgment dealt with a young Muslim woman who had been studying for nutrition assistant at a vocational school. The case was an appeal of a city court ruling from 2013.¹⁵¹ The Muslim woman had to quit her education because of the fact that the school would not exempt her from the requirement to taste pork.¹⁵² 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,

¹⁵⁰ Consolidated Act No. 38 of 5 January 2017.

¹⁵¹ Holstebro city court judgment in case No. BS 7-189/2012 of 23 April 2013.

¹⁵² Western High Court judgment in case No. B-1213-13 of 5 May 2015. Printed in U2015.2984V.

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.

Another decision from 2015 by the Board of Equal Treatment illustrates a similar arguing.¹⁵³ In this decision the Board concluded that it was a violation of the law to require that a job applicant shake hands. In the case the employer had argued that one of the reasons for the complainant not to get the job was the fact that he for religious reasons did not want to shake hands with female customers. The Board held that the employer had not established a legitimate purpose of the requirement to shake hands. Thus, the Board concluded that the complainant had been indirectly discriminated against based on his religion.

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.¹⁵⁴ 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.¹⁵⁵

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

No obligation exists with regard to translation of documents in Braille and other adapted forms e.g. large print, electronic format, easy to read.

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.¹⁵⁶ This includes access to public services where needed.

¹⁵³ Board of Equal Treatment, Decision No. 149/2015 of 23 September 2015.

¹⁵⁴ Bygningsreglement 2015. Erhvervs- og Byggestyrelsen, Vejledning til kommunerne om byggesagsbehandling af tilgængelighedsbestemmelser (2008). Signe Sørensen og Pia Justesen, Tilgængelighed til Offentligt Nybyggeri, Institut for Menneskerettigheder (2013).

¹⁵⁵ Regulation no. 1250 of 13 December 2004 with later amendments.

¹⁵⁶ 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 undocumented immigrants, 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 Natural and legal persons (Recital 16 Directive 2000/43)

a) Protection against discrimination

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.

b) Liability for discrimination

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.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

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.

b) Liability for 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

National Danish 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 prohibits discrimination in the following areas: 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.

A homeless newspaper vendor of Slovakian origin complained to the Board of Equal Treatment.¹⁵⁷ He claimed that he was a victim of discrimination on account of ethnic origin because the private not for profit organisation that was behind the homeless paper did not want to renew his vendor ID since he did not talk Danish. The Board argued that the sellers of the homeless newspapers were not necessarily required to perform the work themselves personally. They could to a limited extent resell the newspapers to other authorized homeless sellers. In addition, the purpose of the newspaper was to ensure a voice for the homeless and to create debate and a focus on the situation of homeless persons. The Board also stated that the selling of homeless newspapers was an alternative to begging and was intended only to be a minor supplement to the economy of the individual homeless person. On that basis, the selling of homeless papers could not be considered as employment encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. The Board dismissed the complaint.

¹⁵⁷ Board of Equal Treatment, Decision No. 10005 of 22 April 2015.

Volunteerism is not considered as employment covered by the Act on the Prohibition of Discrimination in the Labour Market etc. A decision by the Board of Equal Treatment dealt with an unpaid volunteer in the Danish Home Guard whose contract had been dissolved.¹⁵⁸ In the case the Board concluded that the task of the complainant could not be considered as paid employment. The fact that the complainant had received compensation for lost earnings could not bring the tasks of the complainant into the scope of the Act on the Prohibition of Discrimination in the Labour Market etc.

No case law has been found in which the Board considered whether volunteerism could fall under the scope of vocational training (section 3.2.4.).

In a decision by the Board of Equal Treatment 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.¹⁵⁹ 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.¹⁶⁰ 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.

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

Danish legislation prohibits discrimination in the following areas: 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.¹⁶¹

3.2.3.1 Occupational pensions constituting part of pay

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.

¹⁵⁸ Board of Equal Treatment, Decision No. 111/2015.

¹⁵⁹ Board of Equal Treatment, Decision No. 227/2012.

¹⁶⁰ Board of Equal Treatment, Decision No. 104/2011.

¹⁶¹ 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."

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 case for the Board of Equal Treatment, a Swedish citizen complained that he was not accepted to medical school at the university in Denmark.¹⁶² The Swedish citizen believed that the refusal was due to his age and his national origin. Before going into the merits of the complaint, the Board stated that any training aiming at paid employment is covered by the Act on the Prohibition of Discrimination in the Labour Market etc. In other words, the medical school at the university was governed by the obligations of the Act on the Prohibition of Discrimination in the Labour Market etc. In the case in question, the Board found that the applicant had not lifted the burden of proof and the complaint was therefore unsuccessful.

In a decision by the Board of Equal Treatment a woman of 41 years of age complained about age discrimination in a university setting.¹⁶³ 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 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 school¹⁶⁴ 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.¹⁶⁵

¹⁶² Board of Equal Treatment, Decision No. 11065 of 12 August 2015.

¹⁶³ Board of Equal Treatment, Decision No. 237/2012.

¹⁶⁴ Eastern High Court, Case No. B-4028-05. Judgment of 27 June 2006.

¹⁶⁵ Finn Schwarz and Jens Jakob Hartmann, Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven (2011), page 70.

Despite the fact that the above described decisions from the Board of Equal Treatment seems to be in accordance with the directives, this ruling from the Eastern High Court raises concern that Danish law does not quite comply with EU Law.

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 prohibits discrimination in the following areas: 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.

In a concrete case, the Board of Equal Treatment dealt with the question of age discrimination in the regulations of a labour union.¹⁶⁶ The complainant in the case had been a sector president in the labour union. She was unable to run for re-election at the congress because of the regulations stipulating that candidates for the post as sector president were not allowed to be 60 years or more. The Board referred to section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. dealing with involvement in workers' organisations. The Board also argued that the post of sector president in reality constituted "occupation" in the words of Article 3(1)(a) of the directive. On that basis, the Board concluded that the regulations of the labour union violated the prohibition of age discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the complainant was awarded a compensation of DKK 25.000 (€ 3.360).

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

In Denmark national legislation prohibits discrimination in the following areas: 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.¹⁶⁷ 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.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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. However, Section 43 of the Act on Unemployment states that a member of an unemployment insurance fund will automatically stop being a member when he or she becomes eligible for state pension – for most people at the age of 65 years.

¹⁶⁶ Board of Equal Treatment, Decision No. 10073 of 22 June 2016.

¹⁶⁷ Board of Equal Treatment, Decision No. 112/2014.

In a concrete case the Supreme Court dealt with the question, whether the Danish Act on Unemployment Insurance violated the Employment Directive (2000/78/EC).¹⁶⁸ In the case A was informed by his unemployment insurance fund that his membership would be terminated because of the fact that he turned 65 years and would be eligible for state pension. A was still working at that time and did not want to retire. One year later he resigned from his job and declared himself unemployed as well as available. He did not take the state pension and requested unemployment benefit instead. The unemployment insurance fund declined his request referring to Section 43 of the Act on Unemployment Insurance stating that a member of an unemployment insurance fund will automatically stop being a member at the age of 65 years. A sued the Ministry of Employment claiming that Section 43 of the Act on Unemployment Insurance violated Article 2 of the Employment Directive and the general EU-principle on prohibition of age discrimination. The Supreme Court concluded that the Danish system of unemployment benefit should be regarded as a public scheme of social protection. The court stressed the fact that the unemployment benefit scheme works independently of employers and that the benefit cannot be compared to a salary. According to the Court, the payment of unemployment benefit was therefore encompassed by the exception clause in article 3(3) of the Employment Directive. In conclusion, the Court stated that section 43 of the Danish Act on Unemployment Insurance did not violate the Employment Directive.

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

In Denmark, national legislation prohibits discrimination in the following areas: 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 prohibits discrimination in the following areas: 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.

All individuals within Danish jurisdiction regardless of their status, whether they have a permanent or time-limited residence permit or have status as undocumented immigrants, and irrespective of citizenship and nationality, are protected from discrimination according to the legislation above.

¹⁶⁸ Supreme Court judgment in case No. 308/2012 of 19 January 2015. Printed in U2015.1303H.

No information has been found about discrimination of migrants in the field of education. Furthermore, no information has been found about the lack of anti-discrimination law enforcement for migrants in this field. No major Danish policies to address discrimination of migrants in education have been found.

a) Pupils with disabilities

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

For a couple of years now, it has been a goal for the Danish government and local municipalities to increase inclusion in Danish elementary school. More concretely, the government has set a goal that 96% of all pupils must be included in mainstream education.¹⁶⁹ The Education Act has an overall aim of equality but it does not prohibit discrimination or differential treatment based on disability.¹⁷⁰ An amendment to the Education Act was adopted in 2012 with the aim to include more students with special needs into mainstream education.¹⁷¹ The amendments entered into force in May 2012 with the school year 2012/2013. It is an on-going debate whether the changes in actual fact have caused problems for pupils with disabilities. One argument is that mainstream schools and teachers do not have the necessary resources to include more students with special needs into mainstream education. A report shows that children and young pupils with disabilities are doing worse than other pupils in the Danish schools.¹⁷² In the spring of 2016, the Disabled People's Organisation Denmark documented that children with disability do not benefit sufficiently from teaching in school and that the experience of their parents is that inclusion in mainstream education still does not work optimally.¹⁷³

However, since 2012 children with disabilities have increasingly been included in the ordinary primary schools. 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.

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.¹⁷⁴

b) Trends and patterns regarding Roma pupils

The Roma population in Denmark is around 2.000 individuals and no information has been found about Roma and education. There are restrictions on data collections based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about Roma pupils in Denmark,

¹⁶⁹ Disabled Peoples Organisations Denmark: <http://www.handicap.dk/politik/inklusion-i-uddannelse/oget-trivsel-og-faglighed-for-elever-med-handicap-i-grundskolen/>.

¹⁷⁰ Consolidated Act No. 747 of 20 June 2016 with later amendments.

¹⁷¹ Various information is to be found on the website of the Danish Ministry of Education: <http://www.uvm.dk/folkeskolen/laering-og-laeringsmiljoe/inklusion/bag-om-inklusion/>.

¹⁷² Epinion, Uddannelsesresultater og -mønstre for børn og unge med handicap – Årgang 1990, November 2014.

¹⁷³ Disabled People's Organisation Denmark: <http://www.handicap.dk/nyheder/nyhedsarkiv/dhs-inklusionsundersogelse-der-er-stadig-store-udfordringer-med-inklusionen/>.

¹⁷⁴ Regulation No. 693 of 20 June 2014 [Bekendtgørelse om folkeskolens specialundervisning og anden specialpædagogisk bistand].

including lack of knowledge about experienced discrimination. In other words, there are no found 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 Rights¹⁷⁵ and the Complaints Committee for Ethnic Equal Treatment,¹⁷⁶ 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 prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

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.

Civil legislation prohibits discrimination in access to and supply of goods and services, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

In a 2015 decision by the Board of Equal Treatment the complainant argued that he had been harassed because of his ethnic origin when trying to buy a used car through a buy and sale website.¹⁷⁷ The complainant had contacted the owner of the car with a written offer. The owner of the car wrote back: "Fuck you – you Muslim". During the case handling of the Board the car owner claimed that he had been offended by the complainant's low bid and that the expression was just a saying that had nothing to do with the complainant. The Board held that the car owner knew the name of the complainant. The Board concluded that the expression was evidence of harassment because of the complainant's ethnicity. It was of no importance to the Board that the car owner considered the bid to be frivolous.

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 2016, the Board adjudicated 7 cases on discotheques and bars. There was one case that was dismissed based on the fact that the only evidence presented constituted contradictory claims and explanations from the parties and the case could therefore only be resolved by oral testimonies from parties and witnesses in a court setting.¹⁷⁸

¹⁷⁵ Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

¹⁷⁶ Complaints Committee for Ethnic Equal Treatment, Decision No. 730.7. of 5 December 2005.

¹⁷⁷ Board of Equal Treatment, Decision No. 26/2015 of 25 February 2015.

¹⁷⁸ Board of Equal Treatment, Decision No. 10258 of 13 December 2016.

In 2016, there were 5 cases in which the complainant got a compensation for discrimination of DKK 5000 (€ 675).¹⁷⁹ In all 5 cases, the Board based its decisions on written explanations from the individual complainants and their friends as well as the fact that the discotheques typically were not able to concretely contradict these claims. In all of the 5 cases, the complainants explained that they were dressed in similar fashion as everybody else wanting to get in to the discotheques and that they were not drunk or otherwise behaving inappropriately. They also experienced that other persons of "Danish origin" were being admitted at the same time as they were rejected themselves. Situation testing was not used in any of these cases. In one case from 2016, the Board concluded that discrimination had not taken place.¹⁸⁰

In 2015 the Board adjudicated 6 cases on discotheques and bars. There were 4 cases dismissed and 2 cases in which the complainant got a compensation for discrimination of DKK 5000 (€ 675).¹⁸¹ In 6 cases from 2014 the Board dismissed the complaints and stated that since there was no consensus on what grounds the doormen had refused the complainants, the cases could only be resolved by oral testimonies from parties and witnesses.¹⁸² Even though the Board in principle accepts 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.¹⁸³

In 2014 the Board dealt with the principled issue of safety as a legitimate reason for differential treatment. The cases in question regarded the annulment of tickets bought by football supporters in Denmark who had foreign sounding names.¹⁸⁴ The complainants had bought a package of tickets for three football games and with around 700 other ticket buyers, they 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. 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. Using the criterion of non-Danish sounding names would, however, not result in the requested safety. The Board concluded that indirect discrimination because of ethnic origin had taken place.

These cases illustrate 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.¹⁸⁵

3.2.9.1 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

¹⁷⁹ Board of Equal Treatment, Decision No. 9766 of 18 May 2016, Decisions No. 9262 and No. 9263 of 24 February 2016, Decision No. 9233 and No. 9234 of 03 February 2016.

¹⁸⁰ Board of Equal Treatment, Decision No. 9742 of 27 April 2016.

¹⁸¹ Board of Equal Treatment, Decisions No. 20/2016, No. 82/2015, No. 154/2015, No. 203/2015, No. 204/2015, No. 226/2015.

¹⁸² 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.

¹⁸³ Board of Equal Treatment, Decisions No. 108/2014 of 14 May 2014, No. 154/2014 of 27 August 2014.

¹⁸⁴ 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.

¹⁸⁵ Board of Equal Treatment, Decision No. 13/2014 of 22 January 2014.

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 prohibits discrimination in the following area: 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.

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 letting out or sub-letting a room in their own home.

All individuals within Danish jurisdiction regardless of their status, whether they have a permanent or time-limited residence permit or have status as undocumented immigrants, and irrespective of citizenship and nationality, are protected from discrimination according to the legislation above.

No information has been found about discrimination of migrants in the field of housing. Furthermore, no information has been found about the lack of anti-discrimination law enforcement for migrants in this field. No major Danish policies to address discrimination of migrants in housing have been found.

In 2016, the Board of Equal Treatment dealt with a tenant who claimed that his landlord had harassed him.¹⁸⁶ The tenant had an African ethnicity. The landlord told him, that he had been of the belief that the tenant was an "extremist with a turban". He had also referred to the tenant's temporary lodger as a "black negro". The Board found that the tenant had proven facts that gave rise to suspect that the landlord had exposed the tenant to harassment constituting discrimination because of ethnic origin. The landlord had failed to prove that harassment because of ethnic origin had not taken place. The tenant was therefore awarded a compensation of DKK 5.000 kr (€ 670).

In a 2015 decision the Board of Equal Treatment concluded that a housing association had violated the Act on Ethnic Equal Treatment by not intervening in a case of harassment from neighbours.¹⁸⁷ The complainants were of Somali origin and they had contacted the housing association and the police because of threats from a neighbour and ethnic harassment against their children. At the same time several neighbours had complained about noise coming from the complainant's apartment. The Board held that the housing association had only dealt with the complaints from the neighbours and not with the complaints from the Somali family. The Board concluded that the family had been discriminated against because of ethnic origin.

In another 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.¹⁸⁸ 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-

¹⁸⁶ Board of Equal Treatment, Decision No. 10087 of 10 August 2016.

¹⁸⁷ Board of Equal Treatment, Decision No. 143/2015 of 23 September 2015.

¹⁸⁸ Board of Equal Treatment, Decision No. 34/2010.

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.¹⁸⁹ 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*].¹⁹⁰ 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.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

The Roma population in Denmark is around 2.000 individuals and no information has been found about Roma and housing. There are restrictions on data collections based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about housing for Roma in Denmark, including lack of knowledge about experienced discrimination. In other words, there are no found documented patterns of housing segregation and discrimination against the Roma.

¹⁸⁹ Regulation on rental of public housing [*Udlejningsbekendtgørelse*] No. 1303 of 15 December 2009 with later amendments.

¹⁹⁰ Consolidated Act No. 1270 of 24 October 2016 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 concrete work in question, the employer can apply for a dispensation from the relevant government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition against differential treatment. Subsequently, the employer in question can legally make a requirement that the future employee for the job in question has a particular ethnic origin etc. As an example, a police commissioner, who wants to appoint a person with a particular ethnic origin for a particular job, has to apply to the relevant and concerned Minister of Justice for a dispensation. As the "subject matter concerned" minister, the Minister of Justice will subsequently provide a dispensation after having obtained a statement from the Ministry of Labour. A concrete example of an exemption to the prohibition of discrimination is a poultry slaughterhouse exporting to the Arab countries that received a dispensation to hire a Muslim to perform halal slaughter.¹⁹¹

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

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 this exception in section 6(1), in particular situations 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 political or religious requirement has to be of importance to the particular job in question to be encompassed by the exception. Whether the requirement is important to the particular job in question and thereby legal is a concrete assessment, which eventually will have to be done by the Board of Equal Treatment and the courts.

The Board of Equal Treatment has ruled on this issue in two older cases. In one case, a social worker complained that a job advertisement for a position in a shelter required applicants to be members of the Danish National Church.¹⁹² The Board found that the work in the shelter involved pastoral counselling and conversations and that the requirement for membership of the Danish National Church was therefore legitimate. In another case, a Christian organisation had a general requirement that their employees should be members of the Danish National Church.¹⁹³ The Board found that it was discriminatory to have a

¹⁹¹ Information provided by the website of the Ministry of Employment:
<http://bm.dk/da/Beskaeftigelsesomraadet/Arbejdsret/Forskelsbehandling/Forskelsbehandlingsloven.aspx>.

¹⁹² Board of Equal Treatment, Decision No. 216/2012.

¹⁹³ Board of Equal Treatment, Decision No. 56/2011.

general requirement of church membership. However, with regard to a concrete position as an organisational consultant working with the core tasks of the Christian organisation, the Board stated that it was legal to require membership of the church.

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.¹⁹⁴

A 2016 case for the Board of Equal Treatment dealt with a senior sergeant who was diagnosed with diabetes 1.¹⁹⁵ Shortly after the diagnosis, he was declared unfit for despatch. The sergeant was dismissed from his position as a senior sergeant and transferred to another job with a particular focus on education. In this job, he would not have to be sent to operations abroad. The complainant argued that the dismissal constituted discrimination based on disability. The Board stated that the situation was covered by the executive order exempting the military from the prohibition of discrimination based on disability. Thus, the Board did not decide in favour of the complainant.

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.¹⁹⁶ This criterion 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.¹⁹⁷ Since specific citizenship is not covered by the Act, it must be assumed that the same goes for stateless persons.

¹⁹⁴ Executive Order no. 350 of 30 March 2012.

¹⁹⁵ Board of Equal Treatment, Decision No. 9384 of 2 March 2016.

¹⁹⁶ Regulation No. 210 of 11 December 2000 with later amendments [Cirkulære om anvendelse af tjenestemandsansættelse i staten og folkekirken].

¹⁹⁷ Preparatory work to Act no. 459 of 12 June 1996 on the Prohibition of Discrimination in the Labour Market etc.

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.

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 a case from the Board of Equal Treatment the complainant was a EU-citizen temporarily residing in Denmark.¹⁹⁸ 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 held 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. The Board reached the exact same result in another case dealing with a Spanish citizen who lived in Denmark and who was not allowed to buy a new phone from his mobile phone company because of the fact that he did not have a Danish passport or drivers licence.¹⁹⁹ As in the case described above, the Board concluded that the case dealt with nationality discrimination and thus was not covered by the Act on Ethnic Equal Treatment. The complaint was dismissed and as in the above case it is puzzling that the Board did not discuss whether indirect discrimination based on ethnic origin could have taken place.

In a case from the Board of Equal Treatment, a university had used a standard scheme in which job applicants for administrative positions among other things should state their "nationality country".²⁰⁰ 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.

¹⁹⁸ Board of Equal Treatment, Decision No. 160/2014 of 17 September 2014.

¹⁹⁹ Board of Equal Treatment, Decision No. 11202 of 23 September 2015.

²⁰⁰ Board of Equal Treatment, Decision No. 260/2013.

There is often an overlap between the discrimination grounds of ethnic origin and national origin. In a case from 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.²⁰¹ 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.

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.²⁰² 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.²⁰³ 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). According to Section 18 of the Executive Order on the Arrangement of Permanent Workplaces [Bekendtgørelse om faste arbejdssteders indretning], employers are obligated to take into consideration the needs of employees with disabilities when arranging the workplace.²⁰⁴ The aim of these obligations is to provide persons with disabilities the basic working conditions when establishing (new) permanent workplaces.

With regard to the other discrimination grounds, the only exception is found in Section 81(5) of the Road Traffic Act [Færdselsloven]²⁰⁵ and a government circular (Cirkulære No. 17133 of 21 April 1997), 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.

²⁰¹ Board of Equal Treatment, Decision No. 33/2011.

²⁰² 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. 1818 on Marriage of 23 December 2015.

²⁰³ 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. 1818 on Marriage of 23 December 2015.

²⁰⁴ Executive Order No. 96 of 13 February 2001 with later amendments.

²⁰⁵ Consolidated Act No. 38 of 5 January 2017.

In an Eastern High Court judgment a Sikh carried a kirpan knife as a religious symbol in a public space.²⁰⁶ The Court found that there was no exception in the Act on Small Arms [Våbenloven]²⁰⁷ 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.

a) 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 exempt 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 judgment from the Danish Maritime and Commercial Court upheld an age limit in a collective agreement.²⁰⁸ In June 2016, the Supreme Court upheld the judgment and referred to the reasoning of the Maritime and Commercial Court.²⁰⁹ Referring to section 5(a)(3) the Court concluded that the collective agreement did not constitute age discrimination. The provision in the collective agreement stipulated that service station employees below 25 years of age, being students and not working more than 15 hours a week would receive lower pay supplements than other employees. The Court stated that the purpose of the provision was to promote the occupational integration of young people enrolled in education and that the age limit was an appropriate and necessary means to achieve this purpose.

In a similar case the Board of Equal Treatment decided that compulsory retirement of an opera soloist by the age of 56 was objectively and reasonably justified by a legitimate aim within the scope of Danish legislation.²¹⁰

A landmark Supreme Court judgment of 27 August 2013 dealt with an employee who was working in a telecommunications company.²¹¹ His employment was covered by an existing collective agreement containing a provision for retirement without notice at the age of 67.

²⁰⁶ Weekly Law Journal, U.2007.316Ø.

²⁰⁷ Consolidated Act No. 1005 of 22 October 2012 with later amendments.

²⁰⁸ Danish Maritime and Commercial Court, judgment in case No. F-7-14 of 18 June 2015.

²⁰⁹ Supreme Court, judgment in case No. 154/2015 of 16 June 2016. Printed in U.2016.3281H.

²¹⁰ Board of Equal Treatment, Decision No. 22/2015 of 25 February 2015.

²¹¹ Weekly Law Journal, U.2013.3130H.

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 the purposes of an appropriate age distribution and the reduction of the workforce by age-related departures rather than dismissals.

A Western High Court decision of 12 April 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.

By Act No. 1489 of 23 December 2014, Section 5(a)(4) of the Act on Prohibition of Discrimination on the Labour Market etc. was repealed. Since 1 January 2016 following this amendment neither individual employment contracts nor collective agreements on automatic termination of employment by the age of 70 can be entered into. Also, since 1 January 2016 previous individual contracts on automatic termination cannot be enforced after 1 January 2016. Collective agreements on automatic termination are, however, valid until the time the collective agreement in question can be denounced.

With regard to employment, payment and dismissal, Section 5(a)(4) of the Act (until 1 January 2016 it was section 5a(5)) 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.²¹² 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 Supreme Court concluded that section 5a(a) of the Act on Prohibition of Discrimination in the Labour Market etc. was in accordance with EU law by not going further than allowed by article 6(1) of Directive 2000/78/EC. The reasoning was that section 5a(5) was justified by the need to ensure integration of young people under 18 in the labour market.

With regard to employment, payment and dismissal, Section 5(a)(5) (previously 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.

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.

b) Permitted differences of treatment based on age

²¹² Supreme Court judgment of 14 November 2013, Case 185/2010. Judgment printed in U2014.470H.

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

See above.

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

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 or right to occupational pension schemes as long as such requirements do not result in discrimination on account of gender.

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.²¹³ 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)(4) of the Act on the

²¹³ Consolidated Act No. 645 of 8 June 2011 with later amendments.

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.

According to Section 5(a)(5), 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 [*Tjenestemandsloven*] poses a mandatory retirement for priests when they turn 70 years of age.²¹⁴ The provision was dealt with in a decision from the Board of Equal Treatment.²¹⁵ 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 they turned 70 years of age. The Board held 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 opined 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.²¹⁶ There is a minimum age for police officers. Applicants to the National Police College must be 21 years of age.²¹⁷

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*].²¹⁸ 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 68 years of age.

If an individual wishes to work longer, the pension can be deferred for 10 years at the maximum. In other words if a person is entitled to a state 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.

An individual can collect a state pension and still work. The pension will, however, be reduced on the basis of the recipient's income.

b) Occupational pension schemes

²¹⁴ Consolidated Act No. 488 of 6 May 2010 with later amendments.

²¹⁵ Board of Equal Treatment, Decision No. 41/2014 of 5 March 2014.

²¹⁶ Consolidated Act No. 488 of 6 May 2010 with later amendments.

²¹⁷ Website of the National Police Commissioner's Office:
https://www.politi.dk/en/About_the_police/admission/.

²¹⁸ Section 1a of Consolidated Act No. 1239 of 12 January 2016.

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 and they are exempted from the general prohibition of age discrimination pursuant to section 6(a)(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. 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.

In general if an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

In general an individual can collect a pension and still work.

The Supreme Court dealt with the issue of occupational pension schemes in a case of pension contributions increasing with older age.²¹⁹ The court concluded that such schemes do not constitute illegal age discrimination if they are legitimate and comply with the principle of proportionality. In the ruling a woman – age 29 - was recruited by a company providing analytical and information services to businesses and consumers. Pursuant to her employment contract, she was included in a compulsory pension scheme where pension contributions from her employer would increase with her age. The woman resigned less than a year after and claimed that the pension scheme constituted unlawful discrimination on the ground of age. The employer claimed that pension schemes were not covered by the prohibition of age discrimination. A preliminary ruling from the Court of Justice of the European Union was requested and a judgment was issued in case CJEU C-476/11 on 26 September 2013. On that basis the Supreme Court stated that an occupational pension scheme is exempted from the prohibition of discrimination on grounds of age if it can be justified under EU law and especially under article 6(1) of Directive 2000/78. The Supreme Court concluded that the aim of the pension scheme constituted a “legitimate aim” as it took into account the interests of all employees in the company. Hereafter, the Court concluded that the detriments resulting from the differential treatment on account of age were offset by the woman’s benefits from the occupational pension scheme and that the principle of proportionality was not violated. Thus, the employer was acquitted.

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 70.²²⁰

d) Retirement ages imposed by employers

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

However, Act No. 1489 of 23 December 2014 has repealed section 5(a)(4) of the Act on Prohibition of Discrimination on the Labour Market etc. that allowed for automatic termination of employment by the age of 70 years or older. Since 1 January 2016, neither

²¹⁹ Supreme Court, judgment in case No. 1/2015 of 12 November 2015. Printed in U2016.749H.

²²⁰ See Section 34(2) and section 43(2) of Consolidated Act No. 488 of 6 May 2010 with later amendments.

individual employment contracts nor collective agreements providing for automatic termination of employment by the age of 70 or older can be entered. It also follows from this Act that previous individual contracts providing for automatic termination cannot be enforced after 1 January 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.²²¹ 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.²²² 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.²²³ 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 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 concerned 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.²²⁴ In the case in question, an employee claimed that he was entitled to severance allowance according to EU law prohibiting

²²¹ Consolidated Act No. 81 af 3 February 2009 with later amendments.

²²² 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.

²²³ Supreme Court judgments of 17 January 2014. Printed in U2014.1116H and U2014.1119H.

²²⁴ Supreme Court judgment in Case No. 15/2014 of 22 September 2014.

discrimination on the grounds of age. However, the employer refused to pay the severance allowance referring to Danish law. It was left to the Supreme Court to decide whether the private employer could rely on the Danish rules and not pay severance allowance to the employee. In its decision on a preliminary ruling from the CJEU, the Supreme Court stated 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, 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.

In April 2016, the CJEU gave its preliminary ruling in the Ajos-case C-441/14 leaving the Danish Supreme Court with two options; (1) apply national law in a manner that is consistent with the Employment Directive or (2) disapply any provision of national law that is contrary to EU law.²²⁵ In its subsequent judgment,²²⁶ the Supreme Court argued that the legal position under Section 2a(3) of the Salaried Employees Act was clear and that the Supreme Court could not change this legal position with regard to severance allowance as the CJEU had suggested by using methods of interpretation. Therefore, the Supreme Court found that it would be "contra legem" to interpret the national law in conformity with the Directive since the Danish law was clear. Thus, in the first part of the ruling the Supreme Court concluded that an interpretation consistent with EU law was not possible.

In the second part of the ruling, the Supreme Court concluded that it could not set aside national law since the Danish EU Accession Act did not confer sovereignty to the extent required for the unwritten EU principle prohibiting discrimination on the grounds of age to take precedence over national law. In other words, the Court concluded that the Danish Accession Act did not provide legal basis in a horizontal relationship to give precedence to an unwritten EU law principle. The Court finally stated that if the Danish Supreme Court was to set aside national law it would be acting outside constitutional limits to the judiciary.

The Ajos judgment constitutes a fundamental ruling with regard to the demarcation between the competence of the Court of Justice of the European Union and the Danish courts. The judgment also demonstrates that employees on the Danish labour market cannot base a claim on general unwritten EU principles if there is a clear legal position in Danish law, which makes it impossible to interpret national law in conformity with EU-law. The judgment did not follow the guidance of the CJEU in the Ajos-case (C-441/14). In other words, the Danish Supreme Court did not follow any of CJEU's two suggested solutions of the "contra legem" problem.

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 2015 an act was adopted to revoke Subsection 2 and 3 of Section 2(a) of the Salaried Employees Act and conflicts with EU law in this area have ceased to exist.²²⁷ 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

Except for the above described more fundamental issue of the Danish Supreme Court not following the guidance of the CJEU in the Ajos-case, the national legislation is in line with the CJEU case law on age regarding compulsory retirement.

²²⁵ C-441/14 – DI. CJEU Judgment of 19 April 2016.

²²⁶ Supreme Court judgment in Case No. HR-15/2014 of 6 December 2016.

²²⁷ Act No. 52 of 27 January 2015.

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.

In a relevant and illustrative case, the Board of Equal Treatment dealt with a 62-year-old electrician who was dismissed from his job in a supermarket with more than 60 other colleagues.²²⁸ The Board held 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.

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.

²²⁸ Board of Equal Treatment, Decision No. 95/2014 from 7 May 2014.

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 permitted 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 in section 9(2) 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 an 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 [Lov om kompensation til handicappede i erhverv m.v.]²²⁹ 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 belief

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

Since religion is understood as formally approved or recognized religions, there is a theoretical link between the recognition as a religious community and the possibility to benefit from these positive actions in section 9(2). In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice.

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 legislative or public measures that promote the employment opportunities of persons with different sexual orientations.

²²⁹ Consolidated Act No. 727 of 7 July 2009 with later amendments.

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

In practice, there are only limited and very sporadic measures in place for positive action in Denmark.

No information about positive action to promote the employment of migrants has been found.

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.²³⁰ 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 2009.²³¹ 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

²³⁰ Act no. 106 of 26 February 2008 with later amendments on the Labour Court and Labour Arbitration [*Lov om Arbejdsretten og faglige voldgiftsretter*].

²³¹ Consolidated Act No. 1230 of 2 October 2016.

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 2015 the Board of Equal Treatment issued 1355 decisions in total.²³² 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.²³³ 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 Institution 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 Institution (NHRI) in accordance with the UN Paris Principles. The Act on “The Institute for Human Rights – The National Human Rights Institution of Denmark” was adopted on 29 May 2012 and entered into force on 1 January 2013.²³⁴ 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;
- DIHR can take principle cases to the Board of Equal Treatment.

According to its general mandate to support victims of discrimination, the Danish Institute for Human Rights may also 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 2015 and has only assisted complainants in such matters in few cases in the previous years.²³⁵

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

²³² Statistics are found on the website of the Board: <http://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet>. The 2015 numbers are the most recent data available.

²³³ Board of Equal Treatment, Annual Report 2013 (August 2014).

²³⁴ Consolidated Act No. 553 of 18. June 2012 on The Institute for Human Rights – The National Human Rights Institution of Denmark with later amendments.

²³⁵ Information provided by DIHR Equal Treatment Department by e-mail, 9 February 2017.

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.

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, in a concrete case the Board of Equal Treatment concluded that a claim was statute-barred according to the Act on Limitations and on that basis the Board could not decide in favour of the complainant.²³⁶ According to the Act on Limitations, there is an absolute 3-year period of limitation (5-year period of limitation for employment related cases), which means that a procedure must be initiated 3 years (or 5 years) after the unlawful violation at the latest.²³⁷ In another case, the Board of Equal Treatment argued that it could not decide in favour of the complainant because of limitation.²³⁸ The case dealt with a dismissal in April 2004 and the claim of discrimination based on disability and age was not raised until August 2014.

Furthermore, 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.²³⁹ According to a general principle of Danish law a person can lose his claim before the statutory period of limitation by acting passively. Whether a person has acted passively is determined by an individual assessment carried out by the civil courts or other law enforcement agencies. In the Board case in question the complainant had 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. In a similar case the Board rejected a complaint because of the fact that the complainant had acted passively by submitting his complaint 3 years after termination of his employment.²⁴⁰ In another case, the Board of Equal Treatment also decided upon the question of passivity.²⁴¹ The case dealt with a woman who had been a sector president in a labour union. She was unable to run for re-election at the congress because of regulations stipulating that candidates for the post as sector president could not be 60 years or more. The labour union congress was held in 2011 and the woman submitted her complaint to the Board of Equal Treatment in 2014. The Board decided not to reject the complaint because of passivity and ruled on the merits of the case.

Also, no absolute time limit is indicated in the Act on Labour Courts.²⁴² With regard to the civil courts, there is a 3-year period of limitation (5-year period of limitation for employment related cases), which means that a procedure must be initiated 3 years (or 5 years) after the unlawful violation at the latest.²⁴³

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.

²³⁶ Board of Equal Treatment, Decision No. 29/2015 of 4 March 2015.

²³⁷ Act on Limitations (Forældelseslov) Section 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

²³⁸ Board of Equal Treatment, Decision No. 10423 of 25 February 2015.

²³⁹ Board of Equal Treatment, Decision No. 234/2013.

²⁴⁰ Board of Equal Treatment, Decision No. 108/2015 of 24 June 2015.

²⁴¹ Board of Equal Treatment, Decision No. 10073 of 22 June 2016.

²⁴² Act No. 106 on Labour Courts of 26 February 2008 with later amendments.

²⁴³ Act on Limitations (Forældelseslov) Section 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

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).²⁴⁴ Typically, 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.

Chapter 31 of the Administration of Justice Act deals with legal aid and free legal proceedings.²⁴⁵ The Minister of Justice can financially support Legal Aid Offices where individuals can seek free legal advice and representation.²⁴⁶ No public data is available on the practice of supporting and representing victims of discrimination.

There is one primary 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. The private organisation called The Danish Immigrant Counselling also provides legal advice and assists victims of racial discrimination in the cities of Aarhus, Odense, Aalborg and Copenhagen.²⁴⁷

Many Danish labour unions furthermore provide counselling and legal advice on discrimination, in particular discrimination because of disability at the labour market. No information has been found as to the link between disability rights organisations and labour unions.

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) Engaging on behalf of victims of discrimination (representing them)

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

There are very few specialized NGOs providing legal aid to victims of discrimination and using litigation as a method to generate public discourse on equality.

The Danish judicial system is regulated in the Administration of Justice Act.²⁴⁸ Under Danish procedural rules in Section 260 of the Administration of Justice Act, a person may either

²⁴⁴ See: <https://menneskeret.dk/raadgivning>.

²⁴⁵ Consolidated Act No. 1257 of 13 October 2016 with later amendments.

²⁴⁶ Regulation No. 637 of 11 June 2014. [Bekendtgørelse om tilskud til retshjælpskontorer og advokatvagter].

²⁴⁷ See: <http://www.antiracisme.dk/index.html> and <http://indvandrerraadgivningen.dk/kontakt.php?case=3>.

²⁴⁸ Consolidated Act No. 1257 of 13 October 2016 with later amendments.

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.

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.²⁴⁹

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

In Board of Equal Treatment cases, trade unions and NGOs are entitled to represent individuals who have a legitimate interest in the case. Representation of a victim of discrimination for the Board follows traditional administrative law, cf. section 8 of the Public Administration Act.²⁵⁰

In 2016, the Danish Institute for Human Rights was given the competence to take principle cases to the Board of Equal Treatment, including individual cases of discrimination of general public interest.²⁵¹

b) Engaging 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.

²⁴⁹ 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.

²⁵⁰ Consolidated Act No. 433 of 22 April 2014 with later amendments.

²⁵¹ Section 1(7) of Consolidated Act No. 1230 of 2 October 2016.

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 on discrimination because of race or ethnic origin in 2016 or in previous years.²⁵² In 2016, DIHR intervened in 3 civil court cases to support individual victims of discrimination because of disability.²⁵³

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).

The competence of the Danish Institute for Human Rights to take principle cases to the Board of Equal Treatment could be considered as a form of 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.

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 claim, but merely because the

²⁵² Information provided by DIHR Equal Treatment Department by e-mail, 9 February 2017.

²⁵³ *Id.*

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.²⁵⁴ 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 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 cases of discrimination based on disability it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability of the employee.

A number of judgments and decisions from the Board of Equal Treatment illustrate the shared burden of proof in practice:

A 2016 judgment from the Eastern High Court illustrates that the employee has to prove that the condition in question is caused by a medically diagnosed illness existing at the time of dismissal and the burden of proof therefore rests with the employee.²⁵⁵ The case dealt with a claimant who experienced dizziness and visual disorders after a knee surgery where she had an epidural. The specific reasons for her symptoms were unknown but they caused her to call in sick and she was dismissed after six months of partial sickness absence. The Court stated that for the employer to be under the obligation to establish reasonable accommodation according to Section 2a of the Act on Prohibition of Discrimination in the Labour Market etc. it must be documented that at the time of dismissal, the employee had an illness causing a disability and that the employer knew about this disability. In this case the Court concluded that even though the claimant's symptoms had been mentioned in several medical records, it had not been proven that the condition of the employee was caused by a medically diagnosed illness. Thus it had not been documented that the employee had a disability at the time of dismissal and the employer was acquitted.

²⁵⁴ The Act on Ethnic Equal Treatment Section 7 and the Act on the Prohibition of Discrimination in the Labour Market etc. Section 7 a.

²⁵⁵ Eastern High Court, Judgment of 31 May 2016 in case No. B-523-15.

A decision from the Board of Equal Treatment illustrates the kind of facts that can establish possible discrimination resulting in a shift of the burden of proof.²⁵⁶ The case dealt with a man A, who had contacted his bank regarding a bank loan. The man was a refugee and had lived in Denmark since 2009. He was diagnosed with Posttraumatic Stress Disorder (PTSD) because of torture in his country of origin and received treatment for his illness. A called the bank several times on the same day in March 2014 to ask questions regarding a particular loan. In the case, he argued that every time he called the bank, the advisor 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. After a meeting between A and a bank manager, the manager sent a letter expressing regret that A had met an un-polite attitude in the bank. The Board referred to A's information about the content of the telephone-conversations and stated that this information had been substantiated by the patient records from the psychologist, by the observation of the language teacher as well as by the content of the letter from the bank manager to A. On that basis, the Board concluded that A had established facts of possible discrimination in the form of harassment, reversing the burden of proof, and that the bank had not proven that no harassment of A took place. The decision illustrated that harassment can be substantiated by written explanations from witnesses as well as by a subsequent written apology from the alleged discriminator.

In a case from the Eastern High Court of 14 October 2014 disability, reasonable accommodation and the shared burden of proof was at stake.²⁵⁷ 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 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 therefore concluded that the employer had not provided a reasonable accommodation and that the dismissal constituted indirect discrimination.

A judgment from the Western High Court of 16 December 2013 similarly illustrates the use of a shared burden of proof.²⁵⁸ The case dealt with an employee A, who had problems with her back after a traffic accident resulting in sickness absence. 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.

A judgment from the Supreme Court of 7 December 2011 also illustrates the use of a shared burden of proof.²⁵⁹ The case dealt with A, who was 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

²⁵⁶ Board of Equal Treatment, Decision No. 214/2014 of 10 December 2014.

²⁵⁷ Eastern High Court, Judgment of 14 October 2014 in case No. B-3774-13. Printed in U2015.315Ø.

²⁵⁸ Western High Court, Judgment of 16 December 2013 in case No. B-1148-12. Printed in U2014.990V.

²⁵⁹ Weekly Law Journal U.2012.890 H.

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.

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 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.”²⁶⁰

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 held 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).

²⁶⁰ Preparatory work to Act no. 253 of 7 April 2004 amending the Act on Prohibition against Differential Treatment in the Labour Market.

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.²⁶¹

b) Ceiling and amount of compensation

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

Typically, the following amounts of compensation will be awarded to victims of discrimination:²⁶²

- In cases of denials of access to public places like discotheques: from DKK 5.000 (€ 675) to DKK 10.000 (€ 1350);
- In cases of discriminatory job advertisements: DKK 25.000 (€ 3.360);
- In cases of discriminatory denials of employment/new job: DKK 25.000 (€ 3.360);
- In cases of discriminatory dismissals: 6 to 9 months of salary.

In the landmark Supreme Court judgment of 13 June 2013²⁶³ 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 2014²⁶⁴ 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

²⁶¹ Section 3 of Act on Limitations (Forældelseslov), Consolidated Act No. 1238 of 9 November 2015.

²⁶² Board of Equal Treatment, Annual Report 2015 (November 2016), p. 20 ff.

²⁶³ U.2013.2575 H.

²⁶⁴ Supreme Court, judgment in Case No. 322/2012 of 1 October 2014. Printed in U2015.1H.

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. In recent years, the Supreme Court has established that the level of compensation should be set as in the area of gender discrimination cases. The judgment from 1 October 2014 establishes more concretely, 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.²⁶⁵ The judgment also illustrates that long seniority is neither the only nor the decisive criterion when deciding on the level of compensation in cases of age discrimination.

This approach has been corroborated in a Supreme Court judgment from 12 March 2015.²⁶⁶ In this case the Court underlined that when determining the amount of compensation, the Court must emphasize the “coarseness” in the meaning of seriousness of the violation including the background for the violation and the infringement of the individual in question.

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.

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 to sufficiently 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.²⁶⁷

²⁶⁵ Supreme Court, judgment in Case No. 322/2012 of 1 October 2014. Printed in U2015.1H.

²⁶⁶ Supreme Court, judgment in case No. 180/2014 of 12 March 2015. Printed in U2015.2027H.

²⁶⁷ Rådgivende sociologer, Unges syn på diskrimination i det københavnske natteliv – en kvalitativ og kvantitativ afdækning (2014) (Young people’s views about discrimination in the Copenhagen nightlife). See: <https://www.kk.dk/file/16401/download>.

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 Institution 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.²⁶⁸ 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. Since 1 January 2016 the Institute can bring complaints to the Board of Equal Treatment in cases that are a matter of principle or in cases that are a matter of general public interest.²⁶⁹ According to the preparatory works, it is not a condition that the Institute can identify a victim of discrimination by name to file such complaints.²⁷⁰ Thus the Institute does not necessarily act on behalf of individual victims of discrimination in such complaints. Before January 2016 the Institute did not have the authority to bring cases to the Board of Equal Treatment. In the fall of 2016, DIHR filed a complaint to the Board of Equal Treatment.²⁷¹ The complaint deals with discrimination based on ethnic origin at an upper secondary school / high school where students allegedly are divided in classes by their names.

The Board of Equal Treatment adjudicates individual complaints of discrimination.²⁷² 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.

In 2015 the Act on the Board of Equal Treatment was amended to clarify that the Board can only adjudicate complaints if the complainant has an individual and current interest in the case in question.²⁷³ Since 1 January 2016 it has not been possible for an individual to file a complaint because of the fact that he or she belongs to a group of persons (based on for example ethnic origin), who has been discriminated against.

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 2015 the Act on the Board of Equal Treatment was amended to clarify that complaints, which can be adjudicated in accordance with well-established case law, can be decided by one member of the Board's presidency only.²⁷⁴ 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.²⁷⁵

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.

²⁶⁸ Consolidated Act No. 553 of 18. June 2012 with later amendments on The Institute for Human Rights – The National Human Rights Institution of Denmark.

²⁶⁹ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁷⁰ Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

²⁷¹ Information provided by DIHR Equal Treatment Department by e-mail, 9 February 2017.

²⁷² Consolidated Act No. 1230 of 2 October 2016 on The Act on the Board of Equal Treatment.

²⁷³ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁷⁴ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁷⁵ Consolidated Act No. 1230 of 2 October 2016.

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 or they can send an email to DIHR.

In 2016 DIHR was allocated around DKK 16 million (app. € 2.2 million) from the Danish government to its work on equality.²⁷⁶ DIHR is established by law as an independent autonomous institution within the public administration. DIHR works with human rights in general and is accountable to the Danish Parliament by the obligation to submit a yearly report to the Parliament and by the fact that DIHR can only be abolished by legislation. With regard to its budget, DIHR is accountable to the Ministry of Finance.

By the end of 2016, DIHR had around 130 employees. Also by the end of 2016, the Equal Treatment Department had 12 fulltime employees. Another 8 employees, including students worked on equality issues in other DIHR departments.²⁷⁷

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 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 budget for the Board of Equal Treatment for 2016 was DKK 7.8 million (EUR 1.050.000), which included remuneration of Board members and secretarial staff as well as fees to the Legal Advisor to the Danish Government (the law firm Kammeradvokaten), that represents the Board in civil court cases.²⁷⁸ In December 2016 the secretariat of the Board consisted of 3.5 full time caseworkers, one full time chief consultant and 1.5 students each working 15 hours a week in the secretariat.²⁷⁹ 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.

The Danish Parliamentary Ombudsman dealt with the case of a dismissed employee who had worked in the secretariat of the Social Appeals Board.²⁸⁰ The employee claimed that she had experienced discrimination based on her age and submitted a complaint to the Board of Equal Treatment. The secretariat of the Board of Equal Treatment is part of the secretariat of the Social Appeals Board where she had previously worked. The employee therefore argued that the secretariat for the Board of Equal Treatment was disqualified to adjudicate her case. The Board of Equal Treatment and the Ministry of Employment disagreed. The Parliamentary Ombudsman concluded that the situation was a case of a disqualified public authority. He underlined the independence of the Board of Equal Treatment and argued that the Board should have found a substitute for the secretariat to handle the case in question. The Board has subsequently stated that the Legal Advisor to

²⁷⁶ Information provided by DIHR Equal Treatment Department by e-mail, 5 February 2017.

²⁷⁷ Information provided by DIHR Equal Treatment Department by e-mail, 5 February 2017.

²⁷⁸ Email from the chief consultant of the Board secretariat of 8 May 2017.

²⁷⁹ Email from the chief consultant of the Board secretariat of 8 May 2017.

²⁸⁰ Parliamentary Ombudsman, Opinion in case No. 13/04715 of 10 March 2015. Printed in FOM2015.13/04715.

the Danish Government (Kammeradvokaten) will handle cases in which the Secretariat of the Board is disqualified.²⁸¹

c) Grounds covered by the designated body/bodies

The Act on the Institute for Human Rights – The National Human Rights Institution of Denmark establishes the Institute as a separate and independent institution.²⁸² 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.

DIHR also has the responsibility to monitor the Danish implementation of the UN Convention on Rights of Persons with Disabilities, which follows from Parliament Decision B15 of 17 December 2010.

DIHR does not particularly prioritize issues of discrimination of migrants.

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 17 December 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:

- i) assisting victims of discrimination in pursuing their complaints about discrimination in the light of the rights of victims, associations, organisations and other legal entities;
- ii) conducting independent surveys concerning discrimination; and
- iii) publishing reports and making recommendations on discrimination issues.

Since 1 January 2016 the Institute can also bring complaints to the Board of Equal Treatment in cases regarding a matter of principle or in cases of general public interest.²⁸³ The Institute does not necessarily act on behalf of individual victims of discrimination in these complaints, as it is not a condition that the Institute can identify a victim of discrimination by name to file such complaints.²⁸⁴

Besides of 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

²⁸¹ Board of Equal Treatment, Annual Report 2015 (November 2016), p. 17.

²⁸² Consolidated Act No. 553 of 18 June 2012 with later amendments.

²⁸³ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁸⁴ Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

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 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.²⁸⁵ DIHR also publishes a yearly status report on the situation of ethnic minorities and persons with disabilities in Denmark.²⁸⁶

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 body has 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 2016 with regard to cases of discrimination because of race or ethnic origin but did act as *amicus curiae* in three cases of discrimination based on disability.²⁸⁷ DIHR can also take discrimination cases to the courts on its own initiative, which DIHR did one time in 2012 but has not done since then.²⁸⁸ 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.

²⁸⁵ See: <https://www.humanrights.dk/publications/status-report-2015-16-human-rights-denmark-summary>.

²⁸⁶ See: <https://menneskeret.dk/udgivelser/etnisk-oprindelse-statusrapport-2015-16> and <https://menneskeret.dk/udgivelser/handicap-status-2015-16>.

²⁸⁷ Information provided by DIHR Equal Treatment Department by email, 9 February 2017.

²⁸⁸ Information provided by DIHR by email, 11 March 2014. Information provided by DIHR Equal Treatment Department, 30 March 2016.

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.

In the annual report of 2015, the Board describes the current tendencies in complaints and decisions.²⁸⁹ The Board received altogether 317 complaints in 2015, which was the lowest number of complaints received within the last five years. In 2015 the Board decided upon 236 cases. There was a change in the number of decisions within the different areas. Previously, the Board has always decided most cases within the gender area but that was not the situation in 2015 where most cases were about age. The rulings were in favour of the complainant in 1/3 of the decisions in both the gender and the age area. The number of decisions about ethnic origin has always been relatively limited. The Board decided 22 cases about ethnic origin in 2015. The Board decided in favour of the complainant in 14 decisions out of the 22 regarding ethnic origin, which is notably higher than previous years. Over the years the number of cases on disability have increased. In 2015, the Board decided 47 cases on disability and decided in favour of the complainant in 10 of these decisions. As the numbers illustrate, it is relatively difficult for complainants to lift the burden of proof that they have experienced discrimination based on disability. The low number of decisions in favour of complainants in disability cases has not been an issue in the public debate.

There are no updated numbers from 2016 but on the website of the Board, it is possible to get an overview of decisions from 2015 separated by the following four categories of cases:²⁹⁰

- 72 decisions regarding gender;
- 22 decisions regarding ethnic origin;
- 120 decisions regarding age and disability;
- 23 on other or multiple discrimination grounds.²⁹¹

The decisions of the Board of Equal Treatment are not generally organized by field of discrimination or by type of discrimination. However, in 2016 the Board revised its website. When searching for Board decisions, it is now possible to use several search words like for example "ethnic origin" and "harassment" and "language" to narrow down the search for relevant decisions.

The DIHR assists victims of discrimination and has a unit responsible for giving advice relating to individual cases of alleged discrimination. In 2016 DIHR received 18 inquiries on discrimination because of race or ethnic origin, 2 inquiries about multi-discrimination because of race, ethnic origin, gender and 13 inquiries on discrimination because of disability as well as 2 inquiries on discrimination because of age.²⁹² In 2016 DIHR submitted one complaint to the Board of Equal Treatment on behalf of an individual who claimed discrimination because of ethnic origin. The data from DIHR is not generally available to the public.

h) Roma and Travellers

The equality bodies do not treat Roma and Travellers as a priority issue.

²⁸⁹ Board of Equal Treatment, Annual Report 2015 (November 2016), p. 4 and p. 31 ff.

²⁹⁰ See: <https://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet>.

²⁹¹ The category of "other" includes sexual orientation, religion and political opinion. A search on the website of the Board of Equal Treatment reveals that 4 decisions in 2015 dealt with discrimination based on religion. No cases in 2015 dealt with discrimination based on sexual orientation.

²⁹² Information provided by DIHR Equal Treatment Department by email, 10 May 2017.

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. The Unit has ceased to exist. The unit launched several studies during its two years of existence. One study dealt with discrimination based on ethnic origin on the private housing market. The study documented that applicants with Middle Eastern-sounding names have to send 27% more applications on average than applicants with Danish-sounding names in order to have the same chances of receiving a positive reply on an application of housing.²⁹³ Two other studies dealt with the mapping of case law on discrimination as well as the mapping of attitudes towards disability on the labour market. These studies were published in early 2016.²⁹⁴

In theory, the Ministry of Immigration and Integration is working for the promotion of integration and equal treatment of ethnic minorities in Denmark. However, on the website of the Ministry, there is no found information on discrimination. Instead the website has a picture of a meter counting the number of times rules on foreigners and immigrant have been tightened by the current government.²⁹⁵ In the Ministry for Children and Social Affairs, there is an office coordinating efforts and initiatives within the disability area.²⁹⁶

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 2015-16, 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 and the large salary gap between non-Western immigrants and ethnic Danes.²⁹⁷ In the Status Report 2015-16 on disability, DIHR furthermore describes challenges when it comes to accessibility, legal capacity, reasonable accommodation on the labour market as well as the lack of a prohibition of discrimination outside the labour market.²⁹⁸

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.

The Roma and Travellers population in Denmark is around 2.000 individuals and no current general information has been found about the situation of Roma in Denmark. There are restrictions on data collections based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge, including lack of knowledge about experienced discrimination. In December 2011, the Danish government presented its National Roma Inclusion Strategy to the

²⁹³ Ankestyrelsen, Omfanget af forskelsbehandling af nydanskere - Et felteksperiment på lejemarkedet (2015). See: <https://ast.dk/om-ankestyrelsen/organisation/antidiskriminationsenheden/mere-viden/kortlaegninger-pa-det-etniske-omrade>.

²⁹⁴ See: <http://uibm.dk/publikationer/kortlaegningsrapport-domme-og-naevnssager-om-diskrimination-pa-grund-af-etnicitet-og-handicap>. See: <https://ast.dk/nyheder/nyheder/nyheder-2016/to-nye-undersogelser-om-personer-med-handicap>.

²⁹⁵ See: <http://uim.dk/>.

²⁹⁶ See: <http://socialministeriet.dk/arbejdsomraader/handicap/>.

²⁹⁷ See: <https://menneskeret.dk/udgivelser/etnisk-oprindelse-statusrapport-2015-16>.

²⁹⁸ See: <https://menneskeret.dk/udgivelser/handicap-status-2015-16>.

European Commission.²⁹⁹ In the spring of 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.³⁰⁰ 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. No updates have been found with regard to the situation of Roma and Travellers in Denmark in 2016.

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.

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 discrimination 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 in direct conflict with the principle of equality.

²⁹⁹ See: http://ec.europa.eu/justice/discrimination/files/roma_denmark_strategy_en.pdf.

³⁰⁰ National Strategy for Roma Integration - Denmark: http://ec.europa.eu/justice/discrimination/roma-integration/denmark/national-strategy/national_en.htm.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Employment is responsible for issues of discrimination at the labour market.³⁰¹

The Ministry of Immigration and Integration is responsible for integration issues.³⁰² It is not clear from the Ministry's website what kind of efforts the ministry will take to protect genuine ethnic equality and non-discrimination.

The Ministry for Children and Social Affairs has an office coordinating efforts and initiatives within the disability area.³⁰³

No recent National Action Plan on Anti-discrimination has been published.

³⁰¹ See: <http://bm.dk/da/Beskaeftigelsesomraadet/Arbejdsret/Forskelsbehandling.aspx>.

³⁰² See: <http://uim.dk/>.

³⁰³ See: <http://socialministeriet.dk/arbejdsomraader/handicap/>.

10 CURRENT BEST PRACTICES

Annual Status Reports and Annual Reports to the Danish Parliament 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)

- Ajos-case on age discrimination

The Danish Supreme Court Ajos-judgment (HR-15/2014 of 6 December 2016) constitutes a fundamental ruling with regard to the demarcation between the competence of the Court of Justice of the European Union and the Danish courts. The judgment also demonstrates that employees on the Danish labour market cannot base a claim on general unwritten EU principles if there is a clear legal position in Danish law, which makes it impossible to interpret national law in conformity with EU-law. The judgment did not follow the guidance of the CJEU in the Ajos-case (C-441/14). In other words, the Danish Supreme Court did not follow any of CJEU's two suggested solutions of the "contra legem" problem. This is a violation of EU law and a possible outcome could be for the EU Commission to initiate infringements proceedings against Denmark.

- 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.

In a couple of cases dealing with discrimination based on nationality in the area of goods and services, it seemed puzzling that the Board of Equal Treatment did not discuss whether indirect discrimination based on ethnic origin could have taken place.³⁰⁴

- 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. There are later decisions from the Board of Equal Treatment ruling that educational institutions are encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. However, the overriding ruling from the Eastern High Court raises concern that Danish law does not comply with EU Law.

- Sanctions

Outside the area of employment, e.g. in the cases on bars and discotheque, 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

³⁰⁴ Board of Equal Treatment, Decision No. 160/2014 of 17 September 2014. Board of Equal Treatment, Decision No. 11202 of 23 September 2015.

The Danish Institute for Human Rights (DIHR) serves as a specialised equality body. However, like previous years DIHR did not act as *amicus curiae* to intervene in principle court cases on ethnic discrimination in 2016. However, DIHR did act as *amicus curiae* in 3 cases dealing with discrimination based on disability. DIHR did not file applications for free legal aid for discrimination cases in 2016. 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.

Since 1 January 2016 DIHR has had the competence to bring case that are of principle interest to the Board of Equal Treatment and DIHR filed a complaint of discrimination based on ethnic origin in the fall of 2016. This new competence will probably result in DIHR taking a more active approach to individual cases of discrimination in the future.

DIHR also has a unit responsible for giving advice relating to individual cases of alleged discrimination. In 2016 DIHR received inquiries and provided advice on discrimination because of race or ethnic origin in 18 cases and in 2 cases about multi-discrimination. Likewise in 2016 DIHR received inquiries and provided advice on discrimination because of disability in 13 cases and on age in 2 cases.³⁰⁵ Based on the low numbers it can be questioned whether DIHR is an effective specialised equality body when it comes to its tasks on assisting victims of discrimination.

- Concept of disability

As illustrated by case law, Danish courts still focus very much on the need for a medical impairment and a medical diagnosis to establish a disability. Rulings indicate that for a condition to be considered a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. it is critical that the condition is caused by a medically diagnosed illness (Eastern High Court, Ruling No. B-523-15 delivered on 31 May 2016). This makes it questionable whether discrimination because of perceived disability is illegal according to Danish non-discrimination law. In other words, the courts do not seem to sufficiently consider the role that environmental factors can play in creating a disability. It seems that the outdated medical model of disability is still being applied in practice when it comes to cases of disability discrimination in Denmark.

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. With the increased number of refugees arriving to Denmark in later years and the seemingly increasing xenophobia in Denmark, this information becomes even more relevant to establish. However, since the change of government in June 2015 equality and non-discrimination efforts do not seem to be of high priority. On the contrary, the Ministry of Immigration and Integration seems to boast about the number of times that the government has tightened various rules on foreigners and immigrants by having a picture in its website of a running meter counting restrictions.

Positive and special measures to promote non-discrimination and real equality should be undertaken. It should be considered to put some kind of obligations on employers to establish positive measures to improve genuine equality at the labour market. Section 4 of the Act on Prohibition of Discrimination in the Labour Market etc. contains a strict rule

³⁰⁵ Information provided by DIHR Equal Treatment Department by email, 10 May 2017.

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. It is for example illegal and 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. More generally discrimination because of age and disability is not prohibited when it comes to social advantages, education, access to and supply of goods and services. Another example of the unequal approach to the combatting of discrimination 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 since the Board was established in 2009, the number of complaints have decreased the last couple of years and the visibility of the Board among possible victims of discrimination is still relatively low. This is especially the case for ethnic minority groups and people with disabilities.
- It is not possible to present a complaint to the Board in person.
- 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.

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 remains unknown.

There are few NGOs and legal aid offices assisting victims of discrimination in filing complaints and initiating court proceedings. Only very few NGOs specialise in providing legal aid to victims of discrimination.

12 LATEST DEVELOPMENTS IN 2016

12.1 Legislative amendments

The previous Danish 70-year rule was nullified on 1 January 2016. Section 5a (4) of the Act on Prohibition of Discrimination on the Labour Market etc. was repealed.³⁰⁶ According to the amendment of the Act 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 entered into force on 1 January 2016.

The Act on the Board of Equal Treatment has been amended³⁰⁷ to establish that individuals making complaints to the Board of Equal Treatment must have an individual and current interest in the case in question. The amendments also establish that the Institute for Human Rights – The National Human Rights Institution of Denmark may bring complaints to the Board in cases that are a matter of principle or of general public interest. Before the amendment the Institute could not bring cases to the Board of Equal Treatment. Finally, the amendments establish that complaints, which can be adjudicated in accordance with well-established case law could be decided by one member of the Board's presidency only. The objective of the amendment is to avoid cases where the complainants do not have an individual interest in the case. The other objective is for the Board to be able to better prioritize its resources, which is made possible by allowing one member of the presidency to decide on cases by him- or herself. The amendments entered into force on 1 January 2016.

12.2 Case law

Race and ethnic origin

Name of the court: Board of Equal Treatment

Date of decision: 6 April 2016

Reference number: Decision No. 55/2016

Brief summary: A woman claimed that she had been discriminated against due to her race and ethnic origin. She had a 3 year-old son who was hospitalized because of anxiety. The son was to be placed in a 24-hour care centre after staying at the hospital. The mother did not agree in the placement of her son. A social worker from the care centre met with the mother at the hospital and tried to sort out things. In the journal the social worker wrote the following: "In the US the complainant works as a prison guard. [...] The father is a Negro and she does not live with him. [...] She seems very American in her statements and thoughts, which I understand from her opinions about the services of the Danish society being independent of whether you have money or not." The woman claimed that the social worker had acted in a racist way, which was disputed by the care centre.

The Board stated that the woman had established facts of possible discrimination. The reasoning was that the word "Negro" after a subjective assessment could be regarded as insulting towards the complainant.

On the other hand, the use of the term "Negro" in the context in question was not found to have either the purpose or effect of violating the dignity of the complainant and of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In this regard, the Board emphasized that there was no evidence to suggest that the social worker's writings in the journal influenced the proceedings of the case. Thus, the Board stated that the complainant was not treated differently because of her own or her child's

³⁰⁶ Act No. 1489 of 23 December 2014.

³⁰⁷ Act No. 1570 of 15 December 2015.

ethnic origin. On that background the Board concluded that no discrimination or harassment had taken place.

The Board also concluded that the description of the complainant as "American" did not constitute discrimination or harassment according to race or ethnic origin.

Name of the court: Board of Equal Treatment

Date of decision: 6 May 2016

Reference number: Decision No. 9505

Brief summary: The case dealt with an organ player who was born in and had grown up in Taiwan. She was a graduate from the academy of music in Vienna and had a degree from the Danish church music school of Zealand. She had lived in Denmark since 2006. The woman applied for a position as an organ player in a church. One of the job tasks would be to establish and run a children's choir. She got a job interview and later received an e-mail with a job rejection. In the email the parochial church council wrote that they had found a "language barrier, which we recommend that you address if you want to apply for a similar position in the future." The organ player was uncomprehending to the job rejection because she had passed the official Danish language test and because she had previously taught music to children. She filed a complaint with the Board of Equal Treatment for discrimination because of ethnic origin.

The Board stated that the requirement of special Danish language capabilities could constitute indirect discrimination based on ethnic origin if the requirements are unjustified with reference to the nature of the position in question. According to the Board the church had rejected the organ player because of her lack of Danish language skills. On that basis the organ player had established facts of possible discrimination. The Board found that the church could not prove that a language barrier was a hindrance to the woman's handling of the position as an organ player. Thus, the Board decided in favour of the organ player and concluded that she had been indirectly discriminated against because of ethnic origin. The Board awarded the organ player a compensation of DKK 25.000 (€ 3360).

Name of the court: Board of Equal Treatment

Date of decision: 10 August 2016

Reference number: Decision No. 10087

Brief summary: The claimant was a tenant with an African ethnicity. His landlord had told him, that he had been of the belief that the tenant was an "extremist with a turban". The landlord had also referred to the tenant's temporary lodger as a "black negro".

The Board found that the tenant had proven facts that gave rise to suspect that the landlord had exposed the tenant to harassment constituting discrimination because of ethnic origin. The landlord had failed to prove that harassment because of ethnic origin had not taken place. The tenant was therefore awarded a compensation of DKK 5.000 kr (€ 670).

Name of the court: Board of Equal Treatment

Date of decision: 12 September 2016

Reference number: Decision No. 10118

Brief summary: A was a man of Polish origin. He claimed that he had been discriminated against because of his national origin when he applied for a position as a caretaker in an educational institution. It was stated in the job advertisement that the employer was looking for a caretaker who could speak and write Danish fluently.

The Board stated that a language requirement of fluent Danish was unnecessary in relation to the kind of work that the caretaker should perform. The Board therefore concluded that it was a violation of the Act on Prohibition of Discrimination in the Labour Market etc. to post such a language requirement in a job advertisement for a caretaker. However, with regard to the complainant in question, the Board stated that the actual rejection by the

employer did not refer to the language requirement. Thus, it did not constitute discrimination because of ethnic origin to reject the complainant for the caretaker position.

Disability

Name of the court: Board of Equal Treatment

Date of decision: 2 March 2016

Reference number: Decision No. 34/2016

Brief summary: A business consultant in a local municipality was involved in a traffic accident that resulted in fractures and subsequent complications of infection, depression, anxiety and PTSD. At times she was absent from her job owing to illness and she required reduced working hours and changed tasks when she was working. She was following a plan for stepping up the number of working hours at the time of her dismissal.

The Board of Equal Treatment found that her health issues, particularly in relation to her mental illness kept her from fully and effectively participating in the work on equal terms with her colleagues. The Board stated that the impairments were long term and concluded that the consultant had a disability. The Board argued that it had not been tested if the consultant with permanently reduced working hours and opportunities for rest and on-going recovery would have been able to perform her duties. Thus, according to the Board the municipality had not complied with its obligation to make reasonable accommodation in view of the specific needs of the consultant. The consultant was awarded DKK 305.000 (€ 41.000) in compensation constituting 9 months of salary.

Name of the court: Board of Equal Treatment

Date of decision: 2 March 2016

Reference number: Decision No. 9384

Brief summary: The case dealt with a senior sergeant in the military who was diagnosed with diabetes 1. Shortly after the diagnosis, he was declared unfit for despatch. The sergeant was dismissed from his position as a senior sergeant and transferred to another job with a particular focus on education. In this job, he would not have to be sent to operations abroad. The complainant argued that the dismissal constituted discrimination based on disability.

The Board stated that the situation was covered by executive order No. 350 of 30 March 2012 exempting the military from the prohibition of discrimination based on disability. Thus, the Board did not decide in favour of the complainant.

Name of the court: City Court of Kolding

Date of decision: 31 March 2016

Reference number: Judgment described at the website of the City Court of Kolding. See <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsaagt31marts2016.aspx>

Brief summary: The complainant A worked as a child minder for 15 years in the Municipality of Billund. During that entire period, A was obese within the meaning of the definition of the World Health Organization (WHO). He made attempts to lose weight and the Municipality of Billund, as part of its health policy, provided him financial assistance between January 2008 and January 2009 in order for him to attend fitness and physical training sessions. A lost weight, which he subsequently regained, as in his previous attempts. Owing to the decrease in the number of children in the Municipality of Billund, in 2010 A had only three children to take care of instead of four. A was eventually dismissed and claimed that he had been discriminated against on the basis of obesity.

The question for the City Court was whether obesity could be deemed a disability covered by the Act on Prohibition of Discrimination in the Labour Market etc. Previously, the City Court had requested a preliminary ruling from the Court of Justice of the European Union. A judgment was issued in case C-354/13 on 18 December 2014. The City Court referred

to this ruling and stated that EU law cannot be interpreted to lay down a general principle of non-discrimination on grounds of obesity in employment and occupation. The City Court also referred to a statement by the CJEU that obesity in itself does not constitute a disability within the meaning of Directive 2000/78. However, in concrete cases obesity may still constitute a disability.

In the case of A, the City Court argued that according to medical information, the obesity of A did not constitute a disability because of the fact that it did not entail a limitation, which in interaction with various barriers hindered the full and effective participation of A in his professional life on an equal basis with other child minders. In that regard, the court underlined that an employee can be protected by the Act on Prohibition of Discrimination in the Labour Market etc. if the employer perceives the employee as having a disability – whether or not the individual in question is encompassed by the group of people or not. The court found that there was no basis for concluding that the employees in the municipality, who participated in the decision on the dismissal, had perceived A as having a disability. On that basis the Municipality of Billund was acquitted.

Name of the court: The Supreme Court

Date of decision: 13 April 2016

Reference number: Judgment No. HR-98/2015

Brief summary: The claimant was an engineer in a municipality who shortly after she was appointed, had an accident and injured her right arm. She was later diagnosed with Complex Regional Pain Syndrome for which she was partly absent owing to illness for more than a year. Her request for a part time position was rejected by the municipality because of a general practice not to employ engineers in her kind of job in part time positions. She was dismissed due to her sickness absence and argued that she had been discriminated against because of disability.

The Danish Maritime and Commercial Court in its judgment of April 29, 2015 (Case F-9-12) had awarded compensation for indirect discrimination because of disability. The municipality appealed the judgment to the Supreme Court.

The Supreme Court argued that the claimant at the time of the dismissal had an impairment, which in interaction with various types of working tasks hindered her full and effective participation in the working life on an equal basis with other employees. The Court concluded that the impairment at the time of the dismissal could be characterized as long term and that it constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc.

With regard to reasonable accommodation, the court stated that the employer did not have an obligation to provide for a part-time position of 20 hours a week, which would have met the claimant's needs for accommodation. The Court argued that for the municipality to provide for such a position, the municipality would have to divide a current full-time position into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of 3 employees would constitute a disproportionate burden to the employer. The Court acquitted the municipality.

Name of the court: The Supreme Court

Date of decision: 27 April 2016

Reference number: Judgment No. HR-151/2015

Brief summary: A woman claimed that she had been discriminated against due to the disability of her son who had Asperger syndrome. She was dismissed from her job as a child minder at a time when she had been on leave to care for her son for around 14 months. The employer refused that the dismissal was motivated by the illness of the son and argued that it was solely based on necessary budgetary cuts in the local municipality. The employer also argued that the son did not have a disability. The Board of Equal

Treatment had previously found that the son did not have a disability in the meaning of the Act on Prohibition of Discrimination in the Labour Market etc.³⁰⁸

In April 2016, the Supreme Court concluded that the son “suffered from Asperger’s syndrome to such a degree that he was encompassed by the concept of disability” in the Act on Prohibition of Discrimination in the Labour Market etc. The Court stated that the son had a “significant impairment with regards to among other things his social capabilities and the ability to handle changes in everyday life.” The Court also stated, that “the impairment hindered a normal school attendance.” The Court, however, argued that the child minder had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability.

The Court then assessed whether the child minder had experienced indirect discrimination. The local municipality had to cut the budget because of a declining number of children. According to the Court it was both objective and proportional not to move children to a child minder whom the children did not know because of the fact that she had been away from her work for such a long period of time. On that basis the Supreme Court concluded that the dismissal of the child minder in question did not constitute indirect discrimination in violation of the Act on Prohibition of Discrimination in the Labour Market etc.

The Court underlined that it did not need to discuss whether the prohibition of indirect discrimination encompass a situation where an employee does not have a disability herself but is affected by an action because of a disability of a child or another close relative. The Court referred to rulings from the Court of Justice of the European Union in case C-303/06 of 17 July 2006 (Coleman) and in case C-83/14 of 16 July 2015 (CHEZ Razpredelenie Bulgaria) and argued that the correct understanding of the Employment Directive in this regard is neither clear nor settled. As the question of whether indirect discrimination because of the association of an employee to a child with a disability is encompassed by the non-discrimination legislation was not decisive to the case in question, the Supreme Court concluded that it did not need to ask for a preliminary ruling on the issue from the Court of Justice of the European Union.

On that background the local municipality was acquitted.

Name of the court: The Eastern High Court

Date of decision: 31 May 2016

Reference number: Judgment No. B-523-15

Brief summary: Claimant A experienced dizziness and visual disorders after a knee surgery where she had an epidural. The specific reasons for her symptoms were unknown but they caused her to call in sick. After six months of partial sickness absence she was dismissed. The employer argued that she had behaved inappropriately during a meeting dealing with her sickness absence. At the meeting in question, colleagues, representatives from the local municipality as well as her employer had participated. The claimant argued that she had experienced discrimination because of her disability.

The Court 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. The Court also stated that for the employer to be under the obligation to establish reasonable accommodation according to Section 2a of the Act on Prohibition of Discrimination in the Labour Market etc. it must be documented that at the time of dismissal, the employee had an illness causing a disability and that the employer

³⁰⁸ Flash report No. 25: Asperger Syndrome was not a disability (published 26 June 2012).

knew about this disability. In this case the Court concluded that even though the claimant's symptoms had been mentioned in several medical records, it had not been proven that the condition of the employee was caused by a medically diagnosed illness. Thus it had not been documented that the employee had a disability at the time of dismissal. On that basis the employer was acquitted.

Name of the court: The Eastern High Court

Date of decision: 30 June 2016

Reference number: Judgment No. B-477-15

Brief summary: The claimant had undergone a serious brain surgery. After the surgery she experienced abnormal tiredness and was on sick leave for about 2 month. Thereafter she was on partial sick leave for 8 months. She wanted to go back to her full-time position in the bank where she had been employed for 18 years. However, the extreme fatigue meant that she could not work for more than 12-18 hours a week. The hospital had recommended a "flexible job" with reduced working hours (for people with a reduced ability to work) but the employer rejected this. After this rejection the claimant called in sick again. She was dismissed 3 weeks after. The claimant argued that her tiredness constituted a disability and that her dismissal was discriminatory. The employer argued that due to the massive sickness absence since the surgery, the employee could not be expected to perform the job she was appointed to do and she therefore had to be dismissed.

The court argued that based on the medical records of the claimant there were no prospects for her getting back to a full time position in the bank as she was suffering from a "diagnosed disabling fatigue". The Court thus concluded that the impairment at the time of the dismissal could be characterized as long term and that it constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc.

With regard to reasonable accommodation, the court stated that the employer knew about the disability of the employee and thus had an obligation to provide reasonable accommodation. Based on the fact that the employer had refused the complainant a "flexible job" without examining the options more closely, the court concluded that the employer had not provided reasonable accommodation and thus that the dismissal constituted discrimination based on disability.

The court awarded DKK 503.000 constituting 12 months of salary in compensation (€ 67.550). The court referred to her long employment as well as the "coarseness" in the meaning of seriousness of the violation when determining the amount of compensation.

Name of the court: Board of Equal Treatment

Date of decision: 24 August 2016

Reference number: Decision No. 10099

Brief summary: A dyslectic social worker was dismissed after four months of employment at a residential accommodation facility. The employer was not satisfied with the performance of the social worker. The Board stated that the dyslexia of the social worker induced challenges with regard to written assignments and thus constituted a disability in the Act on the Prohibition of Discrimination in the Labour Market etc. The employer had bought a special computer program to accommodate A's dyslexia. In spite of relevant accommodations, A continued to make mistakes in resident files and medicine files. On that background the Board concluded that the social worker was not competent, capable and available to perform the essential functions of the job.

Name of the court: Eastern High Court

Date of decision: 6 December 2016

Reference number: Case B-2828-15

Brief summary: A was a cleaner at a public hospital who was dismissed due to illness after 17 years of employment. A had been diagnosed with diabetes type 2. Because of various sequelae to her diabetes, she had been sick and absent from her job a number of

times. At the time of dismissal the prognosis from her doctor stated that she would be fit for duty in 3 months. The Court stated that diabetes by itself does not constitute a disability. The Court argued that because of the character and the variations of the different complications related to diabetes, the diverse sequelae did not constitute an overall course of an illness, but had to be considered individually. Thus according to the Court, sequelae must be regarded as individual illnesses that cannot be considered together resulting in one long lasting limitation. The Court also argued that because of the prognosis from the claimant's doctor that she could be back at her workplace in 3 months, the illness at the time of dismissal did not constitute a disability. On that basis, the employer was acquitted.

Age

Name of the court: Board of Equal Treatment

Date of decision: 22 June 2016

Reference number: Decision No. 10073

Brief summary: The complainant in the case had been a sector president in a labour union. She was unable to run for re-election at the congress because of the union regulations stipulating that candidates for the post as sector president were not allowed to be 60 years or more. The labour union congress was held in 2011 and the woman submitted her complaint to the Board of Equal Treatment in 2014. The Board decided not to reject the complaint because of passivity and ruled on the merits of the case.

The Board referred to section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. dealing with involvement in workers' organisations. The Board also argued that the post of sector president in reality constituted "occupation" in the words of Article 3(1)(a) of the directive. On that basis, the Board concluded that the regulations of the labour union violated the prohibition of age discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the complainant was awarded a compensation of DKK 25.000 (€ 3.360).

Name of the court: Western High Court

Date of decisions: 1 July 2016

Reference number: B-1149-15 printed in U2016.3632V

Brief summary: An employee in a small labour union did not want to go into early retirement when she turned 62, which the employer had otherwise expected her to do. She was dismissed when she was 61 years old. Although the employer claimed that various financial issues constituted the reasons for dismissing her, the Court argued that the employer had not conducted an individual evaluation of the vocational skills of the employee in question. On that background the Court concluded that the employer had failed to prove that age was not part of the reasoning for dismissing the woman. The Court ruled that the employee was discriminated against because of her age and awarded a compensation of DKK 223.000 (€ 30.000) constituting 6 months of salary.

Name of the court: Supreme Court

Date of decisions: 6 December 201

Reference number: Case No. HR-15/2014 (Ajos-case)

Brief summary: A resigned employee sought a severance allowance from his private employer. According to the Danish law in force at the time, the employer was not bound to pay the severance allowance. It followed from Section 2a(3) of the Salaried Employees Act, which held that no severance allowance should be paid, if the employee would receive an old age pension from the employer and the employee had joined the pension scheme in question before he turned 50 years.³⁰⁹

The employee claimed that he was entitled to severance allowance according to EU law prohibiting discrimination on the grounds of age. However, the employer refused to pay

³⁰⁹ Section 2a(3) of the Salaried Employees Act was revoked by Act No. 52 of 27 January 2015.

the severance allowance referring to Danish law. It was left to the Supreme Court to decide whether the private employer could rely on the Danish rules and not pay severance allowance to the employee.

In the case, the Danish Supreme Court had referred several questions for a preliminary ruling by the Court of Justice of the European Union. In Case C-441/14,³¹⁰ the CJEU gave its preliminary ruling in this case, leaving the Danish Supreme Court with two options; (1) apply national law in a manner that is consistent with the Employment Directive or (2) disapply any provision of national law that is contrary to EU law.

The Supreme Court argued that the legal position under Section 2a(3) of the Salaried Employees Act was clear and that the Supreme Court could not change this legal position with regard to severance allowance as the CJEU had suggested by using methods of interpretation. Therefore, the Supreme Court found that it would be "contra legem" to interpret the national law in conformity with the Directive since the Danish law was clear. In the first part of the ruling the Supreme Court thus concluded that an interpretation consistent with EU law was not possible.

In the second part of the ruling, the Supreme Court concluded that it could not set aside national law since the Danish EU Accession Act did not confer sovereignty to the extent required for the unwritten EU principle prohibiting discrimination on the grounds of age to take precedence over national law. In other words, the Court concluded that the Danish Accession Act did not provide legal basis in a horizontal relationship to give precedence to an unwritten EU law principle. The Court finally stated that if the Danish Supreme Court was to set aside national law it would be acting outside constitutional limits to the judiciary.

There are no found 2016 cases brought by Roma and Travellers.

³¹⁰ C-441/14 – DI. CJEU Judgment of 19 April 2016.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Denmark
Date: 1 January 2017

Act on the Prohibition of Discrimination in the Labour Market etc.	<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 2016 Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=122522 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>
Act on Ethnic Equal Treatment	<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: https://www.retsinformation.dk/forms/r0710.aspx?id=141404 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>
Act on the Prohibition of Discrimination due to Race etc.	<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: https://www.retsinformation.dk/forms/r0710.aspx?id=59249 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>
Act on The Board of Equal Treatment	<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: 1 January 2016 Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=179851</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"> - Within labour market: all protected discrimination grounds - 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
	Principal content: Creation of a specialised body
Act on The Institute for Human Rights – The National Human Rights Institution of Denmark	Title of the law: Act on The Institute for Human Rights – The National Human Rights Institution of Denmark Date of adoption: 18 June 2012 Entry into force: 1 January 2013 Latest amendments: 19 December 2013 Web link: https://www.retsinformation.dk/forms/r0710.aspx?id=142116
	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: 1 January 2017

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
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 Covenant 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

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
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 complaints protocol)	Yes
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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