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Country report

Gender equality

How are EU rules transposed into
national law?

Norway

Marte Bauge

Reporting period 1 January 2019 – 31 December 2019

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1 Introduction¹

1.1 Basic structure of the national legal system

Norway is based on a civil law system, with the Constitution at the top and national laws and regulations defining the system in detail. The interpretation of laws is based on both preparatory works and interpretations by the courts. The court system is based on three levels: the municipal courts, the courts of appeal and the Supreme Court.

Discrimination cases may be brought before the ordinary courts. However, the key administrative procedure to handle discrimination cases is to bring them before the Equality and Anti-Discrimination Ombud (hereinafter the Equality Ombud) for advice² and the Equality and Anti-Discrimination Tribunal³ (hereinafter the Equality Tribunal) for decisions regarding complaints.

In addition, there is the Court of Labour Disputes (Labour Court) which interprets collective agreements. Judgments of the Labour Court may be appealed to the Supreme Court. The Labour Court deals with disputes between trade unions that include the interpretation, validity and existence of collective agreements and cases of breach of collective agreements – to the extent that anti-discrimination provisions are included in the collective agreements.⁴

The Ministry of Children and Equality has usually been responsible for dealing with anti-discrimination in relation to the grounds covered by the Equality and Anti-Discrimination Act (*Lov om likestilling og forbud mot diskriminering*) (GEADA),⁵ but late in 2018 equality and anti-discrimination issues were moved to the Ministry for Culture,⁶ with effect from 2019. This is due to the Christian Democrats entering the Government and obtaining the Minister for Children and Family Affairs. The Ministry has delegated the Norwegian Directorate for Children, Youth and Family Affairs⁷ as also being responsible for equality and non-discrimination issues.

The Ministry for Labour and Social Affairs⁸ is responsible for dealing with the anti-discrimination provisions of the Working Environment Act (WEA)⁹ (*Lov om arbeidsmiljø, arbeidstid og stillingsvern*).

1.2 List of main legislation transposing and implementing the directives

Several attempts have been made to harmonise the anti-discrimination legislation in Norway. The existing acts on discrimination were revised and aligned on 21 June 2013 upon the enactment of the Sexual Orientation Anti-Discrimination Act (SOA) (*Lov om forbud mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk*) covering sexual orientation, gender identity and gender expression, which came into force on 1 January 2014.¹⁰ The other key pieces of anti-discrimination legislation

¹ This report was written on the basis of the Gender Equality country report for 2017 written by Helga Aune and the report for 2018 written by Marte Bauge,

² See Equality Ombud website: <http://www.ldo.no/en/>.

³ See Equality Tribunal website: <http://www.diskrimineringsnemnda.no/en/innhold/side/forside>.

⁴ See Labour Court website: <http://www.arbeidsretten.no/engelsk.php>.

⁵ Act of 2017-06-16-51, available at: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51>.

⁶ See Ministry website: <https://www.regjeringen.no/en/dep/kud/id545/>.

⁷ See Bufdir website: http://www.bufdir.no/en/English_start_page/.

⁸ See Ministry website: <https://www.regjeringen.no/en/dep/asd/id165/>.

⁹ Act of 2005-06-17-62, Working Environment Act (WEA) of 17 June 2005 No. 62, last amended by law of 21 June 2013 No 61, in force as of 1 January 2014, available at: <https://lovdata.no/dokument/NLE/lov/2005-06-17-62>.

¹⁰ Sexual Orientation Anti-Discrimination Act (SOA) of 21 June 2013 No. 59, in force as of 1 January 2014. Translation at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-058-eng.pdf>.

were the Gender Equality Act (GEA),¹¹ the Anti-Discrimination Act (ADA) covering ethnicity, religion and belief,¹² and the Anti-discrimination and Accessibility Act (AAA) covering disability.¹³ The four acts were almost identical and were in force until 31 December 2017. The WEA covered age, political views, membership of trade unions, part-time and temporary work, as well as specialised legislation (such as the Seamen's Act and housing acts).

In 2018 the GEA, AAA, ADA and SOA were replaced by the GEADA, in force as of 1 January 2018. The protected characteristics in the GEADA are: gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors. The new act thus also covers protection against age discrimination outside working life, whereas the protection against age discrimination within working life continues to be covered by the WEA.

The GEADA has no age limits and applies to all areas of society, both in the labour market as well as in all other areas of society.

In addition, the WEA specifically refers to the GEADA in its Chapter 13. All major Collective Agreements contain gender equality and non-discrimination clauses.

The relevant EU directives have been transposed in national legislation, but the actual text of the directives is not included in the text of the law as such. All the Directives in the area of gender equality are implemented and are assumed to be covered by the GEADA.

Pregnancy, maternity and leave related to work-life balance for workers (Directive 92/85/EEC, relevant provisions of the Directives 2006/54/EC and 2010/18/EU are covered by the provisions in the GEADA, WEA and the National Insurance Act (*Lov om folketrygd*) (NIA)).¹⁴

Article 157 TFEU and Recast Directive 2006/54/EC are mainly covered by the provisions in the GEADA and WEA.

Chapter 2 of Directive 2006/54/EC is covered by the GEADA and the provisions in the NIA and WEA. Directive 79/7/EEC is also covered by the GEADA, but mostly by the provisions in the NIA and WEA. Furthermore, Directive 2010/41/EU and some relevant provisions of the Recast Directive are also covered by provisions in the GEADA and WEA.

Goods and services (Directive 2004/113/EC) are covered by the provisions in the GEADA.

1.3 Sources of law

The main source when it comes to gender equality law in Norway is national legislation, such as the GEADA, WEA and NIA. EU law and international treaties, such as the

¹¹ Gender Equality Act (GEA) of 21 June 2013 No. 59, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>. This act replaces the previous Gender Equality Act (GEA) of 9 June 1978 No. 45 (*Likestilling*). Key concepts remain similar in the previous and current versions.

¹² Anti-Discrimination Act (ADA) of 21 June 2013 No. 60, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-060-eng.pdf>. This act replaces the Anti-Discrimination Act of 3 June 2005 No. 33 on Prohibition of discrimination based on ethnicity, religion etc. (*Diskrimineringsloven*). Key concepts remain similar in the previous and current versions.

¹³ Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013 No. 61, in force as of 1 January 2014, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20130621-061-eng.pdf>. This act replaces the previous Act of 20 June 2008 No. 42 relating to a prohibition against discrimination on the basis of disability (*tilgjengelighetsloven*). Key concepts remain similar in the previous and current version.

¹⁴ Act of 1997-02-28-19, available at: <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=folketrygdloven>.

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), also play an important role when it comes to interpreting the national legislation.

Case-law from national courts is sparse, but cases from the Equality Ombud¹⁵ and the Equality Tribunal is also an important source when it comes to gender equality law in Norway. There is now only one Equality Tribunal that treats cases regarding discrimination on all grounds covered by the GEADA and, since few cases are brought before the courts, opinions issued by the Equality Tribunal of course play an important role, not least because they are binding.

Authoritative scholarly interpretations are also considered a source of law in Norway, but these kinds of interpretations are not considered the most important sources in this field.

¹⁵ Before 1 January 2018 the Equality Ombud treated individual complaints in cases of discrimination and issued statements in these cases. The statements could then be brought before the Equality Tribunal. After the amendment of the Act relating to the Equality and Anti Discrimination Ombud and Anti Discrimination Tribunal Act of 2017-06-16-50 (*Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda* (EAOA), available at: <https://lovdata.no/dokument/NLE/lov/2017-06-16-50>), which entered into force on 1 January 2018, the Equality Ombud no longer treats individual discrimination complaints, these complaints are now only dealt with by the Equality Tribunal.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 98 of Norway's Constitution (*Noregs grunnlov*)¹⁶ prohibits discrimination. The article is general in its wording and is assumed to cover sex discrimination according to the preparatory documents to the amendments of the GEADA.¹⁷ Article 98 was new to the Constitution of 27 May 2014 and has the following wording:

'All persons are equal under the law. No person must be subject to unjust or unreasonable differential treatment.'¹⁸

Norway has ratified most of the major international instruments combating discrimination, with the exception of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Since June 2014, Article 98 of the Constitution reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.¹⁹

The Human Rights Act (*Menneskerettsloven*)²⁰ incorporates a number of treaties on human rights into the domestic legal system on a general basis in which the conventions prevail over any other conflicting statutory provision. The Equality Ombud is responsible for the supervision of the national implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives. The constitutional anti-discrimination provisions are directly applicable. The constitutional equality clauses can be enforced against both State actors and private actors.

2.1.2 Other constitutional protection of equality between men and women

The Norwegian Constitution does not contain other articles pertaining to equality between men and women besides Article 98.

2.2 Equal treatment legislation

Norway has one specific piece of equal treatment legislation that prohibits sex discrimination – the GEADA.

In addition to sex discrimination, Article 6 of the GEADA also explicitly covers the following discrimination grounds:

- pregnancy, leave in connection with childbirth or adoption;
- care responsibilities;

¹⁶ Act of 1814-05-17, available at: <https://lovdata.no/dokument/NLE/lov/1814-05-17>.

¹⁷ See Prop 81 L(2016-2017) p. 4.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/?ch=5>.

¹⁸ Constitution, available (in Norwegian) at: <https://lovdata.no/dokument/NL/lov/1814-05-17?q=Grunnloven>.

¹⁹ See <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>. The preparatory works to the constitutional clause: Human Rights Committee (2011) *Dokument 16 (2011-2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven* (Report on human rights in the Constitution from the Human Rights Committee to the Storting (Parliament), Chapter 6, see: <http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>.

²⁰ Act Relating to the Status of Human Rights in Norwegian Law of 21 May 1999 No. 30, available at: <https://lovdata.no/dokument/NL/lov/1999-05-21-30?q=menneskerettsloven>.

- ethnicity;
- religion, belief;
- disability;
- sexual orientation;
- gender identity and gender expression;
- age;
- or a combination of these factors.

In addition to the GEADA, the WEA Chapter 13 covers age, political views and union membership.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys/reports on the definition, implementation and limits of central concepts of gender equality law

Several reports have been published in the last five years that provide insights into legal definitions, implementation and limits in Norway when it comes to central concepts of gender equality law.

A recent report²¹ on attitudes in the Norwegian population regarding discrimination issues, hate speech and the instruments of equality policy was published in 2019. It was commissioned by the Directorate for Children, Youth and Family Affairs (Bufdir), and written by Guri Tyldum of Fafo, an independent social science research foundation.

The report shows that there is broad support among the population for gender equality in Norway. However, more people without higher education responded that they do not believe that men and women are treated equally in the labour market today compared with people from a higher education background.

Despite this, there is broad support for paternity leave across gender and age groups. 82 % agreed, in whole or partly, that it is an advantage for society if men take paternity leave. This is the only gender equality policy that received equal support from both men and women. The report shows that younger age groups are also less supportive of gender equality measures than older generations.

In recent years there has also been increased focus on sex/transgender and also harassment/sexual harassment.

Sex/transgender

In the report entitled *Law and intersex in Norway: Challenges and opportunities* from 2018,²² written by Fae Garland, Nina Lem Samuelsen and Mitchell Travis on behalf of the Division for Equality and Inclusion of Bufdir, the authors conclude that Norway's legal and political framework does not offer real, substantive protections for this group. The authors suggest that states should seek to implement intersex within anti-discrimination, hate crime and hate speech legislation.

A recent report from the Department for Social Research in Norway²³ also presents results from a survey of experiences of hate speech by LGBT people and the rest of the population. The results show that LGBT people, transgender people and other minority groups have been exposed to hate speech to a greater extent than the rest of the population.

²¹ Tyldum, G. (2019) *Fafo report 2019:26 Holdninger til diskriminering, likestilling og hatprat i Norge* (attitudes in the Norwegian population regarding discrimination issues, hate speech and the instruments of equality policy), available at: <https://www.fafo.no/images/pub/2019/20723.pdf>. The report was also published here: <https://www.equalitylaw.eu/downloads/4912-norway-attitudes-in-the-norwegian-population-towards-equality-and-anti-discrimination-issues-hate-speech-and-the-instruments-of-equality-policy-pdf-85-kb>.

²² Garland, F. Samuelsen, N.M. and Travis, M. (2018), *Law and intersex in Norway: Challenges and opportunities*, report commissioned by the Division for Equality and Inclusion, Norwegian Directorate for Children, Youth and Family Affairs (Bufdir), available at: <https://bufdir.no/globalassets/global/law-and-intersex---final.pdf>.

²³ See Fladmoe, Nadim and Birkvad; Report 2019:4 'Erfaringer med hatytringer og hets blant LHBT personer, andre minoritetsgrupper og den øvrige befolkningen' (Experiences with hatespeech amongst LHBT persons and other minority groups and the rest of the people in society) website of 'Samfunnsforskning' (Institute for social research): <https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmli/bitstream/handle/11250/2584665/Erfaringer%20med%20hatytringer.pdf?sequence=2&isAllowed=y>.

The Government's action plan on discrimination on the grounds of sexual orientation, gender identity and gender expression covers the period 2017-2020 and contains 43 specific measures to be implemented over the next three years. The title of the action plan is: 'Safety, openness and diversity: The Government plan of action against discrimination on the grounds of sexual orientation, gender identity and gender expression'.²⁴

Harassment and sexual harassment

A report from the Norwegian research foundation, FAFO, from 2018²⁵ addresses how workplace sexual harassment in the Scandinavian hotel industry is understood, dealt with and prevented. The data show that sexual harassment in the hotel industry in general is a challenging area for the working environment field. Cases of guests perpetrating harassment are viewed as easier to deal with than cases in which co-workers or managers are the perpetrators of harassment. Managers find that the cases are difficult to assess due to a lack of clear definitions of what constitutes sexual harassment and situations that fall into a 'grey zone'. The interview data from the three hotels show that sexual harassment cases are addressed at the lowest level of management and that upper-level management is called in when necessary.

In a report²⁶ on harassment and sexual harassment among conscripts/soldiers and staff in the Norwegian Armed Forces from February 2019, almost 30 percent of women who responded to a survey answered that they had been told offensive jokes and stories by their colleagues. After the results were published the Equality Ombud and the Armed Forces signed a cooperation agreement²⁷ in which the Equality Ombud committed itself to assisting the Armed Forces in the work of preventing sexual harassment. The Equality Ombud reports that several activities are planned as part of the agreement; course material and a methodology will be developed which may be included by the Armed Forces in its mandatory training of staff, conscripts and managers.

3.1.2 Other issues

There are no other issues to be reported on in this section.

3.1.3 General overview of national acts

Article 98 of Norway's Constitution prohibits sex discrimination. The legal framework on gender equality/sex discrimination is also defined by the GEADA. The GEADA has no age limits and applies to all areas of society, both in the labour market as well as in all other areas of society. In addition, the WEA specifically refers to the GEADA in its Chapter 13. Furthermore, all major collective agreements contain gender equality and non-discrimination clauses.

3.1.4 Political and societal debate and pending legislative proposals

In recent years there has been a debate about whether hate speech towards gender identity should be regarded a crime in Norway. Hate speech based on gender identity is

²⁴ See the action plan entitled (in Norwegian) *Trygghet, mangfold, åpenhet. Regjeringens handlingsplan mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk 2017-2020*, available at: https://www.regjeringen.no/contentassets/6e1a2af163274201978270d48bf4dfbe/lhbt_handlingsplan_web.pdf.

²⁵ Bråten, M. and Sletvold Øistad, B. (2018) *Seksuell trakassering i hotellbransjen I Skandinavia* (Sexual harassment in the hotel industry in Scandinavia), Fafo report 2018:29, available at: <https://www.fafo.no/index.php/zoo-publikasjoner/fafo-rapporter/item/seksuell-trakassering-i-hotellbransjen-i-skandinavia>.

²⁶ Armed Forces (2019) *Most, descriptive resultater* (Report on bullying and sexual harassment), available at: https://forsvaret.no/aktuelt/_ForsvaretDocuments/MOST-resultater%20-%20endelige%20tall.pdf.

²⁷ See the Equality Ombud website: <https://www.ldo.no/ombudet-og-samfunnet/siste-nytt2/ombudet-skal-bista-forsvaret-med-a-forebygge-seksuell-trakassering/>.

not protected in the Norwegian Penal Code²⁸ as of 31 December 2019, and the Government has not yet proposed this, but it is promised to be proposed during 2020.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The terms gender/sex are not explicitly defined in national legislation or in case law.

3.2.2 Protection of transgender, intersex and non-binary persons

Transgender, sex and gender identity are explicitly listed as discrimination grounds in Article 6 of the GEADA. Sex characteristics are not explicitly covered as a discrimination ground in the GEADA. However, according to the GEADA preparatory work,²⁹ sex characteristics /intersex are said to be covered by the law through the grounds of gender identity and gender expression or sex (depending on the specific case) in Article 6 and Article 2.

Non-binary people are not listed as being explicitly protected in the GEADA but are still covered by the act because discrimination on the grounds of gender identity or gender expression is covered directly in Article 6 of the GEADA.

Some cases relating to gender identity and gender expression have been dismissed or closed, many of them on the basis of the recently added justification of being 'clearly not in breach' of Article 1 of the Act.

For example, Equality Tribunal Case 18/452³⁰ concerned discrimination on the ground of gender identity. The complainant argued that birth certificates containing information on previous names and social security numbers were discriminatory. The same was true of the National Register in relation to the storing of social security numbers and name history. The leader of the Tribunal decided to close the case in accordance with Article 10 of the EAOA, as he found that this was obviously not in breach of the discrimination regulations. Another example of a case closed is Equality Tribunal Case 19/103.³¹

The question was whether the complainant and his partner were denied fertility treatment because he had previously gone through gender-affirmation treatment. It was his female partner who was to undergo fertility treatment. The Tribunal closed the case as it found it clearly not in violation of the GEADA because the health trustee's dismissal was justified on medical grounds, and the Tribunal found that this was obviously not contrary to the GEADA.

The complainant argued that the refusal of help from a local hospital was discrimination based on his gender identity. This was because the hospital had to some extent justified the refusal of treatment because the complainant had undergone gender affirmation treatment. The hospital argued that the expertise on gender affirmation treatment was at the National Hospital in Norway. The local hospital therefore referred the couple to the National Hospital. The couple lived in another part of the country it was a long journey to Oslo. The local hospital referred to Article 2-6 of the Biotechnology Act,³² which states that the decision on assisted fertilisation should be made by a physician, with the decision being based on psychosocial assessments of the couple.

²⁸ The Norwegian Penal Code of 2005—05-20-28, entered into force 1 October 2015.

²⁹ Preparatory works Prop. 81-L (2016-2017) for the Gender Equality and Anti-Discrimination Act (GEADA), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

³⁰ Statement from the Equality Tribunal of 29 January 2019.

³¹ Statement from the Equality Tribunal of 30 September 2019.

³² Act of 2003-12-05-100, entered into force 1 January 2004 <https://lovdata.no/dokument/NL/lov/2003-12-05-100?q=bioteknologiloven>.

The fact that the Equality Tribunal closed the case without considering whether discrimination took place is problematic as it seems the complainant's gender identity was the reason why the local hospital denied treatment. In the author's view the tribunal should have considered the case and reached a conclusion. The Equality Ombud has also criticised the Equality Tribunal's dismissal of this case.³³

The Equality Tribunal has nevertheless dealt with some cases relating to gender identity and gender expression.

In Case 67/2018³⁴ the Equality Tribunal discussed whether a bank violated the prohibition against discrimination and harassment because of gender identity and gender expression in its treatment of a female customer using the bank's telephone customer service. The customer had undergone gender confirmation surgery and the client manager perceived her to be a man because of her voice. The Equality Tribunal did not dismiss the case and concluded that the bank had not discriminated against or harassed the woman on the grounds of gender identity and gender expression.

Case 68/2018³⁵ concerns whether the complainant (B) was harassed on the ground of gender identity/ gender expression in the changing room at a fitness centre. Since the incident took place before the GEADA entered into force, the Equality Tribunal assessed the case according to the law in force at the time on prohibition of discrimination based on sexual orientation, gender identity and gender expression (Act of 21.06.2013). The complainant was born male but identified as female and had also changed their legal gender. Another woman (A) had approached the complainant in the changing room at the fitness centre and told her that she was provoked to see 'a person with a penis in a women's changing room'. When it came to assessing whether harassment had occurred, the Equality Tribunal was divided. The conclusion was that the complainant had not been harassed on the ground of gender identity/gender expression. The Equality Tribunal found by a majority that the phrase 'she is provoked by seeing a penis in the changing room' is a statement that may seem offensive. The majority of the Equality Tribunal nevertheless found that it was necessary to emphasise the situation in which the statement was given, in which the parties are in an intimate situation in a public changing room. As long as the question of use of changing rooms for transgender people is unresolved, transgender people will have to expect reactions when they use traditionally gendered changing rooms.

A minority of the Equality Tribunal found that the complainant had been harassed and found that it was necessary to assess A's general conduct. They also found that A was aware of the issue of transgender use of gender-segregated changing rooms. She was also aware that B had changed legal gender and that B had had a negative experience at their first meeting in the changing room. A therefore did not need to react again and ask questions about B's use of the women's changing room.

In Equality Tribunal Case 140/2018³⁶ a municipality had announced two available positions in two different departments. The complainant applied for both jobs, but wasn't called for an interview. He had previously been employed in both departments. In 2015, before he applied for the positions, the complainant went through gender-affirming treatment to transition from a woman to a man.

According to the complainant he was qualified for the positions and he argued that the reason he was not called for interview was that he had changed gender. The head of department had previously made comments on his gender change. The municipality

³³ In the Equality Ombud's report *Diskrimineringsretten 2019- en gjennomgang av året som har gått* 'Discrimination Law 2019- a summary', p. 56.

³⁴ Statement of 15 November 2018 from the Equality Tribunal.

³⁵ Statement of 17 September 2018 from the Equality Tribunal

³⁶ Statement of 2 December 2019 from the Equality Tribunal.

argued that the complainant lacked the right qualifications and that the comments about his gender change were only meant positively.

Because this alleged discrimination happened before the GEADA entered into force, the Tribunal assessed the case under the 'burden of proof' rules in the former Sexual Orientation Discrimination Act ³⁷. The Tribunal considered whether there were circumstances that gave 'reason to believe' that discrimination on the ground of gender identity had occurred.

The Tribunal pointed out that the municipality had previously wanted persons with higher education and excluded candidates who turned out not to have this level of qualification. However, the Tribunal concluded that there was no reason to believe that the municipality had discriminated against the complainant because of gender identity. The process had, according to the Tribunal, been sound and fair.

3.2.3 Specific requirements

There are no specific requirements listed in the GEADA that have to be fulfilled in order for a transgender person to be protected by the act. Protection against discrimination based on gender identity and / or gender expression applies irrespective of diagnosis and surgical treatment, or whether a person has changed legal gender. Moreover, it is not a requirement that the person identifies themselves as being transgender. However, the protection does not include a person's experience of not being male/female where it is not visible to others or is not known or otherwise manifested.³⁸ The grounds of gender identity and gender expressions differ from the other grounds of discrimination, because they are largely based on the individual's subjective experiences of themselves.³⁹

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Sex discrimination is explicitly prohibited in national legislation by Article 7 of the GEADA:

'Direct differential treatment means treatment of a person that is worse than the treatment that is, has been or would have been afforded to other persons in a corresponding situation, on the basis of factors specified in Section 6, first paragraph'.

The author of this report finds this definition to comply with the EU definition.

3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are both explicitly prohibited discrimination grounds in the legislation. Article 6 of the GEADA refers to pregnancy discrimination:

'Discrimination because of pregnancy and leave in connection with childbirth and care responsibilities is prohibited'.

Discrimination because of pregnancy and leave related to birth or adoption was regarded as gender discrimination according to the former GEA but is now listed as an explicit ground in Article 6 of the GEADA. The prohibition also covers discrimination because of someone's actual, presumed, previous or possible future pregnancy or leave. The

³⁷ Act of 21 June 2013. Replaced by the GEADA. Only available in closed link.

³⁸ See the former Discrimination Acts preparatory work in Prop. 88 L (2012-2013) s. 119. <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/?ch=1>.

³⁹ See the GEADAS preparatory work in Prop. 81 L (2016-2017). <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

prohibition also covers discrimination because of 'association with a person in the aforementioned conditions'.

The provision complies with Article 2(2)(c) of Directive 2006/54/EC. However, Norway has still not implemented the Pregnant Workers Directive 92/85/EEC correctly. Women are not guaranteed 14 weeks' maternity leave reserved for themselves. Instead, this leave is blurred within the 'big bag' of parental leave.

Case law on pregnancy and maternity discrimination concerns, for instance, the refusal by employers to hire pregnant workers and issues regarding changes in pregnant workers' working conditions and employment contracts (see more about this in Section 5.2) These cases relating to pregnancy and maternity discrimination are regarded as direct discrimination.⁴⁰

3.3.3 Specific difficulties

There are no other specific difficulties in Norway in applying the concept of direct sex discrimination, other than what has already been discussed.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Indirect sex discrimination based on gender is explicitly prohibited in Norwegian legislation, according to the GEADA, Article 6 and Article 8.

Indirect discrimination is also defined in the legislation. Article 8 of the GEADA (third sentence) defines indirect discrimination as taking place where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

The Norwegian text of the article is not identical to the text of the Directive, but the content of the exemption is the same as in the EU Directive. The Norwegian Supreme Court has in several cases stated that it will interpret the law in line with the EU directives as interpreted by the ECJ.⁴¹

3.4.2 Statistical evidence

In Norway, there is legislation regulating the collection of personal data. Statistical evidence is permitted by national law in order to establish indirect discrimination.

Statistical evidence is permitted in courts by national law in order to establish indirect discrimination. The key procedural principle in Norwegian civil courts is the free evaluation of evidence by the courts in the course of the case as presented in court, see the Dispute Act (DA),⁴² Chapter 21, for further details. Chapter 25 of the DA also allows for expert witnesses, i.e. 'an expert assessment of factual issues in the case', for which statistical evidence is particularly relevant.

National law permits the use of statistical evidence to establish indirect discrimination, however, it is not necessary to prove whether or not indirect discrimination has happened,

⁴⁰ See Statement of 18 December 2018 - from Equality Tribunal Case 126/2018.

⁴¹ See for instance Decision from the Norwegian Supreme court of 14 February 2012 in Rt 2012-219 *Helikopterpiloten*. This is a case with similarities to that of C-447/09 *Prigge* with regard to age discrimination.

⁴² Act of 2005-06-17-90: <https://lovdata.no/sok?q=tvisteloven> (Norwegian).

as the assessment that has to be made according to national legislation is whether or not an action or failure to act has had a negative result for the individual or group. The use of statistical evidence is, in fact, often a practical necessity, as the prohibition of indirect discrimination attempts to protect individuals against a systemic group identification that leads to unintended negative results for the individual or the group. In order to prove indirect discrimination at an individual level, the use of statistical data will often constitute a practical necessity in order to prove that discrimination has occurred. The law does not have a specific provision regarding statistical evidence – it is considered in the same way as all other forms of evidence.

There are no specific conditions for statistical evidence to be admissible in courts.

In Norway, statistical evidence in order to establish indirect discrimination is used in practice, but its use is not widespread, as there are few discrimination cases brought before the ordinary courts.

There is no current debate on ethical or methodology issues regarding statistical data as evidence in court. This is probably because there are so few court cases concerning discrimination and in the few cases where statistical data have been used, this has not caused problems or been debated. To the author's knowledge there has been no discussion about European strategic litigation issues.

The case law in this area is sparse. In the Ombud Case 13/1307⁴³ on age and pension rights for women the Ombud took statistics into account and concluded that the age limit of 67 years in general can disadvantage women financially compared to men, since women have fewer working years due to childcare. Based on the figures, the Ombud concluded that an age limit of 67 years in general put women in a worse situation than men, and therefore indirectly discriminates against women compared to men.

There are also examples where statistical data were used in a Supreme Court case on age and retirement,⁴⁴ as well as on gender and work-related pensions.⁴⁵ The significance attributed to this data by the Supreme Court in its judgment was minimal.

3.4.3 Application of the objective justification test

There is little case law from the Norwegian courts in general and especially on indirect discrimination regarding the former GEA and the GEADA. However, when used, the courts do apply the justification test correctly.

As of 1 January 2018, the justification for indirect discrimination is found in the GEADA (Article 9, first paragraph). The new wording of Article 9 on lawful differential treatment is similar to the previous texts, and is as follows:

'Differential treatment does not breach the prohibition in Article 6 if it: a) has an objective purpose, b) is necessary to achieve the purpose, and c) does not have a disproportionate negative impact on the person or persons subject to the differential treatment.'

Thus, differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated, is not regarded as discrimination.

In the WEA, the test is found in Article 13-3(2):

⁴³ Statement of 29 April 2014 from the Equality Ombud.

⁴⁴ Supreme Court judgment of 29 June 2011 in Rt-2011-964 *Gjensidige*.

⁴⁵ Supreme Court judgment of 27 November 2003 in Rt-2003-1657 *Braathens*.

'Discrimination that is necessary to the achievement of a just cause, and does not involve disproportionate intervention in relation to the person or persons so treated is not in contravention of the prohibition against indirect discrimination, discrimination on the basis of age or discrimination against an employee who works part-time or on a temporary basis.'

What constitutes a legitimate aim is based on an evaluation of the justification of the aim assessed in each specific case. The action chosen must be relevant, true, necessary and proportionate in relation to the aim in order for indirect discrimination to be justified.

Legitimate aims, as accepted by the courts, have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law.

The legal preparatory works to the former laws ADA, AAA and SOA state that the possibility for differential treatment in working life is in particular narrow and limited.⁴⁶ Nothing in the GEADA or preparatory works changes this, on the contrary they state that regarding the definitions of direct and indirect discrimination there are no changes in the way the law should be understood.⁴⁷

The test used to justify indirect discrimination is derived from the *Bilka* case,⁴⁸ and thus is compatible with the origins of the directives. The legal preparatory works to the acts all point directly to the understanding of the directives.

In its judgments the Labour Court has traditionally rarely used the GEA and protection against indirect sex discrimination. Yet the employees' union still argues its case both on the basis of protection against indirect sex discrimination (GEA) and according to traditional contract interpretation (i.e. what the parties have good reason to believe is the correct interpretation based on the evidence in the case).

One example is a case from the Labour Court⁴⁹ where the parties disagreed on whether part-time employees should be promoted at the same time as employees working full-time. The wording of the provisions did not give clear indications but was interpreted in the context of the development process of the collective agreements and other provisions. On this basis, the right to promotion was given at the same time for part-time employees as employees working full-time. One judge had a different view on the question of interpretation. According to the majority decision of the Court, it was not necessary to decide whether the unequal treatment of part-time and full-time employees was necessary, and not disproportionate, in order to achieve a legitimate aim. The Court ruled that it was also unnecessary to decide whether it was indirect discrimination in violation of Article 3, second paragraph, second sentence, of the Equality Act and the nature of the EEA Agreement.

However, in the majority of cases the Court has issued a decision based on the facts and a reasonable interpretation of the agreement, reaching the same result as the proper use of indirect sex discrimination legislation would have provided.

3.4.4 Specific difficulties

The relatively low number of cases on gender equality and indirect discrimination may be explained by a variety of reasons, but one explanation may be that not many lawyers are familiar with the discrimination legislation, especially when it comes to indirect discrimination. Discrimination law is not part of the compulsory curriculum in law schools.

⁴⁶ See Proposal to Parliament: Prop. 88 L (2012-2013), p. 87.

⁴⁷ See Proposal to Parliament 81 L (2016/2017), Chapter 12.9.1.

⁴⁸ See CJEU case number C-170/84.

⁴⁹ See case from the Norwegian Labour Court of 15 December 1997 in ARD-1997-253 (public link not available).

Protection from discrimination against part-time workers (the Part-Time Work Directive) seems to be effective. However, protection against indirect sex discrimination in relation to part-time work is still 'strong on paper but weak in practice'. This is a serious point, as gender equality legislation is the only legislation addressing the structural level that recreates and strengthens the gender-stereotypical patterns in society. In her report,⁵⁰ former national expert on gender equality for Norway, Helga Aune, considered the following to be possible solutions to this problem, which the author of this report agrees on: 1) establishing a connection between the WEA and the GEADA to ensure a gender perspective in employment law, which is segregated from gender equality concerns, and 2) strengthening the legislation on the activity and reporting duty regarding gender equality at the company level.

With regard to the second solution on strengthening the legislation on the 'activity and reporting duty', on 11 June 2019 the Norwegian Parliament approved amendments to the GEADA on 'activity and reporting duties', including for companies.⁵¹ The amendment enters into force 1 January 2020.

This means that the employer's duty to report on their efforts to promote equality will be significantly strengthened, see GEADA Articles 26, 26a, 26b and 26c. This duty was removed by the right-wing government some years ago, but has now been reintroduced by the same government, together with increased funding for the Equality Ombud to provide guidance and revisions of the reports by employers and public administration regarding their efforts (Article 5(4) of EAOA).

This revision also includes changes to the Act concerning Annual Accountancy (Accountancy Act Article 3-3c),⁵² stating that large enterprises must report on their efforts regarding anti-discrimination and human rights.

3.5 Multiple discrimination and intersectional discrimination⁵³

3.5.1 Definition and explicit prohibition

As of 1 January 2018, multiple discrimination is explicitly covered in the GEADA and refers to any combination of the protected grounds covered by Article 6 of the GEADA:

'Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors is prohibited.'

⁵⁰ Aune, H., (2017) *Country report. Gender equality 2017. How are EU laws transposed into national law? Norway*, available at: <https://www.equalitylaw.eu/downloads/4470-norway-country-report-gender-equality-2017-pdf-1-46-mb>.

⁵¹ Link to the legal decision from the parliament with the amendment: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. See also Flash report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

⁵² Act concerning Annual Accountancy of 17 July 1998 No. 56 (regnskapsloven), available at: <https://lovdata.no/dokument/NL/lov/1998-07-17-56>.

⁵³ For more information, see Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

3.5.2 Case law and judicial recognition

In Case 73/2018⁵⁴ the Equality Tribunal discussed harassment based on ethnicity and gender in the same case. The complainant was a woman originally from Palestine who worked as an advisor in a municipality in Norway. This case was originally dealt with by the Equality Ombud, but since the Equality Ombud did not finish the case before the new GEADA entered into force, the Equality Tribunal took over the case. The Equality Tribunal considered the case on the basis of Article 8 of the GEA on harassment based on gender, since the case occurred before the GEADA entered into force. The Equality Tribunal concluded that the municipality had not fulfilled its duty to prevent harassment against the woman. The Equality Tribunal argued that the employer did not provide its employees with proper training when it came to important health, environment and safety (HES) programmes in the workplace. However, the Equality Tribunal concluded that the employer had tried to prevent harassment against the woman in an adequate way. The Equality Tribunal stated that the employer had investigated the case and started measures to deal with it.

There have also been several cases in Norway regarding banning headscarves. Traditionally these cases have been considered direct discrimination on the ground of religion and indirect discrimination on the ground of sex/gender in Norway.⁵⁵

However, in recent years there seems to have been a certain change in how the Equality Tribunal approaches headscarf-related cases. At the same time there have been debates on whether it is necessary to include the gender aspect in these cases as the hijab is regarded by some as discriminating in itself.⁵⁶

Based on its most recent decisions on headscarves it seems that the Equality Tribunal regards such cases only as discrimination based on religion, and not indirect discrimination on the ground of sex (gender).

In Case 2/2017⁵⁷ the Equality Tribunal reviewed whether a hospital's neutral rules on uniforms amounted to discrimination based on religion after a female worker was not allowed to wear a headscarf at work. The Tribunal concluded that neutral rules on uniform make those who wear religious headgear worse off than others because of their religion. This is a form of indirect discrimination, unless reasons indicate otherwise. The Tribunal viewed this as indirect discrimination and concluded that indirect discrimination on the ground of religion had occurred. Indirect discrimination based on gender was not mentioned in the case even though the headscarf (hijab) was the only headgear mentioned in the uniform rules at the hospital.

The Tribunal's change of approach in Case 2/2017, from viewing headscarf-related cases as direct discrimination to seeing them as indirect discrimination, may be explained by the ruling in the CJEU judgments C-157/15 Achbita and C-188/15 Bougnaoui. In its decision the Tribunal refers to the two CJEU judgments. The Tribunal states that 'there is no contradiction between the decisions of the EU court and the majority's assessment and conclusion in the present case'.

In addition, in Case 30/2018⁵⁸ the Equality Tribunal concluded that it was differential treatment based on religion to deny an employee the right to wear a headscarf with their uniform at work. In this case the employee was not allowed to wear her headscarf with

⁵⁴ Statement of 19 December 2018 from the Equality Tribunal.

⁵⁵ Statement of 20 August 2010 from the Equality Tribunal, Case 8/2010 Headgear/hijab in the Norwegian Police (searched in 'old cases').

⁵⁶ See Gullikstad, B. (2007), available at: <https://forskning.no/innvandring-kjonn-og-samfunn-likestilling/likestilling-med-hijab/996868>.

⁵⁷ Statement of 23 March 2017 from the Equality and Anti-Discrimination Tribunals case 2/2017.

⁵⁸ Statement of 24 May 2018 from the Equality Tribunal in Case 30/2018.

her uniform. The Tribunal did not consider whether it was indirect discrimination based on gender but found that it was indirect discrimination based on religion. Despite the earlier cases from the Ombud and the Tribunal, the Tribunal did not consider this to be indirect discrimination based on gender.

Most cases in 2019 that raised questions of possible multiple discrimination were closed by the Equality Tribunal due to lack of evidence.

Equality Tribunal Case 19/58⁵⁹ concerned allegations of discrimination on grounds of sex and ethnicity. The complainant stated that she had been expelled from a hotel on suspicion of selling sexual services. The Equality Tribunal closed the case for lack of evidence. According to the Equality Tribunal, no circumstances were provided to indicate that discrimination under Article 6 of the GEADA had taken place. A simple claim of discrimination is not sufficient. Furthermore, the Equality Tribunal pointed out that the defendant had a different view of the facts of the case, so it was also unclear what actually took place. According to the Equality Tribunal's website,⁶⁰ in 2019 there were six more similar cases to this one on sex and ethnicity with allegations of discrimination on grounds of sex and ethnicity. All cases were closed by the Equality Tribunal as the complainants didn't provide enough proof of discrimination.

In 2019 there were also several cases where the complainant argued discrimination because of sex *and* age. Case 18/213⁶¹ concerned discrimination on the grounds of age and / or gender. The complainant argued that she didn't obtain a position as a priest because of her gender and age. The Equality Tribunal's chair decided to close the case as it found that it clearly did not violate the discrimination regulations. In Case 18/211⁶² the complainant argued that she wasn't offered an interview for a job because of her gender/age, but the Tribunal also closed this case for the same reason.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Positive action is allowed in Norwegian national law. Article 11 of the GEADA states that positive action measures in favour of one gender is not in violation of Article 6 if a) the differential treatment is suitable to enhance the aim of the GEADA (to improve equality), b) it is a fair balance between the aim pursued viewed in proportion to how negatively the measures affect the individual or the group affected by the measure, and c) the differential treatment comes to an end when the objective is achieved. Article 11 introduces the possibility for the Ministry (now Ministry of Culture), by means of delegation from the King (i.e. the Government), to issue regulations providing further details of possible positive actions.

The former regulation 1998-07-17-622 (*Forskrift om særbehandling av menn – Regulation on positive action in favour of men*), which explicitly allowed differential treatment in favour of men concerning recruitment for positions within education, was repealed in 2017. However, positive action measures to employ men in certain positions still have to be suitable for eliminating the disadvantages and barriers to applying for positions that are strongly dominated by women. An employer's wish to improve the gender balance in a workplace will not be enough to justify differential treatment of women and men.

The Norwegian definition also complies with the EU definition.

⁵⁹ Statement of 24 October 2019 from the Equality Tribunal.

⁶⁰ See the Equality Tribunal's website: <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/sokklagesaker>.

⁶¹ Statement of 12 April 2019 from the Equality Tribunal.

⁶² Statement of 12 April 2019 from the Equality Tribunal.

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

'Equal opportunities' is not regarded as a separate concept to positive action in national law. Article 11 of the GEADA states that positive action in favour of one gender is not in violation of Article 6. In Article 1 of the GEADA it is stated that the purpose of the law is to promote equality and that equality means equal status, equal opportunities and equal rights.

3.6.3 Specific difficulties

There are no specific difficulties in the legislation regarding positive action at the moment. However, as boys on average achieve lower grades than girls at school, female students are increasingly enrolling in previously male-dominated higher education courses at the universities and thus the request is more and more frequently made for 'gender points' to be used in order to assist the under-represented gender's access to these courses.⁶³ Practically speaking, this means that the under-represented gender is awarded a specific number of points if its members apply to study courses where it is under-represented. For example, a male applicant is awarded two gender points if he applies to nursing school.⁶⁴ This might lead to possible conflicts with the GEADA.⁶⁵

The Equality Ombud released a report in May 2015 on the use of positive action and explaining the legal boundaries of positive action measures.⁶⁶

Norway has also seen one EFTA court case brought against it regarding the use of positive action. The Court stated that by retaining a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive [76/207/EEC](#) of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement. This is problematic since it sets certain limits for Norway in its implementation of positive action measures.

3.6.4 Measures to improve the gender balance on company boards

The legislative technique of quotas, in the sense of demanding the representation of members of both sexes, has been successfully in use since 1981 when the rule was introduced in the GEA of 9 June 1978, regarding public boards and committees. Examples are public-appointed boards of any kind, such as the Board of the National Museum, official delegations representing Norway at the UN, for example, and committees preparing legal reforms.

It is this rule in the GEA which has been the model for the introduction of the requirement for balanced gender representation on company boards in company legislation.

Rules applying to public limited liability companies were put into force by Norway on 1 January 2006 in Articles 6-11a of the Public Limited Liability Companies Act. Similar rules are implemented in all the other company acts where there is partial public ownership.⁶⁷

⁶³ See the university newspaper of Oslo University: <http://universitas.no/nyheter/60404/krever-kjonnspoeng-pa-uo0>.

⁶⁴ <https://www.samordnaopptak.no/info/opptak/poengberegning/legge-til-poeng/kjonnspoeng/>.

⁶⁵ See Aune, H. (2018) *Country report. Gender equality. How are EU laws transposed into national law? Norway 2018*.

⁶⁶ For more information, see the Equality Ombud's report, *Positive action*, May 2015. The report is not available online.

⁶⁷ Teigen, M. (2015), 'Virkningen av kjønnskvoltering i norsk næringsliv' (The effects of the quota rule/affirmative action in the Norwegian employment market), *Gyldendal Akademisk*.

Private companies have no quota requirements as there are many small companies which are owned by between just one and three people and the boards are made up of only three people.

Company legislation in Norway provides general provisions for the enforcement of the rules regarding the composition of the board. The rules on gender representation in these general provisions regarding companies are on an equal footing with other requirements, such as for book-keeping, accounting etc. Thus, no special rules have been adopted for the enforcement of gender representation and this requirement is enforced through the normal monitoring routines followed by the Register of Business Enterprises. Under these rules, the Register of Business Enterprises will refuse to register a company board, if its composition does not meet the statutory requirements, just as it refuses registration if the chief executive officer or auditor does not fulfil the legal conditions. A company which does not have a board that fulfils the statutory requirements may be dissolved by order of the Court of Probate and Bankruptcy.

Article 28 of the GEADA (previously Article 21 of the GEA of 9 June 1978 No. 45, and Article 13 of the former GEA) also lays down the rules regarding the representation of both men and women on all public boards and committees. If a public board or committee has two or three members, members of both sexes must be represented. If a board has four or five members, each gender must be represented by a minimum of two people. If a board has between six and eight members, each gender must be represented by a minimum of three people. If a board has nine members, each gender must be represented by a minimum of four members. If a board has more than nine members, each gender must be represented by a minimum of 40 % of all board members.

The rules accordingly apply to the appointment or election of substitutes. The rule is binding, and exceptions to the rules may only be made as far as special circumstances make it obviously unreasonable to fulfil the requirements. However, there is no supervision to ensure that the provision is complied with. Nevertheless, committees which want to be exempted from the requirement for gender balance must apply to the Ministry of Culture for exemption from the rule on quotas.

3.6.5 Positive action measures to improve the gender balance in other areas

The rule on quotas has also inspired most of the political parties to introduce a similar rule in their work and has provided a near equal representation of men and women in national politics. However, this is not made binding by legislation.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is explicitly prohibited in Norwegian national legislation. In Article 13 of the GEADA, the prohibition of harassment is defined:

'Harassment on the basis of factors specified in Section 6, first paragraph, and sexual harassment, are prohibited.

Harassment means acts, omissions or statements that have the purpose or effect of being offensive, frightening, hostile, degrading or humiliating.

The prohibition in Article 13 covers harassment on the basis of actual, assumed, former or future factors specified in Section 6, first paragraph.'

According to Article 13(6) of the GEADA, employers and managers of organisations and educational institutions shall preclude and seek to prevent harassment and sexual

harassment in their area of responsibility. Until 2019, the understanding of the preparatory works was that there was strict liability for employers in cases where the harassment was perpetrated by the employer or someone acting on behalf of the employer, which is the same rule as for other types of discrimination.⁶⁸ However, the following sentence was added to GEADA Article 38(2) in 2019, and will be in effect from 1 January 2020: 'In cases concerning harassment and sexual harassment, and in sectors of society other than those specified in the first sentence, liability shall exist if the person responsible can be blamed'. It is uncertain what degree of liability the employer now has when they themselves or their representatives harass someone.⁶⁹

According to Article 13(6) of the GEADA, there is a duty of due diligence for the employer⁷⁰ regarding harassment perpetrated by other persons in the workplace, which is twofold 1) a duty to prevent harassment in general, and 2) a duty to prevent the continuation of harassment when made aware of the existence of such.⁷¹ The liability for the employer thus does not include incidents when the harassment occurs between colleagues if no blame is attached to the employer.⁷² For more on this, see Section 11.6 on remedies and sanctions.

Article 4-3(3) and Article 13-1(2) of the WEA also prohibit harassment.

All in all, the definition of harassment complies with the EU definition found in Article 2(1) (c) of Directive 2006/54/EC.

3.7.2 Scope of the prohibition of harassment

The GEADA applies to all areas of society and is not limited to employment and access to goods and services. The WEA applies to the area of work.

3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is explicitly prohibited in Norwegian legislation, and is defined in Article 13, third paragraph of the GEADA:

'Sexual harassment means any form of unwanted sexual attention that has the purpose or effect of being offensive, frightening, hostile, degrading, humiliating or troublesome.'

The sexual attention can be verbal, non-verbal or physical, and how the victim themselves has experienced the situation is important. This includes everything from looks, touching and sexual comments to rape and attempted rape.⁷³ Sexual harassment can also occur if someone is sent pictures or videos with sexual content via, for example, letters, telephone or the internet. The former GEA Article 8 has similar wording.

⁶⁸ Proposition to parliament, Prop. 81 L (2016-2017) Chapter 28.5.2.4.

⁶⁹ In the preparatory works to the recent changes in the GEADA giving the Equality Tribunal the authority to make decisions in cases concerning sexual harassment, it is stated that strict liability cannot follow from judicial interpretation, even when the employer perpetrates the harassment. Norway, Prop. 63 L (2018-2019) p. 16. However, according to the main preparatory works for the GEADA, there is strict liability for the employer if someone acting on behalf of the employer has perpetrated the harassment. Norway, Proposition to parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.4.

⁷⁰ The employer's responsibilities to prevent harassment includes persons who are in a relationship to them similar to employees, such as persons temporarily hired directly or through an agency to perform tasks for the employer. Norway, Proposition to parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.

⁷¹ Proposition to Parliament, Prop 63 L (2018-2019) p. 16.

⁷² Proposition to the Odelsting, Ot.prp. No. 35 (2004-2005) p. 50 and Norway, Proposition to parliament, Prop. 81 L (2016-2017) side 337.

⁷³ See the Preparatory works for the GEADA, Prop 81 L(2016-2017), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/>.

⁷³ See the Preparatory works Prop 81 L (2016-2017) p. 18.2.2, available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/?ch=19#kap18-2-2>.

The definition of sexual harassment in Norwegian law has several similarities with the definition of 'sexual harassment' in Article 2(1)(d) of Directive 2006/54/EC. However, contrary to the definition in the Directive, the definition in Article 13 of the GEADA does not require that a person's 'dignity has to be violated' for it to be sexual harassment. There may be cases of unwanted sexual attention even if the offender's dignity is not violated. For example, in cases where the sexual attention is just annoying, but does not violate dignity. In other words, in Norway 'just' bothering behaviour can also be regarded as sexual harassment as long as it is linked to sexual attention of some sort, either verbal, non-verbal or physical. If there is an unequal relationship between the parties, for example if the person being harassed is in a subordinate position to the person responsible for the sexual attention, the behaviour will probably be considered more troublesome.

In Article 13 of the GEADA it is also a criterion that the sexual attention is unwanted from the victim's perspective. Basically, the harasser must, by a word or action, be made aware that their action is unwanted (though this seems not an absolute requirement). Individual cases of sexual attention may be of such a serious nature that it is not a requirement that the person responsible for the attention is made specifically aware that it is not wanted. The requirement that the harasser must be made aware that the harassment is unwanted does not apply in situations where the woman did not speak and say stop, because it must have been obvious to the perpetrator that such behaviour was unwanted. Using body language must also be regarded as saying stop.⁷⁴

However, contrary to the GEADA, the argument under EU law, EU Directive 2006/54/EC Article 2(1)d, is that there is no requirement for the person subject to the harassment to say stop or make the harasser aware of the fact that the conduct is perceived as harassment. The GEADA, and the way the court interprets it, may not be in accordance with EU law on this matter.

In a recent case from Hålogaland Court of Appeal from December 2019⁷⁵ an employer was held responsible for its failure to prevent and seek to prevent sexual harassment pursuant to the former GEA and GEADA, and sentenced to pay damages to a former employee. The case is also important as it shows how the Court argued when it comes to what is actually considered sexual harassment.

A female mechanic filed a lawsuit complaining of sexual harassment in the workplace, demanding damages and compensation from two customers of the workshop, as well as from her former employer due to his inadequate follow-up of the instances of sexual harassment, which led to her giving notice and leaving the job. The workshop was situated on an island in a small community. The customers were important to the business.

The Court viewed the cases against the customers and the employer separately. The Court stated that one of the customers had not sexually harassed the woman according to the Equality Acts (GEA Article 8 and GEADA Article 13), and was therefore acquitted. At one point he had come up behind her and placed both hands on her back, under her sweater, on her bare skin. The woman stopped what she was doing, got up and left. She did not say anything. Another episode happened when the woman was leaving the lunch room. The customer stood in the doorway and reached out a hand and pretended to grab her by the crotch. The woman clearly stated that this was undesirable behaviour. These episodes were not regarded serious enough to be considered sexual harassment, and the woman had not said stop/no to the episode where the customer came up behind her and touched her bare skin.

The Court argued that the second customer had sexually harassed the woman, and was sentenced to pay damages for lost income as well as compensation, in accordance with

⁷⁵ Judgment of 12 December 2019 from Hålogaland Court of Appeal in case LH-2019-87696 – LH-2019-135298 – LH-2019-135300 (only closed link available).

Article 28 of the GEA and Article 38 of the GEADA. The customer had followed the female employee several times and stayed close to her and tried to touch her while she was working. He had also, on one occasion, put his fingers under her sweater and touched her waist.

The Court of Appeal also stated that the employer had acted negligently by not taking further steps to prevent the sexual harassment of his employee, and he was held responsible for his former employee's financial loss, together with the customer who was not acquitted. The employer was acquitted from paying compensation because the Court did not find his lack of actions in relation to the former employee met the terms of 'grossly negligent behaviour' or 'intended behaviour' in the Act on Compensation Article 3-5.

The judgment is appealed on the basis that one of the customers was acquitted. The appellant argue that the Court of Appeal was too strict when it came to interpreting what is considered sexual harassment in Norwegian law. The judgment is also appealed on the amount of compensation the woman was awarded for sexual harassment from the other customer whom the Court found had sexually harassed her.⁷⁶

3.7.4 Scope of the prohibition of sexual harassment

The GEADA Article 13 applies to all areas of society.

3.7.5 Understanding of (sexual) harassment as discrimination

Norwegian law covers Article 2(2)(a) of Directive 2006/54/EC in Article 13 of the GEADA and Article 13-1(7) of the WEA, as well as Articles 298 and 305 of the Penal Code.⁷⁷ In national law harassment is also understood as discrimination.

Specific difficulties

As mentioned in Section 3.7.1 a specific difficulty is that it is uncertain what degree of liability employers now have when they themselves or their representatives harass someone.

Another specific difficulty is that there are very few cases of sexual harassment brought before Norwegian courts. Sexual harassment cases are time-consuming and expensive. Therefore, few victims of sexual harassment bring their cases to court. In the cases that reach the court system the courts tend to be too strict in their interpretation of what is regarded as sexual harassment.⁷⁸

Statistics from the Equality Tribunal⁷⁹ also show that there were very few cases brought before the Tribunal in 2019 concerning harassment on grounds of sex/gender. When it comes to sexual harassment the Equality Tribunal has so far only had a mandate to address employers' 'duties to seek to prevent sexual harassment' in accordance with Article 13(6) of the GEADA.

⁷⁶ The case will be argued in the Norwegian Supreme Court (Høyesterett) on 8-9 December 2020. The Court of Appeal ruled the conduct not to be sexual harassment because to come up behind her and place both hands on her back, under her sweater on bare skin was not of a sexual nature and she did not say stop, but walked out. The Supreme Court will also review the amount of compensation from the other customer where the Court of Appeal found he had sexually harassed the woman.

⁷⁷ The Penal Code, Act of 2005-05-20-28, available at: <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>.

⁷⁸ See case from Hålogaland Court of Appeal in LH-2019-87696 – LH-2019-135298 – LH-2019-135300 (no public link available), mentioned under Section 3.7.3.

⁷⁹ See the Equality Tribunal website: <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/sokstatistikk>.

On 11 June 2019 the Parliament also approved amendments to the EAOA.⁸⁰ This gives the Equality Tribunal authority to enforce Article 13 of the GEADA regarding the prohibition of sexual harassment. The Equality Tribunal has also acquired the authority to award damages for economic loss in cases regarding breaches of the GEADA and WEA and the other acts mentioned in Article 1 of the EAOA, where the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections. There is no limit on the Equality Tribunal's power to award redress/compensation. In the preparatory works a limit of NOK 10 000 (approximately EUR 100) in damages is mentioned, but this is not absolute.⁸¹ However, it has to be in the context of an employment relationship and in connection with an employer's selection and treatment of self-employed persons and hired workers according to Article 12 of the EAOA. At the same time the Equality Ombud's mandate to give guidance and legal help in cases of sexual harassment has been strengthened. The amendment enters into force on 1 January 2020.⁸²

It will be interesting to see how many cases of sexual harassment actually reach the Equality Tribunal. Some organisations, such as the Confederation of Norwegian Enterprises (NHO), have stated that the Equality Tribunal should not have a mandate to deal with cases of sexual harassment, because such cases are serious. The NHO has further argued that these cases belong before the Norwegian Courts.⁸³

In cases of sexual harassment and where claims for compensation have been made, the parties are entitled to oral negotiations. The Tribunal's decisions are directly enforceable in cases where redress/compensation has been awarded. Victims of sexual harassment can also still bring their cases to the courts.

Another question is whether, after 1 January 2020, the Equality Tribunal will have a mandate to deal with cases of sexual harassment where the harassment happened and ended before 1 January 2020. This is not yet clear. The Equality Tribunal's secretary stated that the Equality Tribunal will consider this question if the issue arises in a specific case.⁸⁴

There are good arguments for why the Tribunal should have competence to deal with these cases. Neither the prohibition of sexual harassment, nor the sanctions in the EAOA are new. The only change in the EAOA is that the Equality Tribunal, in addition to the ordinary courts, shall enforce the ban on sexual harassment.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Instruction to discriminate is explicitly prohibited in national legislation. Article 15 of the GEADA and Article 13-1(2) of the WEA prohibit this and the GEADA now has the following wording:

⁸⁰ Link to the legal decision from the Parliament with the amendments: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. Also available on <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb> (English).

⁸¹ See the Preparatory works Prop 80 L (2016-2017) p. 106, available at: <https://www.regjeringen.no/contentassets/7004bcfcff27491da0ff4cafe6c8eec5/no/pdfs/prp20162017008000dddpdfs.pdf>.

⁸² See the Preparatory works Prop 63 L (2018-2019) pkt 2.7.4.4, available at: <https://www.regjeringen.no/no/dokumenter/prop.-63-l-20182019/id2639399/?ch=2#KAP2-7-4>.

⁸³ <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. See letter from NHO to the Ministry of 5 October 2018; https://www.regjeringen.no/contentassets/8cf018844bd04271a8dbc68dfa16b958/naringslivets-hovedorganisasjon.pdf?uid=N%C3%A6ringslivets_Hovedorganisasjon.

⁸⁴ Equality Ombud (2019) *Diskrimineringsretten 2019- en gjennomgang av året som er gått* (A summary of discrimination law 2019), p. 8, available at: https://www.ido.no/globalassets/Ido_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

'It is prohibited to instruct any person to discriminate in breach of Section 6, harass in breach of Section 13 or retaliate in breach of Section 14.'

Article 13-1(2) of the WEA also has the following wording:

'Harassment and an instruction to discriminate against persons on the basis of the various protected grounds listed in the act are defined as discrimination.'

3.8.2 Specific difficulties

The author is not familiar with any specific difficulties in relation to the concept of an instruction to discriminate and very few cases on this topic have come before the Equality Tribunal.

3.9 Other forms of discrimination

Discrimination by association or assumed discrimination is prohibited. This is explicitly stated in Article 6(2) and (3) of the GEADA:

'The prohibition on discrimination also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on factors specified in the first paragraph.'

For harassment this is regulated in Article 13(4) and this act also applies to employment, see Article 13-1(4) of the WEA.

3.10 Evaluation of implementation

Since the Government has established a low threshold complaint system for individual complaints on sexual harassment that will enter into force 1 January 2020, the national law that implements the EU law concepts discussed in this chapter is in general satisfactory. The amendment also makes it possible for victims of sexual harassment to obtain necessary guidance and legal assistance from the Equality Ombud in cases of sexual harassment.

However, contrary to the GEADA, the argument under EU law, EU Directive 2006/54/EC Article 2(1)d, is that there is no requirement that the person subject to the harassment says stop or makes the harasser aware that the conduct is perceived as harassment. According to the Preparatory works, this is not an absolute requirement in Norwegian law either, but given the courts' interpretations it may be questioned whether Norwegian law is in compliance with the EU law on this matter.

It is also a concern that few cases of discrimination, especially sexual harassment and harassment, reach the Norwegian courts. In the cases that do reach the courts, the courts seem to be too strict in their interpretation of what is regarded as sexual harassment.⁸⁵ There is also a question about how many cases of sexual harassment will actually be treated by the Equality Tribunal, rather than being dismissed due to lack of evidence, when the Equality Tribunal receives the mandate to deal with these cases from 1 January 2020. It remains to be seen what will happen.

Furthermore, a large number of complaints relating to gender identity/gender expression are dismissed by the Equality Tribunal, even cases that clearly raise questions of discrimination, see Section 3.2.2.

⁸⁵ See case from Hålogaland Court of Appeal in LH-2019-87696 – LH-2019-135298 – LH-2019-135300 (no public link available) mentioned under Section 3.7.3.

3.11 Remaining issues

The most important issues have already been discussed in the previous sections.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

Several surveys have been published over the last five years that provide insights into specific factors that explain the gender pay gap.

Figures from Statistics Norway published in 2019 show that the pay gap between men and women most definitely still exists in Norway.⁸⁶ The numbers provided in the survey reveal that in 2019, women's average monthly salaries were only equivalent to 88 % of men's salaries in jobs for the state, 94 % in jobs in municipalities, 89.5 % in the private sector and 88.9 % in all sectors.

Figures from 2019 show that the pay gap between men and women is highest when it comes to people with upper secondary education and in finance, where men earn 20 % more than women.

A report from Statistics Norway from March 2020 with numbers from 2019⁸⁷ states that there is no indication that part-time work creates wage differences between women and men, but the survey shows that there are higher wages among full-time employees than among part-time employees. This is primarily due to the fact that in some female-dominated professions more part-time employees are found than full-time employees. Comparing salaries for full-time and part-time employees in the same occupational group, there are only small differences.

The survey shows that wage differences can primarily be explained by the fact that more women than men undertake education and choose jobs in low-paid professions. In addition, we see that there are quite large differences in wages for women and men with almost equal education and occupation, especially in the private sector where most men work. The survey states that it is not possible to explain the entire wage difference based on education, occupation, age or working hours. This means that there are also other factors that we do not have information about in the wage statistics, such as gender stereotypes and structural gender inequality, which may also be significant for wage differences.

However, the survey also states that the pay gap between men and women has to some extent stabilised in the last couple of years.⁸⁸

4.1.2 Surveys on the difficulties of realising equal treatment at work

Several surveys from Statistics Norway⁸⁹ show that there are almost as many women as men in the labour market in Norway. However, the Norwegian labour market is clearly gender-divided when it comes to which sectors men and women choose to work in and which occupations they have. There is a predominance of women in the health and social services and education sectors, while there are most men in industry and construction. There are also gender differences when it comes to working hours. Women work more part-time than men. The survey shows that the proportion of employed women who work part-time is twice as large as the proportion of men who work part-time.

⁸⁶ See Statistisk sentralbyrå (Statistics Norway) website: <https://www.ssb.no/>.

⁸⁷ See Statistisk sentralbyrå (Statistics Norway) website: <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/saktere-nedgang-i-lonnsforskjellene-mellom-kvinner-og-menn>.

⁸⁸ See Statistisk sentralbyrå (Statistics Norway) website: <https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/lonnsforskjellene-mellom-kvinner-og-menn-fortsetter>.

⁸⁹ See Statistisk sentralbyrå (Statistics Norway) website: <https://www.ssb.no/befolkning/faktaside/likestilling>.

In addition, only one in three managers are women and less than one quarter of top executives in Norway are women. The proportion of female managers is, however, greater than the proportion of male managers in public administration. However, there are fewer management positions in public administration than in the private sector, where the proportion of male managers is clearly the highest.

4.1.3 Other issues

There are no other important issues or cases to be reported.

4.1.4 Political and societal debate and pending legislative proposals

There have been several political debates on equal pay in Norway in recent years. On 24 October 2018⁹⁰ representatives of the Socialist Party in the Norwegian Parliament suggested that the Government investigate how a wage standard and certification scheme, based on the 'Icelandic model', can be introduced in Norway. In 2018 Iceland introduced a statutory certification process for companies and institutions with over 25 employees which, through this process, must prove that they pay men and women the same for the same job. The representatives from the Socialist Party wanted to implement this in Norwegian legislation.

The representatives suggested that the Parliament ask the Government to initiate a collaboration with the social partners, which would be commissioned by 1 October 2019 to provide solutions for equal pay, including a possible equal pay pot in the public sector, measures for increased full-time working and measures to counteract the gender-segregated labour market.

The Parliament discussed the proposal on 5 March 2019. All parties supported the intention of the representative's proposal to equalise gender-based wage differences in Norwegian working life and the importance of equal pay for equal work. However, the Conservative Government parties did not support the proposal, and it did not receive a majority in Parliament.⁹¹

As mentioned in Section 3.4.4 of this report, in 2019 the Parliament also approved the amendments to the GEADA on 11 June 2019,⁹² to strengthen the 'activity and reporting duty' in the GEADA. The purpose of the amendment is to strengthen the obligations for work on gender equality, including equal pay.

4.2 Equal pay

4.2.1 Implementation in national law

The principle of equal pay for equal work or work of equal value is implemented by Article 34 of the GEADA and in Article 13-2, 1, paragraph c of the WEA.

⁹⁰ Proposal 30 S (2018-2019) to the Committee on Family and Culture in the Norwegian Parliament, see the Parliament website: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Representantforslag/2018-2019/dok8-201819-030s/?all=true>.

⁹¹ See the decision from the Committee for Family and Culture in the Norwegian Parliament: available at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2018-2019/inns-201819-192s/?m=3>.

⁹² Link to the legal decision from the Parliament with the amendment: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. See also Flash report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

4.2.2 Definition in national law

The concept of pay itself is defined in Article 34, paragraph 4 of the GEADA:

The term pay means 'ordinary remuneration for work plus all other supplements, advantages and other benefits provided by the employer'.

The WEA does not define pay, but the concept is further defined by the case law.

In the author's opinion the definition of pay complies with Article 157(2) TFEU.

There has not been any leading national case law on the definition of pay in 2019 to the author's knowledge. However, there are some relevant older cases from the Equality Ombud. In Case 07/406⁹³ a woman who was employed by the school leisure scheme in a municipality complained that she received less salary than male supervisors at another department in the municipality. The Equality Ombud concluded that the complainant performed work of equal value to the supervisors and that the lower remuneration was in violation of Article 5 of the GEA, cf. Article 3. The Equality Ombud stated that:

'Equal pay means that the salary shall be determined in the same way for women and men irrespective of gender. This does not mean that everyone who performs work of equal value shall have the same amount of money. The statutory requirements are that wages are determined according to gender-neutral principles and norms. The Gender Equality Act (GEA) does not preclude differences in pay due to differences in seniority, job creation, education, experience or the like, as long as women and men are assessed in the same way according to these criteria'.

This statement from the Equality Ombud is also relevant when it comes to Article 34 of the GEADA. The case was appealed to the Equality Tribunal in Case 42/2009 *Fredrikstad kommune*⁹⁴ where the Tribunal, by a majority, reached the same conclusion as the Equality Ombud.

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Article 6 of the GEADA, in connection with Article 13-2 of the WEA, implements Article 4 of Recast Directive 2006/54/EC. Article 6 of the GEADA states that discrimination based on gender, amongst other grounds, is prohibited. Any action or lack of action which has as its purpose or effect that a person is treated in a lesser way than any other person would have been treated in an equivalent position, and that this is due to gender, is prohibited. This covers all aspects of society.

4.2.4 Related case law

A landmark case came from the Labour Court, ARD-1990-148,⁹⁵ regarding an equal pay claim by female bioengineers as compared to other types of engineers who were all male. The bioengineers were paid less per hour than the other engineers. The court found, after a thorough and specific evaluation of the various elements of the job tasks, that it was indeed work of equal value and that the equal pay rule had been violated. The Court found that the clause collectively negotiated was invalid, while the remaining part of the collective agreement remained valid. Another landmark case is Tribunal Case 42/2009 *Fredrikstad kommune* mentioned in Section 4.16 where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'. The Equality Tribunal undertook a specific evaluation of the job tasks at the two workplaces.

⁹³ Statement of 8 April 2009 from the Equality Ombud.

⁹⁴ Statement of 27 May 2010 from the Equality Tribunal.

⁹⁵ Judgment from the Labour Court of 28 September 1990 in case ARD-1990-148 (no public link available).

Case 36/2019⁹⁶ from the Equality Tribunal is interesting because the Tribunal did not consider this a traditional equal pay case in accordance with Article 21, but treated the case on the basis of Article 5 of the former GEA on discrimination on the ground of sex. The Tribunal discussed whether the different pay for the female and male colleagues was related to sex and examined the matter in light of Article 27 of the GEADA on 'burden of proof'.

The Equality Tribunal does not explain why it didn't consider the case in accordance with the equal pay provision in Article 21 of the former GEA rather than Article 5. Article 21 of the GEA applies to individuals and one comparator is enough. In the author's view it would be more correct to use the equal pay provision here since the GEADA has a specific provision on equal pay in Article 34. The case concerns the question of whether a police district had discriminated against a female prosecutor on grounds of sex/gender regarding her pay.⁹⁷ The complainant argued that she had not received the pay rise she should expect during her employment. Her male colleague earned NOK 31 000 (approximately EUR 3 000) more than her.

The Equality Tribunal found the police district's explanation as to why the male prosecutor was paid a higher salary than his female colleague reasonable. The salaries of the male employee were related to professional skills, especially great work capacity and flexibility. The difference in pay was not because of gender.

4.2.5 Permissibility of pay differences

According to Article 9 of the GEADA, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society, including pay.

However, it is stated in Article 9(2) that:

'In employment relationships and in connection with the selection and treatment of self-employed persons and hired workers, direct differential treatment on the basis of gender, ethnicity, religion, belief, disability, sexual orientation, gender identity or gender expression is only permitted if the characteristic in question is of decisive significance for the performance of the work or the pursuit of the occupation and the conditions in the first paragraph are met.'

4.2.6 Requirement for comparators

A concrete comparator is not required according to the law (GEADA, Article 34). However, a comparator of the other sex is very often referred to, but this may be a hypothetical comparator, which is accepted. This is not perceived as problematic in practice and may be regarded as a necessity, as the Norwegian employment market is highly gender-segregated. If there was a requirement that there should be a concrete comparator of the opposite sex in every case, it would be almost impossible to bring an equal pay claim.⁹⁸

4.2.7 Existence of parameters for establishing the equal value of the work performed

The GEADA (Article 34, third paragraph) establishes that the decision as to whether or not the work/positions are of equal value is made after an overall evaluation where relevant factors such as effort, responsibility and working conditions in the workplace are assessed.

⁹⁶ Statement of 29 April 2019 from the Equality Tribunal.

⁹⁷ The complaint was from before the GEADA entered into force on 1 January 2018. The case was therefore assessed under the former GEA (Act No. 59/2013) Article 5.

⁹⁸ For more on proving unequal pay and the use of a comparator or a hypothetical comparator see the Equal Pay Commission's discussion in NOU 2008: 6 Kjønn og lønn, Chapter 7.1.2.

For example, the need for the necessary competence/qualifications to perform the job is relevant as well as other factors such as effort, responsibility and other working conditions. The parties can in principle raise all aspects/parameters that they consider relevant.

4.2.8 Other relevant rules or policies

The author is not familiar with other relevant rules or policies.

4.2.9 Job evaluation and classification systems

Norway has not introduced the 'Icelandic model', a explicit mandatory certification process for companies and institutions with more than 25 employees,⁹⁹ to provide evidence that they pay men and women equally for the same job. As mentioned in Section 4.1.6 this was proposed in Parliament in Norway in 2018 by the Socialist Party.

As also mentioned in Section 3.4.4 the Parliament also approved the amendments to the GEADA on 11 June 2019.¹⁰⁰ According to Article 26 litra a of the amended GEADA, employers shall now report every year on the current situation regarding gender equality in the company and what the company does/has done to fulfil its obligations when it comes to gender equality, such as to achieve equal pay. The statement, in accordance with the first paragraph, shall be included in the annual report or in another publicly available document. See Section 3.4.4 for a detailed description of the amendment.¹⁰¹

4.2.10 Wage transparency

National law addresses wage transparency. Article 32 of the GEADA lays down the employer's duty to provide information regarding pay:

- 1) 'An employee who suspects pay discrimination may demand that the employer provides in writing: information about the pay level and the criteria for defining the pay level for those person(s) with whom the employee is comparing herself/himself.'
- 2) 'The person who receives information about pay according to this provision has an obligation of secrecy and shall sign a statement of secrecy. This does not cover situations covered by the Act regarding Public Information (*offentleglova*).'
- 3) 'The person who is the subject of a comparison and the pay information, as revealed by the colleague, shall be informed that such information is being shared.'

In addition to Article 32 of the GEADA, one may also mention Article 26, which states that the employer is obliged to actively try to fulfil the purpose of the act. Article 26a states that the employer shall account for how and whether it is fulfilling these obligations.

⁹⁹ See report 2018:10, 'Sertifisert likestilling, likelønnsstandarden på Island' (Certified equity. Equal pay in Iceland' from the Institutt for samfunnsforskning (Institute for Society Science), available at: https://samfunnsforskning.brage.unit.no/samfunnsforskning-xmlui/bitstream/handle/11250/2503028/Rapport_2018_10_Sertifisering_web.pdf?sequence=1&isAllowed=y.

¹⁰⁰ Link to the legal decision from the Parliament with the amendment: <https://www.stortinget.no/no/Saker-ogpublikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. See also Flash report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

¹⁰¹ See also Bauge, M. (2019), Flash report 'Amendments to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal and Gender Equality and Anti-Discrimination Act' of 30 July 2019: available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

National law addresses wage transparency. Article 32 of the GEADA lays down the employer's duty to provide information regarding pay as mentioned above in Section 4.2.10. There is no information about any actions in response to the Recommendation on the Government's website.

4.2.12 Other measures, tools or procedures

The World Economic Forum's report¹⁰² on the gap between women and men shows that, for equal opportunities, Norway is in second place out of 149 countries, after Iceland, the same position as last year.

The Government plans to initiate measures that contribute to a more even gender balance in education programmes and will prioritise recruiting men to primary and lower secondary education and to education in the health and social care sector.¹⁰³ This may be a measure that can affect the gender pay gap between women and men in the long term.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Article 2 of the GEADA states that the law applies to all areas of society.

A worker is not defined as such in the WEA but is defined by analysing the characteristics of the relationship between an employer and an employee as laid down in Articles 1-8 and 1-9 of the WEA. However, it follows from the EEA and the Norwegian Supreme Court's decisions in other areas of employment law that Norwegian law seeks to be compliant with the rulings of the CJEU.¹⁰⁴ This includes the fact that the term employee includes everyone active in the labour market.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

The material scope is not directly defined as in the Directive. However, Article 2 of the GEADA states that the law applies to all areas of society and the definition as such may be described as being even broader.

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Norway has not implemented an exception based on occupational activities and there is no case law to refer to. Article 11 of the GEADA provides a general opportunity for the use of positive action, but Norway has not made use of the opportunity provided by Article 14(2) of Recast Directive 2006/54/EC. Article 11 states that positive action in favour of one gender does not violate the prohibition of sex discrimination if the terms in a) to c) are fulfilled.

¹⁰² See the website of the World Economic Forum: http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

¹⁰³ See the Government's page (in Norwegian): <https://www.regjeringen.no/no/aktuelt/nummer-to-i-verden-pa-likestilling/id2623472/>.

¹⁰⁴ See for instance the following cases relating to age discrimination: Supreme Court Judgment of 5 May 2011 in Rt-2011-609 and Supreme Court Judgment of 14 February 2012 in Rt-2012-219.

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

In national law protection for women, in particular as regards pregnancy and maternity, follows from Article 6 of the GEADA where it is stated explicitly that discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, or care responsibilities is forbidden. It is stated in Article 29 of the GEADA that the prohibitions in Chapter 2 apply to all aspects of an employment relationship.

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

According to Article 9 of the GEADA, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society. Article 9 (first paragraph) applies to differential treatment on the basis of leave in connection with childbirth or adoption during periods not covered by the first paragraph. Differential treatment on the basis of pregnancy, childbirth, breastfeeding or leave in connection with childbirth or adoption is never permitted in connection with recruitment and dismissal. This also applies in connection with extension of a temporary position.

In addition, according to Article 10 of the GEADA, differential treatment is only permitted on the basis of:

- a) pregnancy, childbirth or breastfeeding, including leave pursuant to Sections 12-1, 12-2, 12-3(1), first sentence, 12-4 or 12-8 in the WEA; or
- b) leave reserved for each of the parents; see Section 14-12, first paragraph, of the National Insurance Act

if the differential treatment is necessary to protect the woman, the foetus or the child in connection with pregnancy, childbirth or breastfeeding, or if other obvious grounds apply. The differential treatment may not have a disproportionate negative impact on the person subject to the differential treatment.

4.3.6 Particular difficulties

There are no difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment and working conditions.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

According to Article 28 of the GEADA on positive action, both the Equality Ombud¹⁰⁵ and the Equality Tribunal in Case 8/2014 from 10th June 201¹⁰⁶ regarding ethnicity have assumed that the legal situation has not changed and that the principles derived from the former EU judgments on positive action are still relevant.¹⁰⁷ This means that earmarking of positions is not permitted by law, including for temporary positions. Rigid quotas for under-represented groups is therefore still prohibited in Norway.

4.4 Evaluation of implementation

The national law fulfils the requirements of EU law discussed in this chapter.

¹⁰⁵ Report from the Equality Ombud on Positive Action from 28 May 2015 (not available online).

¹⁰⁶ Statement of 14 June 2014 from the Equality Tribunal.

¹⁰⁷ CJEU, C-450/93 Kalanke, C-409/95 Marschall and C-407/98 Abrahamsson.

4.5 Remaining issues

There are no remaining issues regarding national law on equal pay/and or equal treatment at work that have not been discussed so far.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)¹⁰⁸

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

The practical difficulties linked to work-life balance are discussed in a report from the Equality Ombud from 2015 regarding the former GEA. The report shows that 55 % of all women have experienced discrimination because of pregnancy or the use of parental leave and 22 % of men who have been on parental leave report experience of discrimination because of taking leave.¹⁰⁹ A large proportion of the cases concern pregnant women being bypassed in hiring processes, including non-renewed temporary contracts which would otherwise have been renewed.

5.1.2 Other issues

The link between female employees and part-time work is an important issue in Norway in relation to work-life balance, especially after having children. It seems that more women with children than women who do not have children work part-time. For men, part-time work is the exception, something someone does in addition to studies or on their way out of working life.

Part-time work is highest in female-dominated professions such as shop assistants, auxiliary nurses, care workers, waiters and canteen workers. The proportion of full-time employees is around 30 % in occupations such as care work, shop work, etc., while the proportion of full-time employees is significantly higher among nurses and among pedagogical staff within kindergartens and primary schools. While only every third shop assistant is working full-time (and the proportion is even lower among caregivers), this applies to 55 % of nurses in healthcare and just over two thirds of teachers and preschool teachers.¹¹⁰

5.1.3 Overview of national acts on work-life balance issues

The most important acts on work-life balance issues in Norway are:

The WEA, Chapters 4 and Chapters 13, especially Article 13-1,4-3, and Chapter 12
The National Insurance Act, Chapters 14 and 15.
The GEADA, Articles 6, 9 and 10 and Chapter 5.

5.1.4 Political and societal debate and pending legislative proposals

The GEADA entered into force on 1 January 2018. The author is not familiar with any pending legislative proposals on work-life balance after this.

¹⁰⁸ See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

¹⁰⁹ See the Equality Ombud's report: <https://www.ido.no/arkiv/nyheitsarkiv/nyheiter-2015/gravide-diskrimineres/>.

¹¹⁰ See the Equality Ombud's website: https://www.ido.no/diskriminert_oldstart/forebygg-i-arbeidslivet/Lonn-og-arbeidsvilkar/Arbeidstid/Deltid-kvinner/.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Norwegian protection of pregnant employees applies to any employee who is pregnant, not only to employees who have informed their employer about their condition. Article 6(2) of the GEADA states: 'The prohibition includes discrimination on the basis of actual, assumed, former or future factors specified in the first paragraph', in this case pregnancy.

Article 30 of the GEADA states that it is illegal for an employer in a recruitment situation to collect information about a person's plans regarding pregnancy or family plans. In this respect Norwegian law appears to be broader than the wording of Article 2 of Directive 92/85/EEC.

5.2.2 Obligation to inform employer

In Norway a pregnant worker is not obliged to inform her employer about the pregnancy, neither in a process of recruitment nor as an employee in a workplace.

However, Article 12-7 of the WEA states that leave related to pregnancy shall be notified to the employer as soon as possible and no later than one week in advance in case of absence of more than two weeks, no later than four weeks in advance in case of absence of over twelve weeks and no later than twelve weeks in advance in case of absence of over one year.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

One case concerning discrimination because of pregnancy is from the Equality Tribunal in 2018 (Case 126/2018).¹¹¹ Since the case was from before the GEADA entered into force, the Equality Tribunal considered the case in light of the former GEA. In the case a real estate agent was awarded fewer internal assignments after the employer found out that she was pregnant. The Equality Tribunal discussed whether the woman had been treated less favourably when she did not receive the same amount of internal assignment as before. The answer to this was that she had been treated less favourably and the Equality Tribunal also found that there was no doubt that this happened due to her pregnancy. The Equality Tribunal also stated that protection against discrimination due to pregnancy and maternity leave is absolute and is not covered by the exemption clause in Article 6 of the GEA.

The Equality Ombud has also dealt with some cases of discrimination affecting women who were breastfeeding on the basis of the former GEA. To the author's knowledge there has not been any case law on this matter in 2018 after the GEADA entered into force.

In Case 07/1706,¹¹² the Equality Ombud stated that a woman was discriminated against as a result of lack of facilitation during breastfeeding. In the opinion of the defendant, the Directorate of Health, there was no discrimination, as the process was governed by gender-neutral rules. However, the Directorate admitted that the rules did not sufficiently take into account the needs of young children and nursing mothers. The Equality Ombud assumed that discrimination based on breastfeeding is covered by the prohibition of direct discrimination on the basis of gender in the former GEA. Failures are equated with actions in the GEA. Failure to facilitate, so that someone is disadvantaged by breastfeeding, was a violation of the GEA's prohibition of direct discrimination on the grounds of gender. In this case the Directorate of Health did not sufficiently prove that it could justify exemptions

¹¹¹ Statement of 18 December 2018 from the Equality Tribunal.

¹¹² Statement of 2 February 2010 from the Equality Ombud.

from the prohibition of discrimination. The Equality Ombud therefore concluded that the lack of facilitation during the nursing period was discriminatory.

5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

The protective measures mentioned in Articles 4-7 of Directive 92/85/EEC are not explicitly implemented in national law, but the legislation provides broad protection against health hazards for all employees in relation to the rules on the general working environment, working hours, the information and consultation obligation and the entitlement to leave. Pregnant workers are protected under the general provisions of the WEA (Articles 8-1, 4-6(1), 10-2(1) and 12-8).

Article 8-1 of the WEA has the following wording: 'In undertakings that regularly employ at least 50 employees, the employer shall provide information concerning issues which are of importance to the employees' working conditions and discuss such issues with the employees' elected representatives.'

Article 4-6(1) of the WEA applies to employees with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The wording is as follows: 'If an employee suffers from a reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall implement, as far as possible, the necessary measures to enable the employee to retain his or her work or to be given suitable work. The employee shall preferably be given the opportunity to continue his or her normal work...'

Article 10-2(1) of the WEA on 'working time arrangements' is general in its wording: 'Working hours shall be arranged in such a way that employees are not exposed to adverse physical or mental strain, and that they shall be able to observe safety considerations.'

Article 12-8 has the following wording: 'A nursing mother is entitled to request the amount of time off which is necessary for breastfeeding. At least 30 minutes' time off may for example be taken twice daily or as a reduction in working hours by up to one hour per day.'

All the provisions are general in their wording and do not protect pregnant workers in particular. The provisions cover all workers in relation to the articles in Directive 92/85/EEC (4-7). Because the robust protection of pregnant workers and the prohibition of discrimination against pregnant workers and workers who are on maternity leave or are breastfeeding is so clearly stated in the GEADA, the Norwegian law implements the EU provisions in a sufficient manner.

5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

For breastfeeding women see the case law from the equality bodies mentioned in Section 5.2.3.

5.2.6 Prohibition of night work

National law does not directly prohibit night work by workers during pregnancy and for a period following childbirth. However, Article 4-6(1) of the WEA applies to employees in general with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The article has the following wording:

'If an employee suffers from a reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall implement, as far as possible, the necessary measures to enable the employee to retain his or her work or to be given suitable work. The employee shall preferably be given the opportunity to continue his or her normal work...'

5.2.7 Case law on the prohibition of night work

The author is not familiar with any case law relating to the prohibition of night work.

5.2.8 Prohibition of dismissal

Dismissal from work is prohibited in national law from the beginning of the pregnancy until the end of the maternity leave according to Article 15-9 of the WEA and this is in line with the requirements of Article 10(1) of Directive 92/85/EEC.

Article 15-9(1) of the WEA states: 'An employee who is pregnant may not be dismissed on grounds of pregnancy. Pregnancy shall be deemed to be the reason for the dismissal of a pregnant employee unless other grounds are shown to be highly probable.'

A dismissal is thus permitted in exceptional cases as defined in the Directive's Article 10(1). This is if the employer can show that it is highly probable that the dismissal during pregnancy is grounded on general terms, which justify a dismissal according to the Norwegian WEA. This will typically be instances where an enterprise is forced to downsize due to economic conditions and insufficient level of activity to maintain the business.

When an employee is made redundant during her maternity leave, the paid maternity leave does not cease. Article 15-9(2) of the WEA states that if the employee is lawfully dismissed during her maternity leave, the notice is still valid but is extended by a corresponding period.

5.2.9 Redundancy and payment during maternity leave

If an employee is made redundant during her maternity leave this doesn't mean that maternity leave payments cease.

According to Article 14-6 of the NIA the right to parental benefit (the payment for maternity leave) is earned through work activity. Both the mother and the father can earn the right to parental benefit by being active in employment with pensionable income (Article 3-15) for at least six of the last ten months before they begin to draw parental benefit, see Articles 14-10 first and second paragraph and 14-14(2).

However, some employers provide for pay superseding the salary level provided by the NIA. This may occur in some work relations. In this case it will follow from the contract of employment as a benefit in the agreement between the employer and employee or it may be described as a right in the Employee Handbook, which is common in most companies in Norway. The Handbook provides employees with all the rules and regulations, internal procedures and practical information that may be useful for them, for example if the employee is made redundant during her maternity leave.

5.2.10 Employer's obligation to substantiate a dismissal

Article 15-4(1) of the WEA states that a dismissal must be given in writing. Furthermore, Article 15-4(3) states that when the dismissed worker so requests, the employer must state the circumstances claimed as the grounds for dismissal. The employee may demand that such information be provided in writing.

In the case of an illegal dismissal/notice of termination because of pregnancy /parental leave, the employee/job seeker may receive full compensation for his or her economic loss in addition to punitive damages.¹¹³

5.2.11 Case law on the protection against dismissal

In Section 5.2.3 above it was shown through case law that discrimination because of pregnancy is still regarded as a problem in Norway.

Some cases have appeared before the courts with questions about the dismissal of pregnant workers, based on Article 15-9 of the WEA. One case at the Supreme Court relating to discrimination on the basis of Article 15-9 of the WEA¹¹⁴ from 2018 concerned a pregnant worker who was partially on sick leave and was dismissed with reference to the company's staffing needs a few weeks into the leave. The Supreme Court treated the case as a discrimination issue based on Article 15-9 of the WEA. The Supreme Court unanimously concluded that, according to Article 15-9 of the WEA, the termination of a pregnant employee's contract requires a clear likelihood that the dismissal is not due to the pregnancy. The Supreme Court concluded that clear likelihood ('predominantly probable') means that the employer must provide clear proof that the termination is not due to the pregnancy. Based on the evidence presented in the case, the court found that the company had not fulfilled its duties and had discriminated against the woman.

This judgment clarifies the requirement of proof for dismissal in accordance with the special employment protection rules in the working environment legislation. It revoked the earlier decision by the Court of Appeal (*Borgarting lagmannsrett*), which was divided on whether the dismissal of A was objectively justified and in which the majority, consisting of three judges, concluded that the dismissal was justified in the circumstances of this company and did not have any connection with A's pregnancy. The Court of Appeal had thus acquitted the employer.¹¹⁵

In another recent Court of Appeal case (Case LB-2018-159246)¹¹⁶ a woman who was employed as an economist inspector had her employment contract terminated while she was on parental leave. The Court of Appeal found that her dismissal was not justified, if it was due to her pregnancy or parental leave. The court was divided but the majority found that the dismissal did not have a substantive basis in her work performance, based on the WEA. Two judges found the dismissal to be justified. The woman was awarded EUR 78 000 (NOK 700 000) in redress and the company also had to pay her court expenses of EUR 53 163 (NOK 478 467).

In 2019 a number of cases with questions about the dismissal of pregnant workers came before the Equality Tribunal.

The Equality Tribunal Case 2018/410¹¹⁷ is interesting because the Tribunal assumes that the GEADA requires that the employer must have known about the employee's pregnancy, and that the employer must have acted intentionally, possibly negligently, for it to be considered to be discrimination in law. There is no requirement for discriminatory intent in discrimination cases according to the GEADA. There is also no requirement for an employer to be jointly liable for a breach of the law, according to Article 38, second paragraph of the GEADA. Whether or not a pregnant employee is responsible for helping to avoid discrimination in situations as described in the case is not discussed in the

¹¹³ See judgment from Oslo District Court from 17 November 2017 in TOSLO-2006-52718 and verdict from Alta District Court from 7 April 2008 in TALTA-2007-74733. In the database 'Lovdata Pro'. Public link not available.

¹¹⁴ Supreme Court judgment of 19 June 2018 in HR-2018-1189-A (no public link available in Lovdata Pro').

¹¹⁵ See judgment from Borgarting Court of appeal of 11 September 2017 in LB-2016-147369.

¹¹⁶ See [judgment from Borgarting Court of Appeal of 13 March 2019 in LB-2018-159246](#).

¹¹⁷ Statement of 4 October 2019 from the Equality Tribunal.

preparatory works of the GEADA.¹¹⁸ The case concerned whether a woman was discriminated against on the basis of pregnancy when she was not offered a new agreement working shifts at a nursing home in the municipality of Oslo. The Equality Tribunal concluded that the woman was discriminated against because of pregnancy and granted her compensation of NOK 60 000. (approximately EUR 6 000).

The complainant and the municipality had agreed on a so-called 'framework agreement' with the nursing home that lasted from September 2017 to March 2018. An agreement like this means that the employee receives an overview of available shifts and the workers are assigned shifts according to the department's specific need. The Tribunal argued that there were no other obvious reasons than her pregnancy to explain why a new framework agreement should not be offered to the complainant. The employer had also not provided sufficient evidence that there were other reasons why she wasn't offered a new agreement.

In the Equality Tribunal Case 18/168¹¹⁹ the complainant claimed she had been discriminated against on the grounds of pregnancy and maternity leave because i) during a contract meeting the employer had asked if the complainant was pregnant, ii) she was offered a short-term contract until she was on maternity leave and iii) she was not allowed to return to the same or similar position after her leave had expired. The Equality Tribunal concluded that the employer had acted contrary to the prohibition on obtaining information on pregnancy and contrary to the prohibition on discrimination on grounds of maternity leave.

5.3 Maternity leave

5.3.1 Length

The minimum maternity leave is six weeks, as prescribed by Article 12-4 and 12-5 of the WEA (which prescribes the right to leave) and Article 14-9 of the NIA (which prescribes pay while on leave). According to the Article 12-5 of the WEA, the total parental leave is 12 months. However, under Norwegian law, maternity leave is counted as part of parental leave and is not treated differently from parental leave.

5.3.2 Obligatory maternity leave

The obligatory period of maternity leave before and/or after birth consists of three weeks before the birth and six weeks after the birth, as per Article 14-9 of the National Insurance Act.¹²⁰ Section 12-4 of the WEA states: 'After giving birth, the mother shall have a leave of absence for the first six weeks unless she produces a medical certificate stating that it is better for her to resume work'. In total, the maternity leave is therefore for nine weeks.

Maternity leave is specifically defined as being included in and a part of parental leave. The Norwegian solution thus blurs the two different types of leave.

As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish. The maternity leave period is still included in the quota reserved for the mother, which might be a violation of Directive 92/86/EEC since the

¹¹⁸ *Proporsisjon til Stortinget om Lov om likestilling og forbud mot diskriminering* (Proposition for the Parliament) Equality and Anti-Discrimination Act Prop 81 L (2016-2017), available at: <https://www.regjeringen.no/no/dokumenter/prop.-81-l-20162017/id2547420/?ch=2#kap1-1>.

¹¹⁹ Statement of 3 July 2019 from the Equality Tribunal.

¹²⁰ See NIA, Article 14-9, fifth paragraph: https://lovdata.no/dokument/NL/lov/1997-02-28-19/KAPITTEL_6-1#KAPITTEL_6-1. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish. The length of the parental leave as such remains unchanged. Just as before, the maternity leave period is included in the quota reserved for the mother.

mother is not entitled to a separate maternity leave and the maternity leave is treated as part of the paternal leave.

5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

Articles 1-1, 4-9, 10-12 and 12-8 of the WEA ensure that all employees, including pregnant workers, are entitled to the rights referred to in Articles 5, 6 and 7 of Directive 92/85/EEC.

Article 1-1 of the WEA describes 'the purpose of the act', including the fact that its objectives are to secure a healthy and meaningful working situation, to ensure equality of treatment at work, and to facilitate adaptations of the individual employee's working situation in relation to her capabilities and circumstances.

5.3.4 Legal protection of rights ensuing from the employment contract

Articles 14-4 and 14-5 of the NIA establish the rights to maternity benefits and parental benefits paid by National Insurance.

5.3.5 Level of pay or allowance

Pay during maternity/parental leave is the same level as sick pay, which is based on the employee's normal full pay. Full pay as well as the maternity leave pay cannot exceed six times the social security base amount, which is subject to an annual regulation. Six times the social security base amount is EUR 58 807.28 per year. Article 14-7 of the NIA states that pay during pregnancy and maternity leave shall be based on the same rules as sick leave.

5.3.6 Additional statutory maternity benefits

When it comes to maternity benefits some employers provide for pay superseding the salary level provided by the NIA. In such cases it will follow from the contract of employment as a benefit in the agreement between the employer and employee or it may be described as a right in the Employee Handbook, which is common in most companies in Norway. The Handbook provides employees with all the rules and regulations, internal procedures and practical information that may be useful for them.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

The conditions for being eligible for the applicable benefits follow from Article 14-6 of the NIA which meet the requirements of Article 11(4) of Directive 92/85/EEC. Article 14-6 states that parental benefits are paid on the basis of the individual being engaged in work-related activity and having had paid work for six of the last ten months before the birth. However, if the parents are receiving other benefits from the National Insurance fund instead of a salary at the time of the birth, they are still entitled to parental benefits from the National Insurance fund. The amount of parental benefits received depends on the income of the person in question.

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

Article 33 of the GEADA ensures that the requirements in Article 15 of Directive 2006/54/EC are fulfilled. Article 33 a-c states that a person who has had maternity/parental leave is entitled to return to his or her job or to an equivalent job on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company.

5.3.9 Legal right to share maternity leave

Maternity leave is specifically defined as being included in and a part of parental leave. The Norwegian solution thus blurs the two different types of leave. As of 1 July 2018, the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they wish.

5.3.10 Case law

Most cases concern female workers and parental leave. The issues most frequently addressed in case law on this matter are women who are given other work tasks due to maternity leave or are not given the same wages as colleagues when they are on maternity leave. Issues which are less commonly addressed in the case law in this area are termination of contract following their maternity leave.

Case 126/2018¹²¹ from the Equality Tribunal concerned alleged discrimination against a female employee because of gender (pregnancy and imminent parental leave), in that she was no longer allocated / assignments by the employer and / or was put on a lower wage due to the company's commission pay scheme. The Equality Tribunal concluded that the employer had discriminated against the applicant due to gender. The Equality Tribunal stated that:

'In this case, B (the employer), in the opinion of the Equality Tribunal, has deprived A (the complainant) of the opportunity to profit from a larger portfolio because she no longer received internal assignments. This happened without prior dialogue with A about her capacity to follow up both existing and new assignments during the relevant period. The change was also implemented despite immediate objections from A...

The employer had continued to allocate her assignments to the office, as well as to work on assignments she had already had and possibly acquired on her own. It is not disputed that in this case there is a causal relationship between A's pregnancy / impending leave and the fact that the allocation of internal assignments ceased...'¹²²

In addition, Case 11/2018¹²³ concerned the question of whether the employer acted in contravention of the prohibition of discrimination in Article 5 and 20 of the GEA, by giving the complainant other work tasks after her return from parental leave. The Equality Tribunal concluded that the employer discriminated against the complainant.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

National legislation provides for adoption leave in Article 12-5(4) of the WEA. In connection with adoption, the adoptive parents are entitled to paid leave for a period of 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) if the child is under 15 years of age.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

When it comes to protection against dismissal, Article 15-9 of the WEA provides for protection for workers who take adoption leave and secures their rights after the end of adoption leave. Article 15-9 states that:

¹²¹ Statement of 18 December 2018 from the Equality Tribunal.

¹²² Translated by the author.

¹²³ Statement of 18 June 2018 from the Equality Tribunal.

'An employee who has leave of absence pursuant to section(s) ... 12-5, first paragraph, for up to one year shall not be given a notice of dismissal that becomes effective during the period of absence if the employer is aware that the absence is due to such reasons or the employee notifies the employer without undue delay that the absence is due to such reasons. If the employee is lawfully dismissed at a time falling within this period, the notice is valid but shall be extended by a corresponding period.'

5.4.3 Case law

The author is not familiar with cases relating to adoption leave from 2019 or before.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18/EU has been explicitly implemented through a decision by Parliament's EEA Committee. The existing legislation in Articles 6 and 10 of the GEADA and in the WEA is in line with the requirements of the Directive. The requirements of the Directive follow from provisions in the GEADA, WEA and NIA.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The legislation applies equally to the public and the private sectors, but not for matters concerning the Parliament. According to Article 1 third paragraph of the EAOA, the Equality Tribunal does not have a mandate to enforce activities of the Parliament, including legislative decisions. Equality Tribunal Cases 19/74 to 19/97¹²⁴ concerned questions of discrimination on the ground of sex and the amendment of Article 14-9 of the NIA on the distribution of parental leave between the parents. The Equality Tribunal had no choice but to dismiss the 24 complaints because the cases concerned a legislative decision on how the parental leave should be shared between the parents.

5.5.3 Scope of the transposing legislation

National legislation applies equally to all types of employment contracts.

5.5.4 Length of parental leave

The provisions regarding the duration of parental leave do not differ between the public and private sectors.

The framework for parental leave is laid down in Article 12-5 of the WEA. Parents are entitled to 12 months of leave, see WEA, Article 12-5, 1. Pay is regulated by the NIA. An employee who has been gainfully employed for at least six of the last 10 months prior to the birth of a child is entitled to paid leave for 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) in connection with the birth of a child.

In addition to the first year of paid leave, each of the parents has a right to 12 months of leave, see Article 12-5, 2 of the WEA. This makes the total period of leave three years altogether, but the last two years are not linked to any right to be paid.

5.5.5 Age limits

Workers are entitled to paid parental leave until the child is three years old or until the workers have another child (see the National Insurance Act, Article 14-10(3)).

¹²⁴ Statement of 23 April 2019 from the Equality Tribunal that was dismissed. Case 19/74.

5.5.6 Individual nature of the right to parental leave

The Norwegian Government has introduced a three-part parental leave scheme with part to mother, part to father and an optional part. The Government argues that this may lead to fathers taking a higher percentage of the parental leave, and in that way make it easier for women to return to work after the birth of a child.

Both parents have an individual right to parental leave according to the WEA. However, the pay awarded during parental leave for both parents together is limited to the 49/59 weeks, in accordance with Article 14-9 of the NIA.

With regard to this paid leave, both parents have a right to their 'quota': 15 weeks of the leave is reserved for each of the parents if they choose the full rate. If they choose the reduced rate with 80 % payment, 19 weeks are reserved for each of the parents. The remaining part of the leave may be shared between the parents as they deem fit.

5.5.7 Transferability of the right to parental leave

It is not possible for one parent to transfer part of the parental leave to the other parent as regards the mother's or the father's quota. The remaining third part of the leave may be shared between the parents as they see fit.

5.5.8 Form of parental leave

According to Article 14-9 and 14-16 of the NIA, parental leave can be full-time (at the full daily rate) or part-time (at a reduced daily rate), see Article 12-6 of the WEA. An employee may also apply to his/her employer to be allowed to combine parental leave with reduced working hours ('time account') and employees may also use the right to a period of extended care leave. These are provisions in the WEA entitling the employee to a leave of absence from work, but not to paid leave.

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

According to Article 14-6(1), the required period of service is at least six of the last ten months before starting the parental leave. In the case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period.

5.5.10 Notice period

According to Article 12-7 of the WEA, the employee is under an obligation to notify the employer about the leave as soon as possible and no later than one week in advance in the case of leave lasting for more than two weeks, at least four weeks in advance in the case of leave lasting for more than twelve weeks and no later than twelve weeks in advance for leave lasting for more than one year. If an employee does not meet these periods of notice, the consequence may be that the leave may be postponed so that the notice period is met. This is not the case for instances when the leave is necessary for reasons of which the employee had no knowledge at the end of the notice period.

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

Parental leave may never be postponed for justifiable reasons related to the operation of the organisation.

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

In national law there are no special arrangements for small firms.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) of Directive 2010/18)

Article 12-9(3) of the WEA states that, 'If the child has a chronic or long-term illness or disability and there is therefore a markedly greater risk of the employee being absent from work, the employee is entitled to a maximum of 20 days' leave of absence ... per calendar year.'

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

The needs of adoptive parents mentioned in Clause 4 of Directive 2010/18/EU are met, as they are provided with the same rights as other parents under the rights as described in the WEA and GEADA. The rights of adoptive parents start from the day that they take over the care of the child who is adopted. The right to leave does not apply if the child is older than 15 years of age, see Article 12-5(4) of the WEA.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

The provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave are laid down in Article 15-9(2) of the WEA and Article 33 of the GEADA. It is stated that a person who has taken parental leave is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company. Article 33 of the GEADA includes both maternity leave and parental leave.

Article 15-9(2) of the WEA states that, 'an employee who has leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

Workers benefitting from parental leave have the right to return to the same job, or if this is not possible to an equivalent or similar job consistent with their employment. This is stated in Article 33 of the GEADA.

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

In national law rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave.

5.5.18 Status of the employment contract or relationship during parental leave

The employment relationship is maintained during parental leave.

5.5.19 Continuity of entitlement to social security benefits

There is continuity between the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave.

5.5.20 Remuneration

Parental leave is not remunerated by the employer. Parental leave benefits are paid by the Norwegian Labour and Welfare Service (NAV). If the employment contract entitles the employee to their full salary during the leave, and this exceeds the maximum amount of six times the social security base,¹²⁵ the employer is obliged to cover the difference if this is stated in the individual employment contract or as part of a company's Employee Handbook.

5.5.21 Social security allowance

The social security system in Norway does not provide for an allowance during parental leave in addition to the parental leave benefits. For people who have had no connection with the employment market (never been employed or self-employed) the NAV grants an allowance of one lump-sum payment upon the birth of a child, see Article 14-17 of the NIA.

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

When it comes to Clause 8 of Directive 2010/18/EU the paid father's quota has had positive consequences regarding the rate of fathers taking parental leave. Statistics show that most fathers take up exactly the number of days of parental allowance in the quota.¹²⁶ As the length of the paternity quota changes, the length of paternity leave taken by fathers also changes almost immediately.

The quota has also stimulated both men and employers to accept parental leave as something that is natural for both men and women. In addition, the quota system has taught women that the leave is not theirs alone but is a joint project between the parents.

5.5.23 Case law

There are cases from the Equality Tribunal concerning unfavourable treatment related to parental leave. An important case from 2019 is Case 95/2018.¹²⁷ The question was whether a nurse had been discriminated against because of parental leave when she was assigned different job tasks when she returned from the leave.

The Equality Tribunal treated the question in accordance with the rule on the burden of proof in Article 37 of the GEADA. The Tribunal found that there was reason to believe that the changes in the nurse's position were related to her leave. This is because both she and her colleagues were informed of the changes and that they also coincided with her return from leave. However, the Tribunal found that the employer had proved evidence that the possible changes were not related to the leave, but that these changes would have happened anyway as part of the municipality's restructuring of existing positions.

In previous statements the time for assessing whether the job tasks have been changed when returning from parental leave has been at the actual return. In this case the Equality Tribunal's view is that the complainant's right to return to the same position was not violated because the changes were reversed six months later. The Equality Ombud has

¹²⁵ See NAV's website for the social security base amount for 2019: <https://www.nav.no/no/nav-og-samfunn/kontakt-nav/utbetalinger/grunnbelopet-i-folketrygden>.

¹²⁶ <https://www.infotjenester.no/artikler/fedre-tar-noytaktig-ut-fedrekvoten/> (Norwegian text).

¹²⁷ Statement of 29 March 2019 from the Equality Tribunal.

commented on the decision,¹²⁸ and in its opinion it would have been better to include arguments that the changes in job tasks were in fact reversed when discussing whether the changes of job tasks were proportional under the exemption in Article 9 of the GEADA. The author agrees with the Equality Ombud.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Norwegian legislation provides for paternity leave in Article 12-3 of the WEA, which prescribes a right to two weeks 'care' leave for the father in relation to a spouse or cohabiting partner giving birth. This right to leave is unpaid, but some employers offer pay during the leave on a voluntary basis. Pay can also be a right due to collective agreements. A 'father's quota', a part of the parental leave which is reserved for fathers, exists in addition to the paternity leave, as laid out in Article 12-5(2) of the WEA. Parents are entitled to a leave of absence with pay of 12 months in total. Fifteen weeks of this benefit period are now reserved for the father if the parents choose the full rate. This is the father's quota as set out in Article 14-9(5) of the NIA. Similarly, 19 weeks are now reserved for each parent if they choose the reduced rate of 80 %. The father can use the quota from week 7 or wait until the child is a bit older.

If the father wholly or partly refrains from taking the father's quota, the benefit period will be correspondingly shorter. The parental benefit is paid by the national insurance (NAV) fund.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Article 15-9(2) of the WEA and Article 33 of the GEADA provide for protection against dismissal for workers who choose to take paternity leave. Article 15-9(2) of the WEA states that, 'an employee who has a leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

Article 33 of the GEADA states that a person who has taken parental leave (including paternity leave) is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the company.

5.6.3 Case law

The author is not familiar with cases on paternity leave directly, but there are some older cases from the Equality Tribunal concerning unfavourable treatment related to parental leave, with the quota that is reserved for the father, now a minimum of 15 weeks.

In Case 41/2009¹²⁹ a municipality in Norway wanted to employ a lawyer to lead the municipality's property tax office. Five applicants were called for the first interview. Three of the candidates went on to a second interview. One of the candidates who did not go further in the interview process expressed a wish during the first interview to take parental leave (the father's quota) in May/June 2009.

¹²⁸ In the report from the Equality Ombud (2019) *Diskrimineringsretten 2019, gjennomgang av året som er gått* (Discrimination Law 2019- a summary) p. 33: available at: https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

¹²⁹ Statement of 12 March 2010 from the Equality Tribunal.

The Equality Tribunal found that there were circumstances which gave reason to believe that the question of parental leave had contributed to the applicant not being considered relevant in the further employment process. The burden of proof was thus transferred to the employer. The municipality had neither presented any documentation that showed which criteria were emphasised in the further hiring process and how these were emphasised. Nor did the municipality prove or document matters that may justify exceptions pursuant to Article 3, fourth paragraph of the GEA. The municipality thus acted in contravention of Article 4, second paragraph, of the GEA, Article 3.

In 2019¹³⁰ a case regarding Norway's parental benefits for fathers was brought before the EFTA court by the EFTA Surveillance Authority (ESA).

According to Articles 12-2, 12-4 and 12-5 of the WEA, parents are entitled to parental leave. According to Article 14-13 first paragraph of the NIA, a father's right to parental benefits during the shared period of parental leave depends on whether, after the birth or after taking over care responsibilities for a child, the is involved 'in activity', such as working or studying.

In contrast, the mother's rights to parental benefits in the NIA are independent of the father's activities. ESA argued that this unlawfully discriminates against fathers on the ground of sex, in breach of Article 14(1)(c) of the Recast Directive.

The Court concluded that the parental benefit scheme established in the NIA does not fall under 'employment and working conditions', within the meaning of Article 14(1)(c) of the Recast Directive. Although the right to parental benefits clearly affects an employee's ability to use parental leave, the purpose of the scheme is to provide income support that is not in itself related to any employment relationship.

The Court also rejected ESA's claim that parental benefits are directly linked to the right to parental leave, so that parental benefit must be considered as 'employment and working conditions' as in the Recast Directive. The Court recalled that, although the EEA States, with the exception of a defined period of protection for the mother, must give both parents the right to leave on equal terms, it is up to the EEA States to provide additional support schemes. Finally, the Court pointed out that the concept of 'pay' in the Recast Directive does not include social security schemes as in this case.

Consequently, the Court dismissed ESA's application seeking a declaration that Norway had failed to fulfil its obligations under Article 14(1)(c) of the Recast Directive by maintaining in force provisions such as NIA Article 14-13 and 14-14.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

Norwegian legislation entitles workers to time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or an accident. Article 12-9(2) of the WEA provides for a right to paid leave in the case of the sickness of a child below the age of 12 years; this is 10 days per calendar year and a maximum of 15 days if the employee has more than two children. Single parents are entitled to double the amount of leave, as per Article 12-9(5). In case of a hospital stay or rehabilitation where the child is at home after such a hospital stay or the child has a life-threatening condition, the parent is entitled to leave as per Article 12-9(4). In this latter case the parent will receive pay from the NAV and thus the employer does not pay anything.

¹³⁰ Judgment of 13 December 2019 from the EFTA Court Link to the judgment, available at: <https://eftacourt.int/download/1-18-judgment/?wpdmdl=6387>.

5.7.2 Case law

The author is not familiar with cases on force majeure for urgent family reasons in case of sickness or an accident.

5.8 Care leave

5.8.1 Existence of care ('or carers') leave in national law

Article 12-10(2) has the following wording: 'Employees shall be entitled to a maximum of 10 days' leave of absence per calendar year to care for parents, a spouse, a cohabitant or a registered partner...'

As mentioned in Section 5.5.8 employees on parental leave may also use the right to a period of extended care leave. These provisions in the WEA entitle the employee to a leave of absence from work, but not to paid leave. According to Article 12-5 of the WEA, in addition to leave of absence pursuant to the first paragraph, each of the parents is entitled to leave of absence for up to 12 months for each birth. This leave must be taken immediately after the parents' leave of absence pursuant to the first paragraph. An employee who has partial leave of absence pursuant to Article 12-6 is nevertheless not entitled to leave of absence pursuant to this paragraph

Also, according to Article 6 of the GEADA, discrimination on the basis of care responsibilities is prohibited.

No further rules for care leave have been specified in Norwegian law.

5.8.2 Case law

In Section 5.6.3 above there are examples of national case law concerning unfavourable treatment related to the taking up of the 'father's quota' of parental leave. See especially the Judgment of 13 December 2019 from the EFTA Court mentioned in Section 5.6.3 under case law.

5.9 Leave in relation to surrogacy

Surrogacy is illegal in Norway, so there is no leave in relation to surrogacy.

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

Pursuant to Article 10-2(3) and (4) of the WEA, an employee may be entitled to flexible working time arrangements with reduced or extended working time.

In Article 10-2(3) it is stated that an employee shall be entitled to flexible working hours if this can be arranged without major inconvenience to the employer. Pursuant to Article 10-2(4) of the WEA,¹³¹ an employee who has reached the age of 62, *or who for health, social or other weighty welfare reasons* so requires, shall have the right to a reduction of their normal working hours, if the reduction of working hours can be arranged without major inconvenience to the employer. The size of the employer doesn't matter, but the reduction of working hours must be arranged without major inconvenience to the employer.

¹³¹ See the Preparatory works for the WEA Ot. Prop 49 (2004-2005), available at: <https://www.regjeringen.no/no/dokumenter/otprp-nr-49-2004-2005-/id396602/>.

'Health' refers to the employee themselves. Health reasons must be documented with a medical certificate. If an application for reduced working hours in such cases is related to the fact that the employee has reduced opportunities to practise their profession, the situation must be assessed on the basis of the legal obligation of the employer to organise the work for disabled workers.

'Social reasons' relate to the employee's family or immediate surroundings. Examples are care obligations, sole responsibility for children, responsibility for children with chronic illnesses, care for spouse or parents with permanent illness and care needs. If necessary, the employer may require the situation to be documented with a medical certificate.

'Other important welfare reasons' are primarily related to the needs of parents of toddlers to spend more time with their young children, or parents who have trouble obtaining childcare during working hours. There is no explicit age limit for children, but 'young children' means children of preschool age and children who are not old enough to be left unattended.

An employee is not entitled to pay during their non-employed periods. If an employee works extra during the 'off-duty period', they will not be entitled to overtime payment for work that falls within ordinary working hours. Only when the working day exceeds nine hours within 24 hours or 40 hours within seven days is the right to overtime triggered by the rules of the WEA.

According to Article 10-2(4) second paragraph, the employee, when the agreed period of reduced working hours has expired, has the right to resume their previous working hours, stated in the employment relationship / employment agreement, unless otherwise agreed.

The right to reduction in working hours must not cause significant disadvantage for the company. The employer must evaluate the situation and weigh the needs of the employee against the disadvantages of the business. The disadvantages, for example, may be that it is difficult to cover the remaining time available, that the position itself may be difficult to divide, or that it is not possible to adapt the reduction to the rota schedule. If the employee needs reduced working hours, the employer must have a stronger justification in order to reject the application.

It is an absolute requirement that there must be a need for reduced working hours. For example, long work trips, participation in political activities, sports or other activities are not considered important welfare reasons.

There aren't any measures specifically to encourage men to make use of reduced working time. The same rules applies for men and women.

5.10.2 Right to adjust working time patterns

National law also provides workers with a legal right to adjust working time patterns on request under certain conditions. Article 10-2(3) of the WEA states that the worker is entitled to flexible working hours if this can be done without major disadvantages for the employer.

There is no detailed regulation on flexible working hours. Employees are equally entitled to demand such a scheme. The employer must in any case justify a possible refusal in specific circumstances (that there is a 'significant disadvantage'). If the employer and employee do not agree on flexible working hours, the dispute may be brought before the Dispute Settlement Board.¹³²

¹³² See the Dispute Settlement Board website: <https://www.nemndene.no/tvistelosningsnemnda/>.

However, there are collective agreements between unions on working life that may have detailed regulations on, for example, flexible time. The 'flexi-time' agreement in the public sector in Norway is probably the best known exception from working time.¹³³ A special agreement on flexible working hours in the public sector is entered into on the basis of Article 10-12 of the WEA. The agreement on flexible working hours in the public sector does not prevent the employer and employee from entering into an individual agreement in accordance with Article 10-2, third paragraph and Article 10-5, first paragraph of the WEA.

5.10.3 Right to work from home or remotely

National law does not give employees a legal right to work from home or remotely on request. This has to be arranged in the employment contract or by making an arrangement with the employer.

Article 10-2(3) and (4) of the WEA apply to 'the employee'. As mentioned in Section 5.10.1 and 5.10.2 and according to Article 10-2(3), the employee shall be entitled to flexible working hours if this can be arranged without any major inconvenience for the company.

5.10.4 Other legal rights to flexible working arrangements

Article 10-6(12) of the WEA provides for some legal rights to flexible working arrangements whereby workers can 'bank' hours to take time off in the future. These rights are in connection with the overtime rules. Article 10-6(12) states that the employer and the employee may agree in writing that overtime hours shall be wholly or partly taken as off-duty time on agreed dates. Some Collective Basic Agreements provide for time banking accounts where overtime may be taken as time off instead.

The right to flexible working hours can be exercised for any purpose, as long as it can be arranged without any major inconvenience for the company.

5.10.5 Case law

The author is not familiar with recent cases from the courts or equality bodies concerning flexible working time arrangements.

5.11 Evaluation of implementation

The Norwegian legislation is generally in line with the EU gender rules discussed in this chapter.

However, the previous national expert on gender equality for Norway, Helga Aune,¹³⁴ has argued that one area is still not satisfactory. This is in relation to the Pregnant Workers Directive 92/85/EEC, which is, in her opinion, not correctly implemented in Norway, as mothers are not guaranteed a specific 14 weeks of independent maternity leave.¹³⁵ In Norway, women are entitled to three weeks' leave before the birth and six weeks afterwards as leave which is specifically for women who are pregnant or have recently given birth. However, these weeks are deemed to be part of the parental leave under what is called a 'mother's quota'.

¹³³ See the Special agreement on flexible working hours in the state: https://lovdata.no/dokument/SPH/sph-2020/KAPITTEL_9-15#KAPITTEL_9-15.

¹³⁴ See Aune, H. (2018), *Country report. Gender Equality. How are EU rules transposed into national law? Norway*, State of affairs 1 January 2018, available at: <https://www.equalitylaw.eu/country/norway?page=1>.

¹³⁵ See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See also CJEU cases C-519/03 para. 32 and C-342/01 para. 41 and the Maternity Leave Directive 92/85/EEC.

With reference to the two very different purposes of the two types of leave, one may argue that the Norwegian solution is problematic. The Ministry of Children, Equality and Inclusion (the former 'BLD')¹³⁶ has interpreted EU law (the EU Directive) on the right to maternity leave so that it can be fulfilled with leave both before and after the birth. This understanding provides for a total of 18 maternity leave weeks in the Norwegian model. However, as the author sees it, as stated by Aune, leave before the birth should not be a part of the fulfilment of the maternity directive requirement. The right to maternity leave of 14 weeks in accordance with the maternity directive should, in the author's opinion, be compared with the right to the six compulsory weeks of leave after the birth set out in Article 12-4 of the WEA.

It is also worth mentioning that in Norway, certain limits on the granting of paid parental leave are only applicable to fathers. The result is that mothers are explicitly granted more comprehensive rights to paid leave.

In an EFTA judgment of 13 December 2019 (as mentioned in Section 5.6.3) the Court did not consider whether the mentioned provisions of the NIA discriminate against fathers on the ground of sex according to the Recast Directive. As this was not discussed, it is not a judgment of much relevance when it comes to EU or Norwegian Discrimination Law. However, the fact that the Court considered this case to fall outside the scope of the Recast Directive does not mean that the regulations are not discriminatory according to the GEADA.

In Case 12/340¹³⁷ the Equality Ombud concluded that the requirement in Article 14-13 of the NIA on 'activity' for mothers was not in compliance with the former Gender Equality Act (GEA) (the GEADA has a similar wording) because no corresponding requirements were set out for the father's activity for mothers to be entitled to parental benefit.

The Equality Ombud has been in contact with the Ministry of Culture several times after its statement and asked if the Ministry intends to change the regulation in the NIA. The Ombud argues that the practice amounts to discrimination against fathers. The author agrees with the Equality Ombud since mothers and fathers do not have equal rights on this matter. It seems that the Ministry doesn't agree with the Ombud, since in the EFTA Court case it argues that the regulation in the NIA is a type of 'positive action measure' that is an advantage to women because fathers are more likely to assume a larger share of family obligations if the mother returns to work in the period where the father receives benefits.

However, the Equality Ombud has reported¹³⁸ that it will continue to work for the NIA to be changed on this matter so that fathers are not discriminated against.

5.12 Remaining issues

The most relevant issues on this matter have been discussed above.

¹³⁶ Currently, Ministry of Culture.

¹³⁷ From the Ombud's website: <https://www.ldo.no/arkiv/nyheitsarkiv/Nyheter-i-2013/--Gi-far-eigen-rett-til-permisjon/>.

¹³⁸ Report from the Ombud *Diskrimineringsretten 2019, gjennomgang av året som er gått* (Discrimination Law, summary of 2019), available at: https://www.ldo.no/globalassets/ldo_2019/03_ombudet-ogsamfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf (mentioned several times in this report).

6 Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Surveys from Statistics Norway show that gender equality has increased in several areas of working life over the years.¹³⁹ Nevertheless, Statistics Norway's gender equality indicators show that the labour market in Norway is still gender-divided, and this affects the occupational social security schemes. The proportion of women who work part-time is still large, compared to men. In addition, women and men work to a large extent within different sectors and industries, which contributes to different salaries among women and men, and different social security schemes. Reports¹⁴⁰ also show that there are far more women than men who receive benefits. Among those over 45 years old, the proportion is about 1.5 times as high.

6.1.2 Other issues related to gender equality and social security

There are no other issues related to gender equality and social security to be reported, except for what is mentioned in this chapter.

6.1.3 Political and societal debate and pending legislative proposals

There have not been any particular political/societal debate or pending legislative proposals on this topic in 2019.

6.2 Direct and indirect discrimination

Direct and indirect discrimination on grounds of sex in occupational social security schemes are prohibited in national law. This is not explicitly stated with regard to occupational pension schemes, but Article 2 of the GEADA states that the law applies to all areas of society and case law has interpreted this as applying to occupational social security schemes.

6.3 Personal scope

The personal scope of Norwegian law relating to occupational social security schemes is the same as that specified in Article 6 of Directive 2006/54.

6.4 Material scope

The material scope of Norwegian law relating to occupational social security schemes is the same as that specified in Article 7 of Directive 2006/54/EC.

6.5 Exclusions

Norway has not implemented exclusions from the material scope as specified in Article 8 of Directive 2006/54/EC in national law. This may be explained by the fact that the GEADA is generally applicable to all areas of society and is not limited to the employment market. In addition, there has not been any tradition of providing men and women with different age limits or different services in the social security system.

¹³⁹ See Statistisk sentralbyrås (Statistics Norway) website: <https://www.ssb.no/befolkning/artikler-og-publikasjoner/attachment/341883>.

¹⁴⁰ See article from Nav: <https://memu.no/artikler/store-kjonnforskjeller-innen-uforetrygd/>.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no laws or new case law from 2019 which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54/EC.

6.7 Actuarial factors

In national law, sex is not used as an actuarial factor in occupational social security schemes to the author's knowledge.

6.8 Difficulties

As far as the author is aware, there are no specific difficulties when it comes to occupational security schemes in Norway.

6.9 Evaluation of implementation

In the author's view the Norwegian legislation is generally in line with the EU law discussed in this chapter.

6.10 Remaining issues

The most relevant issues regarding social security have been discussed above.

7 Statutory schemes of social security (Directive 79/7)

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

Statistics show that there is a higher sickness absence among women than among men.¹⁴¹ In 2019, absence due to sickness was 7.61 % among women and 4.59 % among men. Women also have a higher rate of sick leave than men in almost all age groups. Absence from work due to sickness has also been higher among women than among men since the 1970s (SSB 2016). The situation and developments in Norway are similar to those in other countries with high labour force participation by women.¹⁴²

Furthermore, the statistics/survey from Bufdir show that the reasons for the gender difference in sick leave are complex. PROBA societal analysis (2015) has reported in an analysis of international research on sickness absence that they find support for the fact that pregnancy-related sickness absence accounts for some, but not all, of the difference between women and men's sick leave.

The risk of sickness absence certified by a doctor for 21 days or more was 42 % higher among women working in health and social care than among women in other occupations.¹⁴³ The results also showed that this can mainly be explained by working environment factors, such as part-time work, work with violence and threats of violence, emotional demands, and heavy lifting of patients as the most significant factors.

7.1.2 Other relevant issues

There have not been any recent changes concerning social security schemes in national law that are worth mentioning here.

7.1.3 Overview of national acts

Folketrygdloven LOV-1997-02-28-19 TNIA, The National Insurance Act of 1 May 1997),¹⁴⁴ *Sosialtjenesteloven LOV 2009-12-18-131* (The Act on Social Services in the Work and Welfare Administration of 1 January 2010),¹⁴⁵ *Lov om Statens Pensjonskasse LOV 1949-07-28-26* (The Act on the State Pension Fund) of 1 August 1949¹⁴⁶ and the WEA contain provisions on statutory security schemes.

7.1.4 Political and societal debate and pending legislative proposals

There have not been any specific pending legislative proposals on this topic during 2019.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

The principle of equal treatment for men and women in matters of social security is implemented in national law. Article 2 of the GEADA states that the law applies to all areas of society. This includes matters of social security.

¹⁴¹ See report from Statistisk sentralbyrå (Statistics Norway): <https://www.ssb.no/sykefratot/>.

¹⁴² See Bufdir website: https://bufdir.no/Statistikk_og_analyse/Kjonnslikestilling/Helse_og_kjonn/Sykefravar_og_uforhet/.

¹⁴³ Aagestad et al. 2016.

¹⁴⁴ See Lovdata: <https://lovdata.no/dokument/NL/lov/1997-02-28-19?q=folketrygdloven>.

¹⁴⁵ See Lovdata: <https://lovdata.no/dokument/NL/lov/2009-12-18-131?q=sosialtjenesteloven>.

¹⁴⁶ See Lovdata: <https://lovdata.no/dokument/NL/lov/1949-07-28-26>.

7.3 Personal scope

The personal scope of national law relating to statutory social security schemes is the same as that in Article 2 of Directive 79/7/EEC.

7.4 Material scope

The material scope of national law relating to statutory social security schemes is the same as that in Article 3 paras. 1 and 2 of Directive 79/7/EEC.

7.5 Exclusions

Norway has not implemented any exclusions from the material scope as specified in Article 7 of Directive 79/7/EEC.

7.6 Actuarial factors

Case C-318/13 (*Korkein hallinto-oikeus v. Finland*) concerning the prohibition of the use of gender-based actuarial factors in statutory pension schemes has no direct implication, as the use of gender-based actuarial factors is illegal according to the GEADA.

7.7 Difficulties

To the author's knowledge there are no specific difficulties in Norway in relation to implementing Directive 79/7/EEC.

7.8 Evaluation of implementation

The Norwegian legislation is generally in line with the EU law discussed in this chapter.

7.9 Remaining issues

The author does not have remaining issues to discuss in this chapter.

8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

There are few reports or surveys from the last five years that provide insights into the specific difficulties that self-employed workers face. However, research shows that the under-representation of women in entrepreneurship is consistent over cultures and countries, and is even higher in Norway than in most other industrialised societies.¹⁴⁷ The research explores an area that has been little researched so far – the family and household situation. The researchers studied the presence of children and their ages, the role of the partner and the household's financial resources. Surprisingly, the results show that women are more likely to choose self-employment over wage-work when their children are small, indicating that children are no barrier to entrepreneurship, at least not when defined as self-employment as in this report.

8.1.2 Other issues

As mentioned in Section 8.1.1 it might seem that women with small children are under-represented in self-employment, but research from 2013 indicates otherwise. However, the research has also pointed out the high and persisting sex-segregation in education and in the labour market as one reason for the low number of female entrepreneurs. Girls tend to choose an education that qualifies them for jobs in the public and private service sectors, whereas boys choose fields that more often qualify them for jobs in private industry and commerce.

8.1.3 Overview of national acts

The NIA, WEA and GEADA cover provisions for self-employed workers relevant which are for this chapter in the report. The provisions in the acts will be discussed further in this chapter.

8.1.4 Political and societal debate and pending legislative proposals

There have been no political/societal debate or pending legislative proposals on this topic in 2019.

8.2 Implementation of Directive 2010/41/EU

The NIA and the GEADA contain the rights established in Directive 2010/41/EU.

8.3 Personal scope

8.3.1 Scope

Self-employment is defined in Article 1-10 of the NIA. Whether or not a person is self-employed will depend on an overall evaluation of various factors such as: does the person run an activity at their own cost and risk and is this activity likely to create an income, does the activity have a certain turnover, does the person employ freelancers or employees, does the business have its own office/workshop, and does the person own their own tools and are they economically responsible for the entity?

¹⁴⁷ See Statistisk sentralbyrå (Statistics Norway) website: <https://www.ssb.no/a/publikasjoner/pdf/DP/dp727.pdf>.

8.3.2 Definitions

Self-employment is defined in Article 1-10 of the National Insurance Act. Whether or not a person is self-employed depends on an overall evaluation of various factors, as explained in Section 8.3.1 above.

8.3.3 Categorisation and coverage

All self-employed workers are considered to be part of the same category, including agricultural workers.

8.3.4 Recognition of life partners

In national law the personal scope does not include the spouses and life partners of self-employed workers. National legislation recognises life partners but only as regards the possibility to purchase additional insurance from the NIA, for instance for someone employed on their partner's company. In this regard, life partners are registered as employees. Life partners do not automatically receive any status as such.

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The principle of equal treatment under Article 4 of Directive 2010/41/EU is implemented in the equal treatment legislation in Articles 1 and 6 of the GEADA.

8.4.2 Material scope

Norwegian legislation is more restrictive than specified in Article 4 of Directive 2010/41/EU, as it does not include spouses and life partners and does not ensure that they have the same rights as employees. However, it is possible to purchase additional insurance from the NAV when life spouses work, for instance, in an agricultural business.

8.5 Positive action

Norway has not taken advantage of the power to take positive action.

8.6 Social protection

Norway has a system of social protection for self-employed workers.

The NIA covers self-employed workers. According to Articles 23-6 and 8-35, self-employed people may receive sickness benefit of up to 65 % of the sickness allowance scheme. The Norwegian system relies on the NIA as a base platform for all residents. In addition, people are free to purchase additional insurance in the NI system as a supplement. The requirement to ensure that spouses and life partners can benefit from social protection in accordance with national law has been implemented in a voluntary system where it is possible to buy social protection (health/sickness or a pension), on the basis of Articles 3-13 and 23-6 of the NIA and under a specific regulation.¹⁴⁸ Working spouses of self-employed workers thus need to purchase specific insurance.

¹⁴⁸ See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

8.7 Maternity benefits

Article 8 of Directive 2010/41/EU regarding maternity benefits for the self-employed has been implemented into Norwegian law, see Article 14-4(5) of NIA.

The maternity allowance is the same for employees and the self-employed: the payment is either 80 % or 100 % of the salary level, depending on the length of the leave to be taken. The maximum pay is 6 G, one G corresponding to the base amount for calculations for the NI, subject to annual regulations.¹⁴⁹

Female self-employed workers and female spouses and life partners are entitled to maternity benefits if they have fulfilled the base requirement of having been at work during six of the last ten months before the birth of the child, see Article 14-6 and 14-7 of the NIA. The amount of the benefit is calculated according to the average income during the last three years.¹⁵⁰ Spouses or any person who does not work will receive a cash benefit in relation to the birth; see Article 14-17 of the NIA.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

Article 10 of Directive 2006/54/EC regarding occupational social security for self-employed people is implemented in the NIA. It is a voluntary system where it is possible to buy social protection (health/sickness or a pension) according to Sections 3-13 and 23-6 of the NIA and under a specific regulation.¹⁵¹

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

Norway has not made use of the exceptions for self-employed people regarding matters of occupational social security under Article 11 of Directive 2006/54/EC.

8.9 Prohibition of discrimination

Article 14(1)(a) of Recast Directive 2006/54/EC is implemented in national law as regards self-employment, both through the general wording of the GEADA as well as specific declarations in sections of the WEA, see for instance Article 13-2(2). This states that the rules as described in Chapter 13 of the WEA apply equally for an employer's selection of and treatment of independent/self-employed workers and employees hired by a company.

8.10 Evaluation of implementation

All in all, the Norwegian legislation is generally in line with the EU law discussed in this chapter.

8.11 Remaining issues

The most important topics on this matter have been discussed.

¹⁴⁹ In 2019 the G (*grunnbeløp*) was NOK 99 858 (about EUR 11 095). The G is a calculation figure for the NAV calculating every person's right to benefits from the National Insurance system (*Folketrygden*).

¹⁵⁰ See the information about maternity/parental leave benefits on the NAV website: <https://familie.nav.no/>.

¹⁵¹ See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere*.

9 Goods and services (Directive 2004/113)¹⁵²

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

The report 'Investing in gender equality' from Price Waterhouse Cooper (PWC) Norway commissioned by Storebrand and Care Norway¹⁵³ from 2019 shows that gender equality is profitable for businesses. Increasing female labour market participation has led to many positive effects, such as increased economic growth, increased productivity and an increased economic resilience. The report points out that a more diverse corporate culture can lead to more innovation, creativity and critical thinking, as well as higher productivity. In addition, the literature finds that more diverse leadership can lead to increases in profitability. Gender equality in management and on company boards is even more crucial as the workforce and markets become more diverse.

Specific problems of discrimination in the online environment/digital market/collaborative economy

There have been some examples of sex discrimination in advertisements where the body of a person of one sex is taken advantage of and represented in an offensive and degrading manner. This especially applies to women. The Consumer Authority (CA)¹⁵⁴ has also dealt with cases on dating sites, such as Richmeetbeautiful.no and Digisec Media As,¹⁵⁵ and concluded that the sites contravened Article 2 of the Marketing Act, as they used stereotypes and outdated views of men and women in their advertisements. When it comes to the media and advertising, Norwegian law appears to be broader than the Directive Article 3(3) as well.

9.1.2 Political and societal debate

There has been no particular/specific political or societal debate on this topic in Norway in 2019.

9.2 Prohibition of direct and indirect discrimination

National law does not prohibit direct and indirect discrimination on grounds of sex in access to, and the supply of, goods and services directly but Article 2 of the GEADA states that the law applies to all areas of society. This includes access to goods and services.

9.3 Material scope

The material scope of the national law relating to access to goods and services fulfils the requirements according to Article 3 of Directive 2004/113/EC. As far as the Directive's Article 3(3)s concerned, the GEADA (Article 27) prescribes that all teaching materials in schools and education shall be in accordance with the aim of the Act, thereby emphasising gender equality and non-discrimination on the ground of gender. The GEADA is in this respect broader than the Directive.

¹⁵² See e.g. Caracciolo di Torella, E. and McLellan, B. (2018) *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

¹⁵³ 'Investing in gender Equality', Report of 5 June 2019 prepared by PWC Norway and commissioned by Storebrand and Care, available at: <https://www.pwc.no/no/pwc-aktuelt/likestilling-er-lonnsomt-for-virksomheter.html>.

¹⁵⁴ See the Consumer Authority website: <https://www.forbrukertilsynet.no/english>.

¹⁵⁵ Case from the Consumer Authority in Case 17/2040. See CA website: <https://www.forbrukertilsynet.no/lov-og-rett/veiledninger-og-retningslinjer/veiledning-kjonnssdiskriminerende-reklame>.

9.4 Exceptions

As far as the Directive's Article 3(3) is concerned, Article 27 of the GEADA prescribes that all teaching materials in schools and education shall be in accordance with the purpose of the Act, emphasising gender equality and non-discrimination on the ground of gender. The GEADA is in this respect broader than the Directive. As mentioned under Section 9.1, when it comes to media and advertising, Norwegian law appears to be broader than the Directive as well. There is protection against discrimination on the ground of gender in the Marketing Act (*Lov om markedsføring og avtalevilkår m.v*) (Article 2)¹⁵⁶ as follows:

'Advertisements and the person producing a commercial/advertisement shall ensure that the advertisement is not in violation of the principle of equality between men and women, and ensure that the advertisement does not take advantage of either gender's body or image or provide a representation of one of the sexes in an offensive or degrading manner.'¹⁵⁷

9.5 Justification of differences in treatment

There have been some cases concerning justification of differences in treatment from the Equality Tribunal in 2019.

In Equality Tribunal Case 19/122¹⁵⁸ the complainant argued that a fitness centre discriminated against men by offering cheaper training subscriptions only for women. The Equality Tribunal concluded that this was discrimination on the ground of sex, but that the discrimination was legitimate.

The Equality Tribunal found that the exception in Article 9 of GEADA applied in this case, and pointed out that the alternative for the fitness centre would have been to increase working staff, or possibly have security at night in order for women to feel safe. This would cost too much for the fitness centre and price reduction was the most appropriate measure to achieve the centre's goal of getting more women to exercise at the centre in the evening. The Tribunal saw it as a necessary measure to achieve the purpose of getting more women to exercise at the centre in the evening.

The Equality Tribunal also considered that men were not disadvantaged compared to women by not being able to make use of the 'time-limited membership', which was cheaper. The Equality Tribunal argued that the membership did not in fact have a real negative impact on men. If the centre changed the membership, it did not have any impact on men who still had ordinary membership. Furthermore, the centre was to stop the practice once 50 memberships were sold and the purpose of getting more women to exercise in the evening was achieved. The advantage women gained from the cheaper membership was therefore relatively small and limited. In the Equality Tribunal's view, the price reduction in general was proportionate.

However, the Equality Tribunal stated that in this case it was not taking a general stand on the issue of price differentiations between men and women. Whether price differentiations between women and men are considered to be illegal discrimination or permitted differential treatment must be decided on the basis of the specific circumstances in each case.

9.6 Actuarial factors

The GEADA, with the general prohibition on discrimination, ensures that the use of sex/gender as a factor in the calculation of premiums and benefits for the purposes of

¹⁵⁶ Act-2009-01-09-2.

¹⁵⁷ Unofficial translation.

¹⁵⁸ Statement of 4 October 2019 from the Equality Tribunal.

insurance and related financial services does not result in differences in individual premiums and benefits, see Article 5(1) of Directive 2004/113.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Norway has not made any exceptions according to Article 5(2) of Directive 2004/113/EC. Even though it is clear, according to the Equality Tribunal's early practice and the text of the law, that sex discrimination is not legal in collective pensions, the judgment of the Court of Labour Disputes (2013-01-014 ARD-2013-1)¹⁵⁹ implies that sex may still be used as an actuarial factor in some cases. The *Test-Achats* ruling has therefore not resulted in any changes to national legislation, as Norway presumes that national law is in compliance.

9.8 Positive action measures (Article 6 of Directive 2004/113)

Norway has not adopted positive action measures in relation to access to and the supply of goods and services.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in Norway in relation to access to and the supply of goods and services.

9.10 Evaluation of implementation

The national law relating to access to goods and services fulfils the requirements of Directive 2004/113/EC. As mentioned under Section 9.4, as far as the Directive's Article 3(3) is concerned, Article 27 of the GEADA prescribes that all teaching materials in schools and education shall be in accordance with the aim of the Act. It could be said that the GEADA is in this respect broader than the Directive.

9.11 Remaining issues

The author does not know of any remaining issues regarding goods and services that have not been discussed so far.

¹⁵⁹ Judgment from the Norwegian Court of Labour Disputes 'Arbeidsretten', of 14 January 2013.

10 Violence against women and domestic violence in relation to the Istanbul Convention

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

There are several important surveys and reports that provide insight into issues of violence against women and domestic violence in Norway, as mentioned in last year's country report.¹⁶⁰ One of these is the study by Siri Thoresen and Ole Kristian Hjemdal (2014), on violence and rape in Norway.¹⁶¹ Another is the study produced by Mia Myhre, Siri Thoresen and Ole Kristian Hjemdal (2015) on violence and rape during childhood.¹⁶² Finally, there is the study from 2016 on violence and abuse against children and young people.¹⁶³

The Norwegian Directorate for Youth and Family Affairs (Bufdir) has produced an online resource providing an overview of current statistics and quantitative and qualitative research on gender equality in Norway.¹⁶⁴

As to ongoing research, the Ministry of Justice is financing a five-year Domestic Violence Research Programme (2014-2019). The research is being conducted by two Norwegian research institutions: the Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS)¹⁶⁵ and Norwegian Social Research NOVA at OsloMet.¹⁶⁶

As a result of the obligations in the Istanbul Convention, gender equality and women's rights are and will be affected and strengthened in many ways in Norway. For example, related to the Articles 13 and 14 of the Convention, on awareness-raising and education: in February 2016, the Ministry of Justice and Public Security launched a web portal on domestic violence and rape. It is named Dinutvei.no ('your way out') and has a Q&A service where users can be anonymous. It also guides its users to the organisations that can provide further help, such as crisis shelters and family services.

Article 15 of the Convention highlights relevant training for professionals dealing with victims or perpetrators who need knowledge about prevention, detection, equality, rights of victims, and the prevention of secondary victimisation. In Norway this has led to the result that building capacity and competence are two central issues in the national action plan on intimate partner violence.¹⁶⁷

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

Article 13 of the GEADA prohibits harassment based on gender and sexual harassment.

¹⁶⁰ See Bauge, M. (2019) *Country report. Gender Equality. How are EU laws transposed into national law? Norway 2019*, p. 60, available at: <https://www.equalitylaw.eu/downloads/5063-norway-country-report-gender-equality-2019-pdf-1-57-mb>.

¹⁶¹ Thoresen, S., & Hjemdal, O.K. (eds.) (2014) *Vold og voldtekt i Norge. En nasjonal forekomststudie av vold i et livsløpsperspektiv* [Violence and rape in Norway. A national prevalence study with a life course perspective.] Norwegian only. Oslo: Nasjonalt kunnskapssenter om vold og traumatisk stress.

¹⁶² Myhre, M.C., Thoresen, S., & Hjemdal, O.K. (2015). *Vold og voldtekt i oppveksten: En nasjonal intervjuundersøkelse av 16- og 17-åringer* [Violence and rape during childhood: A national interview survey of 16 and 17-year-olds.] Norwegian only. Oslo: Nasjonalt kunnskapssenter om vold og traumatisk stress. (Rapport 1/2015).

¹⁶³ Mossige, S. and Stefansen, K. Nova report 5/16 (2016), *Vold og overgrep mot barn og unge, omfang og utviklingstrekk 2007-2015* [Violence and assault against children, development 2007-2015], available at: <http://www.hioa.no/Om-OsloMet/Senter-for-velferds-og-arbeidslivsforskning/NOVA/Publikasjoner/Rapporter/2016/Vold-og-overgrep-mot-barn-og-unge>.

¹⁶⁴ See website from Bufdir: www.kjonnsligestilling.no.

¹⁶⁵ See NKVTS website: <https://www.nkvts.no/>.

¹⁶⁶ See OsloMet website: <http://www.hioa.no/Om-OsloMet/Senter-for-velferds-og-arbeidslivsforskning/NOVA>.

¹⁶⁷ http://kriminalitetsforebygging.no/wp-content/uploads/2018/03/stubberud_hovde_and_aarbakke_-_the_istanbul_convention_the_nordic_way_2018.pdf.

In Norwegian, the term consistently used is 'vold i nære relasjoner', which can be literally translated as 'violence in close relationships'. The term is translated variously as 'domestic violence', 'family violence', 'partner abuse', 'battering', etc, mainly to distinguish this violence from more random violence perpetrated by attackers with whom the abused has no established or lasting relationship.

In 2005, the Parliament adopted a penal provision regarding 'vold i nære relasjoner' (Article 219 of the former Penal Code; current Article 282). In the new provision, it is the perpetrator's long-term terrorisation and abuse of the next-of-kin (current or ex-spouse or partner, their own or their partner's relatives, household members or others for whom the perpetrator plays a caring role) that constitutes the criminal aspect of the act. The expression 'domestic violence' (also referred to as 'family violence', 'partner abuse', 'battering', etc.) covers all forms of physical and emotional abuse of current or former family members, and its victims include child witnesses. The term also covers the crimes of genital mutilation and forced marriage.

Article 291 also covers sexual assault/rape as follows:

- 'A penalty of imprisonment for a term not exceeding 10 years shall be applied to any person who
- c) obtains sexual activity through violence or threatening conduct;
 - d) engages in sexual activity with a person who is unconscious or for other reasons incapable of resisting the act; or
 - e) through violence or threatening conduct makes a person engage in sexual activity with another person, or perform acts corresponding to sexual activity on himself/herself.'

Article 293 covers aggravated sexual assault and Article 294 covers grossly negligent sexual assault. The article on grossly negligent sexual assault is not used much in Norwegian criminal law. However, it is used when it cannot be proved that the person committed a sexual assault on purpose, but the person has obviously been grossly negligent in his or her actions. The courts take an objective view of this.

The Act relating to Municipal Crisis Centre Services¹⁶⁸ entered into force on 1 January 2010. The purpose of the Act is to ensure the provision of a good, comprehensive crisis centre service for women, men and children who are subjected to domestic violence or threats of such violence.

10.1.3 National provisions on online violence and online harassment

There is no specific regulation regarding online violence and harassment of women and girls in the national legislation. Threats and serious threats are prohibited in Article 263 of the Penal Code. Article 264 also covers serious threats and online threats. According to Article 266, the dissemination of intimate images online is also a crime.

Article 13 of the GEADA prohibits harassment based on gender, gender identity and gender expression amongst other grounds. This also includes online harassment.

10.1.4 Political and societal debate

Women's vulnerability to hate speech and other forms of written violence, intimidation and abuse on the internet has received increased attention in Norway over the last couple of years.¹⁶⁹ It has been debated how female journalists, together with prominent female

¹⁶⁸ Lov om kommunale krisesentertilbud of 2009-06-19-44, available at: <https://lovdata.no/dokument/NL/lov/2009-06-19-44?q=krisesenterlova>.

¹⁶⁹ See Institutt for samfunnsforskning (Institute for Social Research's) website; <https://www.samfunnsforskning.no/aktuelt/nyheter/2018/hvor-vanlig-er-hatytringer-pa-nett.html>.

politicians and contributors to public debate, suffer from trolling, misogyny and sexual harassment online. Concern has been voiced about how this can negatively affect women journalists' reporting and, in general, women's freedom of expression and contribution to public debate and democracy.

There are no direct pending legislative proposals in relation to online violence and harassment, but since the introduction of Article 266 of the Penal Code, serious stalking has become a crime in Norway.¹⁷⁰ However, the provision on stalking has been debated after the Supreme Court concluded in a recent case¹⁷¹ that serious stalking is not illegal as long as the victim does not know they have been stalked. This means that stalking is not a crime according to Norwegian law as long as the victim doesn't know they are being stalked. After this ruling from the Supreme Court several political parties initiated a campaign to change the article in the Penal Code so that stalking that is hidden, where the victim does not know they are being stalked, will be a crime according to Norwegian legislation.¹⁷² As of 31 December 2019 the law has not yet been changed on this matter.

10.2 Ratification of the Istanbul Convention

The Istanbul Convention was ratified by the Norwegian Parliament in July 2017 and entered into force on 1 November the same year. Norway's first report to GREVIO has not yet been scheduled.¹⁷³ Norway has not issued any reservations to the Convention.

Prior to 2016 Norway lacked a penal provision on stalking, which the Convention requires, and this had to be amended through legislation before Norway could ratify it. The amendments to the Penal Code were implemented by law on 17 June 2016 (cf. 42 L (2015-2016)), and this means that Norwegian law mainly fulfils its obligations to the Istanbul Convention. However, as mentioned under Section 10.1.1, following a recent ruling by the Supreme Court, several political parties have initiated a campaign to change the law on stalking so that hidden stalking will also be a crime according to Norwegian legislation. The public prosecutor has already drafted a new bill on this matter and sent it to the Director of Public Prosecutions.¹⁷⁴ However, the Director of Public Prosecutions has not yet considered the bill.¹⁷⁵

¹⁷⁰ See Article 266 at: https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2.

¹⁷¹ Supreme Court judgment of 21 March 2019 in HR-2019-563-A.

¹⁷² <https://www.dagbladet.no/nyheter/rystet-etter-stalking-frifinnelse---slik-skal-det-ikke-vaere/70918064>.

¹⁷³ See the Norwegian National Human rights Institution website: <https://www.nhri.no/2018/ett-ar-med-istanbulkonvensjonen/>.

¹⁷⁴ See article in Norwegian newspaper VG from 26 May 2019; 'Smutthull' tillater skjult stalking: *Riksadvokaten fraråder hastebehandling av loven* (Hidden stalking is not a crime. The Director of Public Prosecutions doesn't want to deal with the bill proposal quickly), available at: <https://www.vg.no/nyheter/innenriks/i/Opzdk1/smutthull-tillater-skjult-stalking-riksadvokaten-fraraader-hastebehandling-av-loven>.

¹⁷⁵ See article of 26 May 2019 in Norwegian newspaper VG: <https://www.vg.no/nyheter/innenriks/i/Opzdk1/smutthull-tillater-skjult-stalking-riksadvokaten-fraraader-hastebehandling-av-loven>.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

The author is not familiar with any surveys or reports about difficulties related to obtaining legal redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

As a general rule, in Norway the procedures for addressing discrimination issues are the same for employment in the private and public sectors. In Norway, there are no special procedures for enforcing the principle of equal treatment if the case is taken to the courts, as this follows general legal principles.

For matters within the scope of the WEA, the law itself has a special procedure to be followed (WEA, Chapter 17), which gives a number of clear timelines.

For the enforcement of the GEADA within the ordinary civil courts, discrimination cases follow the 'normal' procedural rules for civil cases as set out in the Dispute Act.¹⁷⁶

There are no specific procedural rules when referring a case to the administrative dispute mechanism, the Equality Tribunal, other than those laid out in the Act on the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA), described below under 'Equality bodies'.

11.1.3 Political and societal debate and pending legislative proposals

The courts can award redress/compensation and damages in all discrimination cases.

Only the Equality Tribunal has a mandate to give administrative decisions, including redress and compensation/damages, under Article 12 of the EAOA. The Tribunal may make an administrative decision concerning redress in the context of an employment relationship and in connection with an employer's selection and treatment of self-employed persons and hired workers. The Tribunal may make a unanimous administrative decision concerning damages in connection with a breach of the discrimination provisions, if the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections. Following this change, there has not been any particular public debate on this matter and there are no relevant pending legislative proposals at the moment.

With the amendment from June 2019 on sexual harassment (due to enter into force on 1 January 2020), the Equality Tribunal will have a mandate to deal with individual complaints of sexual harassment and also to award redress/compensation and damages in these cases, as stated in Article 12 of the EAOA. Claims for redress and damages in other cases of sexual harassment, which the Tribunal doesn't have a mandate to consider, will have to be brought before the courts (for more on this see Section 3.1.1 above, under *sexual harassment*). However, the Equality Tribunal does not have a mandate to award compensation/damages in cases based on Article 13(6) of the GEADA on the employer's duty to prevent harassment and sexual harassment. It is the Equality Tribunal that enforces this provision, but the Tribunal does not have the authority to impose redress

¹⁷⁶ See Act of 17 June 2005 no 90 relating to mediation and procedure in civil disputes (the Dispute Act), available at: <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

and compensation. Any claim for redress and compensation in these types of cases must therefore be submitted to the ordinary courts.

11.2 Victimisation

In national law the directives' provisions on victimisation are implemented through Article 14 of the GEADA and Article 2 A-2 of the WEA. If there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment shall be assumed to have taken place unless the person responsible proves, on the balance of probabilities, that such differential treatment did not take place. This goes for all discrimination cases and applies equally to situations of reprisals and victimisation. In addition, it is not permitted to retaliate against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted. There is a limitation to this right, and that is in instances where the complainant has acted with gross negligence. The protection against victimisation applies correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

Both the Ombud and Equality Tribunal have dealt with a limited number of cases in which victimisation was alleged. The Equality Tribunal Case 27/2008 was subsequently taken to the Oslo municipal court by the municipality of Oslo, which was accused of reprisals. The decision of the Tribunal was overruled by the court, which found that the refusal to employ a male nurse was due to his personal abilities, and that he was not subject to reprisals or victimisation by the former employer, as the decision to refuse to use his services as a nurse was taken before he brought the case to the Ombud and the Equality Tribunal.¹⁷⁷

In a court case on discrimination on the grounds of age and gender, the female complainant was found to have been subject to victimisation in breach of the GEA and WEA, Articles 2-5 and 13-8.¹⁷⁸

Other examples from the Equality Tribunal include Case 20/2018¹⁷⁹ concerning the question of whether a municipality acted in breach of the prohibition against discrimination and harassment on the grounds of gender in connection with the complainant's appointment and training as a fire fighter. The case also raised questions about whether the employer had exposed the complainant to retaliation and fulfilled its duty to prevent and seek to prevent sexual harassment in the workplace.

The Equality Tribunal concluded that the municipality had not discriminated against or harassed the complainant on the ground of gender in connection with their appointment and training to become a fire-fighter, and that the municipality had not acted in violation of the prohibition against retaliation/victimisation.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Access to the courts is in theory legally guaranteed for alleged victims of sex discrimination. However, an important and significant challenge is that, in practice, few cases make it to the courts. The low rate of court litigation in Norway is due to the risks and costs involved in litigation, and the difficulties in obtaining free legal aid in discrimination cases, among other factors. It is not a procedural requirement to be represented by a lawyer or legal practitioner in court, as it is given as a right – but not a duty – to use counsel.

¹⁷⁷ Oslo municipal court, first instance judgment of 27 October 2009, case number TOSLO-2009-72697.

¹⁷⁸ Øst-Finnmark district court, judgment of 17 March 2010, case number TOSFI-2009-136827.

¹⁷⁹ Statement of 19 December 2018 from the Equality Tribunal.

The key costs of the judicial proceedings in civil cases are, however, the fees linked to legal counsel – that is, the fee of the lawyer. Where a complainant is not represented by legal counsel, the judge has an extended or specific duty to advise the complainant/victim of procedural matters that might be of relevance to the case. The court also has a duty to assist the complainant/victim in setting up a proper writ summons to start the case, and to assist in making an appeal, as long as the complainant/victim appears in court and asks for assistance.

There is furthermore a significant economic risk linked to the costs of proceedings. The general rules on costs of proceedings in discrimination cases before the ordinary courts are found in Chapter 20 of the Dispute Act, and are also applicable in discrimination cases. The general rule is that the successful party is entitled to full compensation for their legal costs from the opposite party (Article 20-2(1) of the Dispute Act). The court can exempt the opposite party from liability for legal costs in whole or in part if the court finds that 'weighty grounds' justify exemptions (see Article 20-2(3)). These costs are practical barriers for most discrimination complaints.

Although the courts do handle discrimination cases, and although the number of cases handled by the courts is increasing, the overwhelming number of discrimination cases in Norway are still channelled through the Equality Tribunal.¹⁸⁰

Another barrier is that the rules regarding the qualifications of judges and lay judges are vague in both civil and criminal cases. Article 55 of the Courts of Justice Act states that judges should fulfil high standards both personally and professionally and must perform their duties impartially and in a way that promotes mutual trust and respect. Article 70 of the Courts of Justice Act is particularly problematic, as it stipulates only that a lay judge must be 'personally suitable'. If this is not the case, the person may not be elected or must be excluded from the pool of lay judges.¹⁸¹ This may create doubts about the impartiality of the courts in both civil and criminal cases.

The total number of discrimination cases brought to court remains small, especially compared with the volume of cases brought before the Equality Ombud. The Equality Ombud and the Equality Tribunal have detailed annual statistics for their work and they receive more than 95 % of all discrimination cases.

Thus, the question may still be raised as to whether, in reality, victims of sex discrimination have the necessary access to justice / efficient sanctions and remedies.

11.3.2 Availability of legal aid

Legal aid is offered to individuals whose income is below a certain level.¹⁸² In 2019 the eligibility thresholds for free legal aid were NOK 246 000 for single households (EUR 28 000) and NOK 369 000 (EUR 41 000) for spouses/co-habiting partners. Discrimination as a ground for eligibility for free legal aid does not exist.

However, some organisations do offer free legal support in discrimination cases, for example Juridisk rådgivning for kvinner (JURK), Jussbuss, Jusshjelpa and Jussformidlingen. These organisations are linked to the law faculties at the largest universities in Norway, such as Oslo, Bergen and Tromsø, and are so-called 'legal clinics'.

The Equality Ombud also offers free guidance on discrimination law to some extent.

¹⁸⁰ As of 1 January 2018 only the Equality Tribunal can deal with individual complaints of discrimination after the amendments of EAOA that entered into force on 1 January 2018.

¹⁸¹ Act relating to the Courts of Justice (Courts of Justice Act) of 13 August 1915 No. 5, available at: <https://lovdata.no/dokument/NL/lov/1915-08-13-5>.

¹⁸² See Regulation concerning free legal aid FOR-2005-12-12-1443 (*Forskrift til lov om fri rettshjelp*), available at: https://lovdata.no/dokument/SF/forskrift/2005-12-12-1443?q=fri_rettshjelp.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

The gender differences in the education system largely reflect the horizontal gender division in the labour market.

People's choice of education affects what jobs women and men choose and can also contribute to (re)producing a gender-divided labour market. On the other hand, a gender-divided labour market can also affect people's educational choices. When occupations are dominated by one gender it can help to (re)produce gendered stereotypes. Gender-divided educational choices and a gender-divided labour market can help to create, reinforce and maintain each other.

However, when it comes to education, boys on average achieve lower grades than girls at school, female students increasingly undertake previously male-dominated higher studies at universities, and this may reflect on the jobs women and men choose in the future. In order to ensure that men and women have equal rights to a successful outcome to their education it is important to focus on what happens to boys and girls early on in the education system and to ensure their equal opportunities regardless of sex.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

The recognition of horizontal direct effects of the Charter provisions has not yet had specific relevance for better enforcement of gender equality in Norway, but due to an increased focus on this matter, it is expected to affect gender equality law and the development of practice in discrimination cases.

11.5 Burden of proof

Norwegian national law permits a shift of the burden of proof from the complainant to the respondent. The rule of a shared burden of proof applies to all grounds of discrimination, including harassment, victimisation and instructions to discriminate, see Article 37 of the GEADA and Article 13-8 of the WEA.

In cases concerning dismissals according to the labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases – as a general rule – the burden of proof rests with the claimant. This is why the shifting of the burden of proof as, implemented in the discrimination legislation, is important. In all discrimination cases, if there are circumstances that give '*reason to believe*' that there has been direct or indirect differential treatment in contravention of the said legislation, such differential treatment shall be assumed to have taken place, unless the person responsible proves, on the balance of probabilities, that such differential treatment nevertheless did not take place. Article 37 of the GEADA states:

'Discrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred, and the person responsible fails to substantiate that discrimination did not in fact occur.'

If the claimant provides a '*reason to believe*' that discrimination has occurred, the burden of proof shifts to the employer/ discriminator. If the employer/ discriminator fails to fulfil the burden of proof, discrimination is assumed to have occurred.

In a judgment from the Norwegian Supreme Court ('Kontreadmiral')¹⁸³ the Court stated that the 'burden of proof' will be reversed/ transferred to the employer if sex/gender is mentioned during the case preparation.

The Equality Tribunal has also stated that for the burden of proof to be reversed/transferred the allegation must be 'supported by the chain of events and the external circumstances of the case which necessitate an assessment of the specifics of that case'.¹⁸⁴

However, Equality Tribunal Case 97/2018¹⁸⁵ is interesting when it comes to 'burden of proof' because in this case the Equality Tribunal made a, overall assessment of the evidence instead of starting by transferring the burden of proof to the employer. Normally, the Tribunal starts by discussing the burden of proof. The question was whether a woman was discriminated against on the ground of sex when she wasn't hired for a position as head teacher at a school. A male applicant got the job.

Two candidates were called for interview by the municipality (employer), including the female complainant. The male applicant was ranked number one and accepted the position. The female applicant's union complained, arguing that the complainant had been discriminated against on the ground of sex when she wasn't offered the position. The municipality, on the other hand, argued that it had offered the best qualified candidate the job and that gender had nothing to do with it.

The Equality Tribunal concluded that gender was not the main reason the male applicant was chosen, but that gender had been part of the decision. To achieve gender balance among school head teachers was explicitly listed as something the municipality wanted to achieve. However, the argument on gender balance came last, and after the consideration of the male applicant's experience. The Tribunal concluded that there was no 'reason to believe' that the female applicant was discriminated against on the ground of sex when she didn't get the job.

The Tribunal might have reached the same conclusion if it had transferred the burden of proof to the employer. However, 'reason to believe' requires less with regard to evidence than the usual balance of probabilities in discrimination cases.¹⁸⁶

In an article by a previous head of the Equality Tribunal and the head of its Secretariat, the conclusion was drawn that the current rules on the reversal of the burden of proof are useful and fulfil the EU requirements.¹⁸⁷ As the practice of the Equality Ombud and the Equality Tribunal has not changed based on the new wording of the legislation, the revised text is also in line with the EU requirements, including the CJEU judgement of 21 July 2011 (C-104/10 *Patrick Kelly vs National University of Ireland*) and CJEU judgment of 19 April 2012 (Case C-45/10 *Galina Meister vs Speech Design Carrier Systems*).

¹⁸³ Supreme Court judgment of 29 April 2014 in Rt 2014 s.402 (only available via non-public link in 'Lovdata Pro').

¹⁸⁴ See Statement of 21 December 2006 from the Equality Tribunal in Case 26/2006 in which this quote was used by the dissenting member of the Equality Tribunal. Although the remainder of the Equality Tribunal in this particular case did not agree with the dissenting member, the quote was later referred to by the Equality Ombud and the Equality Tribunal in a number of subsequent cases.

¹⁸⁵ Statement of 26 March 2019 from the Equality Tribunal.

¹⁸⁶ See the Preparatory works in Prop. 81 L (2016-2017) Chapter 28.4.2.2 p. 293.

¹⁸⁷ See Syse, A. Helgeland, G. (2009), 'Reglene om delt bevisbyrde i norsk diskrimineringsrett' ('The rules on the shared burden of proof in Norwegian discrimination law'), in Aune, H. Fauchald, O.K., Lilleholt, K. and Michalsen, D. (eds), *Arbeid og Rett, Festskrift til Henning Jakhellns 70-årsdag*, Cappelen DAMM.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Applicable sanctions in EU gender equality law.

Sanctions according to the GEADA and the WEA that are enforced by the civil courts consist of liability for damages and compensation/ redress awarded to the discrimination claimant. Sanctions according to criminal law consist of penalties such as fines or imprisonment. Sanctions are largely equally applicable in private and public employment. In general, they cover all discrimination grounds in all fields. The provisions on sanctions are found in Article 38 of the GEADA and Article 13-9 of the WEA.

There are several general rules on compensation in Norwegian legislation that are applicable when it comes to gender equality law. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation set mainly by the Act relating to Compensation,¹⁸⁸ as well as by the non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

Article 38 of the GEADA regulates redress/compensation and damages as of 1 January 2018. In employment relationships and in connection with an employer's selection and treatment of self-employed people and hired workers, the employer's liability in cases of discrimination exists irrespective of whether the employer can be blamed. The general rule on liability in discrimination cases is that '[i]n employment relationships and in connection with an employer's selection and treatment of self-employed persons and hired workers, employer's liability exists irrespective of whether the employer can be blamed.' Article 38(2) of the GEADA. The responsibility for damages is objective, not based on the intention or fault (*culpa*) of the employer. (When it comes to harassment/sexual harassment other rules apply, see below.) In other sectors of society, fault-based liability exists.

When it comes to harassment and sexual harassment, as a general rule, the person perpetrating the harassment is liable. In order for an employer to be liable for harassment, the harassment must have been committed by someone who can be identified with the employer, or that the employer can in any way be blamed for. To determine whether the employer is liable, a key issue is whether the employee was in a management position or otherwise had the authority to instruct the person in question. The employer cannot be held objectively responsible for an employee who harasses a colleague. There were different signals in the preparatory works on this matter.¹⁸⁹

To try to clarify the rules on this matter the following sentence was added to Article 38(2) of the GEADA in 2019¹⁹⁰ and will be in effect from 1 January 2020: 'In cases concerning harassment and sexual harassment, and in sectors of society other than those specified in the first sentence, liability shall exist if the person responsible can be blamed.'

¹⁸⁸ Lov om Skadeerstatning LOV-1969—06-13-26 of 1 July 1967 (Act relating to Compensation of 13 June 1969, No. 26).

¹⁸⁹ In the preparatory works to the recent changes in the GEADA giving the Equality Tribunal the authority to make decisions in cases concerning sexual harassment, it is stated that strict liability cannot follow from judicial interpretation, even when the employer perpetrates the harassment. Norway, Prop. 63 L (2018-2019) p. 16. However, according to the main preparatory works to the GEADA, there is strict liability for the employer if someone acting on behalf of the employer has perpetrated the harassment. Norway, Proposition to parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.4.

¹⁹⁰ See the preparatory works Prop 63 L (2018-2019) pkt 2.6.5.4: <https://www.regjeringen.no/no/dokumenter/prop.-63-l-20182019/id2639399/?ch=2#KAP2-6> (Only in Norwegian).

It is, however, still rather uncertain what degree of liability the employer now has when they themselves or their representatives harass someone, but based on the latest preparatory works it seems this will depend on the intention or fault (*culpa*).

According to Article 13(6) of the GEADA there is also a duty of due diligence for the employer¹⁹¹ regarding harassment that is perpetrated by other persons in the workplace, which is twofold: 1) a duty to prevent harassment in general, and 2) a duty to prevent the continuation of harassment when made aware of the existence of such.¹⁹² The liability for the employer thus does not include a situation when the harassment takes place between colleagues if no blame is attached to the employer.¹⁹³ According to Article 38 (1) a) of the GEADA, the Equality Tribunal does not have mandate to award compensation/damages in cases based on Article 13(6). Claims for compensation damages in these cases have to be taken to the ordinary courts.

Outside the scope of Article 38 of the GEADA, the liability follows the rules of the Act relating to compensation in certain circumstances.¹⁹⁴

Regarding redress/compensation for non-economic loss, all acts contain the general rule that compensation will be set at an amount that is reasonable in view of the scope and nature of the harm, the relationship between the parties and other circumstances (see Article 38(3) of the GEADA and Article 13-9 of the WEA).

Preliminary injunction on the right to remain in position: a practical form of 'sanction' often claimed by victims of discrimination in employment is the right to remain in their position until the case has been finally decided in court. This has been granted on one occasion related to age discrimination in the context of interlocutory judgments,¹⁹⁵ but refused by the Supreme Court¹⁹⁶ and in later cases by the appellate court.¹⁹⁷

Article 39 of the GEADA provides penalties in the form of fines or imprisonment for up to three years for the perpetrators of a serious case of discrimination. that has been committed jointly by several persons.¹⁹⁸ However, this is only in relation to discrimination based on ethnicity, religion or belief.¹⁹⁹

The Equality Tribunal also has a mandate to give an administrative decision including redress/compensation and damages under Article 12 of the EAOA. However, according to Article 12 of the EAOA the Equality Tribunal can only award redress/compensation in employment relationships and in connection with an employer's selection and treatment

¹⁹¹ The employer's responsibilities to prevent harassment includes persons who are in relationships to them similar to employees, such as persons temporarily hired directly or through an agency to perform tasks for the employer. Norway, Proposition to parliament, Prop. 81 L (2016-2017) Chapter 28.5.8.

¹⁹² Proposition to Parliament, Prop 63 L (2018-2019) p. 16.

¹⁹³ Proposition to the Odelsting, Ot. prp. nr. 35 (2004-2005). Page 50 and Norway, Proposition to parliament, Prop.81 L (2016-2017) side 337.

¹⁹⁴ Act relating to compensation in certain circumstances (*Skadeserstatningsloven*) of 13 June 1969 No. 26.

¹⁹⁵ For example, judgment of 19 November 2009 by the Oslo municipal first instance court in Case No. 09-143503TVI-OTIR/02.

¹⁹⁶ In its judgment Rt 2011-974/ HR-2011-1294-A of 29 June 2011, the Supreme Court did not give the claimant the right to continue in her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company.

¹⁹⁷ Judgment of Borgarting Court of Appeal of 18 June 2014 in Case No. LB-2014-56188 (*Mediaas-saken*).

¹⁹⁸ In an assessment of the penal protection against discrimination on behalf of the former Ministry of Children and Equality (now Ministry of Culture), Professor Kjetil Mujezinovic Larsen assessed the former ADA Article 26 and suggested that it be continued in the upcoming legislation, and that it should be extended to cover all grounds in a holistic new law. He furthermore proposed that gender, gender identity and gender expression should be included in the penal protection: see

<https://www.regjeringen.no/no/dokumenter/utredning-om-det-strafferettslige-diskrimineringsvernet/id2520561/> (in Norwegian only). It was upheld, but not extended to other grounds.

¹⁹⁹ See the legal preparatory works: Proposition to Parliament, Prop 81 L (2016-2017) *Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)* (GEADA), Chapter 28.6.

of self-employed persons and hired workers, and award damages if the only submissions made by the respondent relate to inability to pay or other manifestly untenable objections.

The Equality Tribunal also has limited authority to make an administrative order – that is to order an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition.

The Equality Tribunal may set a time limit for compliance with the order. The Equality Tribunal will state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure implementation of orders pursuant to Article 7, if the time limit for complying with the order is exceeded (see EAOA, Article 13). The coercive fine begins to run if a new time limit for complying with the order is exceeded and will normally run until the order has been complied with. The Equality Tribunal may reduce or waive a fine that has been imposed when special reasons warrant doing so. The coercive fine accrues to the State. An administrative decision to impose a coercive fine constitutes grounds for enforcement. The Equality Tribunal must state the grounds for an administrative decision to impose a coercive fine at the time the decision is made. So far, the Equality Tribunal has made use of its mandate to impose a coercive fine only once, in a case concerning universal design.

Level of remedies and sanctions

There are no upper limits for compensation or damages, nor are there rules for calculation provided in the national legal framework. The compensation must as a rule compensate for actual loss.

Redress/compensation has only been awarded in two Supreme Court cases,²⁰⁰ both of which concern discrimination on the ground of membership of trade unions.

In the *Gate Gourmet 2* case, the Eidsivating²⁰¹ Court of Appeal awarded compensation for real economic loss because of discrimination due to membership of a trade union. In Case Rt-2011-1755 *Gate Gourmet* the Supreme Court found that the employees had been discriminated against in violation of the general rule in the Working Environment Act (Article 13-1, first paragraph) because jobseekers who were members of another union got preferential hiring. The 50 complainants were awarded NOK 5 000 (EUR 625) in non-monetary damages for discrimination incurred. In subsequent cases at the Øvre Romerike district court²⁰² and the Eidsivating Court of Appeal, the claimants were awarded compensation for loss incurred. The compensation to all the claimants totalled more than NOK 8 million (approximately EUR 1 million).

In the other case where compensation was awarded, Rt 2001-248²⁰³ *Olderdalen*, NOK 100 000, (approximately EUR 12 000) was awarded to the claimants to compensate for economic loss because of discrimination due to political affiliation. The WEA at the time did not contain a clause specifically on liability for economic loss, thus the comparable sanctions used for gender discrimination were referred to.

In the other cases before the Supreme Court, compensation has either not been claimed, or the case was lost and compensation thus not awarded. Noteworthy is the lack of compensation awarded in a Supreme Court judgment of 30 January 2017.²⁰⁴ This case

²⁰⁰ Supreme Court judgment of 22 December 2011 in Rt-2011-1755 (public link not available in 'Lovdata Pro').

²⁰¹ Judgment of 28 March 2014 from Eidsivating Court of Appeal, Case No. LE-2013-113570.

²⁰² Judgment 23 April 2013 from Øvre Romerike District Court in Case 12-073184TVI-OVRO.

²⁰³ Supreme Court judgment of 22 February 2001 in Rt-2001-248 (no public link available in 'Lovdata Pro').

²⁰⁴ Supreme Court Judgment of 30 January 2017 in HR-2017-219-A (public link not available in 'Lovdata Pro').

was a direct follow-up to the Supreme Court Case Rt 2012-219,²⁰⁵ where the Supreme Court found that the pilots had been discriminated against (see Section 12.2 below for a description of the case). The same court subsequently found that the discrimination did not merit compensation.

Apart from these judgments, compensation has been awarded in lower court cases: discrimination on grounds of gender/ pregnancy²⁰⁶ and concerning age and gender. The cases all concern employment relations.²⁰⁷ The non-pecuniary compensation for the discrimination was set above NOK 100 000 (approximately EUR 12 000) in the three recent cases. This is considered to be a high level of compensation when compared with, for example, the level of compensation in cases of unjustified dismissals within employment. In cases concerning Article 15-2 of the WEA and dismissals the courts have also rewarded compensation. In the judgment in Case LB-2018-159246²⁰⁸ the compensation was set at NOK 705 000, about EUR 78 000 (see Section 5.2.11).

In a case from 2019 concerning sexual harassment from Hålogaland Court of Appeal²⁰⁹ damages were set at NOK 36 387 (EUR 4 000) and the redress/compensation was set at NOK 20 000 (EUR 2 200). The redress/compensation in this case seems low. However, not many cases of sexual harassment have yet come before the Norwegian courts.

To the author's knowledge there is no statistical information available concerning the average amount and level of compensation available to victims.

11.6.2 Effectiveness, proportionality and dissuasiveness

The remedies and sanctions in national law to some extent meet the EU law standards. The existing sanctions are effective, proportionate and dissuasive when they are used. However, as mentioned several times in this report, it is a challenge with the Norwegian system that only a very limited number of discrimination cases are brought before the ordinary courts.

Until recently, there were few consequences for breaches of the anti-discrimination legislation. The changes in the EAOA as of 1 January 2018, giving the Equality Tribunal the power to award non-monetary damage in cases concerning employment, might partly overcome this barrier,²¹⁰ but a lot of cases will continue to lack efficient remedies, for example various types of harassment outside employment relationships. In such cases the Equality Tribunal can award only damages for economic loss in some specific cases, not redress (EAOA, Article 12).

In 2019 the Equality Tribunal awarded redress/ compensation in only one case concerning gender equality.²¹¹ The compensation was set at NOK 60 000 (EUR 6 600). The amount

²⁰⁵ Supreme Court Judgment of 14 February 2012 in Rt-2012-219 (public link not available in 'Lovdata Pro').

²⁰⁶ These are: Court of second instance/ Judgment from Hålogaland Court of Appeal, of 21 January 2009, LH-2008-99829 (*Bang-saken*); Oslo municipal court judgment of 17 November 2006, Case No. TOSLO-2006-52718; and court of second instance/ Eidsivating Court of Appeal, 12 December 1994, Case No. LE 1994-892 (*Lufthansa*).

²⁰⁷ Judgment of 17 March 2010 from Øst-Finnmark court of first instance, Case No. 09-136827TVI-OSFI (age and gender).

²⁰⁸ Judgment from Borgarting Court of appeal of 13 March 2019 in LB-2018-159246 (no public link available in 'Lovdata Pro').

²⁰⁹ Judgment from Hålogaland Court of Appeal of 19 December 2019 in LH-2019-87696, LH-2019-135298 and LH-2019-135300 (the case is also mentioned in Section 3.7.6 of this report under sexual harassment).

²¹⁰ See the legal preparatory works: Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, building on the paper sent for public hearing in 2016: <https://www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf>. This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf>.

²¹¹ Statement of 4 October 2019 from the Equality Tribunal.

was set for a number of reasons: pregnancy is particularly strongly protected in the legislation; it was found the employer could be blamed; the discrimination had major financial consequences for the woman; and the relationship between the parties was very unequal, with a large municipality with resources against the complainant.

As for remedies regarding the public sector except for employment relationships, the Equality Tribunal can evaluate the decisions of other parts of the public administration, even if they can't overrule them, see Article 14(2) of the EAOA. For the most part, the Equality Tribunal appears to have been reluctant to use this possibility so far.

When it comes to the Equality Tribunal's power to issue fines, the mandate to make use of fines is more a coercive tool, as this sanction has been used so rarely.²¹² The lack of use is a problem. The effectiveness of this sanction may also be questioned.

In addition, in Norwegian courts, the procedure is oral, with direct presentation of proof and witnesses. Few complainants are represented by lawyers specialising in discrimination cases, instead they are often represented by either NGOs, 'legal clinics' or barristers, or they choose to represent themselves in court.

The Equality Tribunal is an administrative body, with written procedures instead of oral. Presenting a case in writing is difficult for complainants when they do not know the law, have little experience with presenting such matters, and have little idea what type of proof is needed. Lack of legal aid is thus an issue not only before the courts but also before the Equality Tribunal. An oral hearing in court may also give a different result, as the court will hear the case again in full, and not use the findings of the Equality Ombud and Tribunal alone.

The Equality Ombud has assisted complainants in a few cases before the Equality Tribunal and this might, to a limited degree, remedy this problem. With the new amendment on sexual harassment some sexual harassment cases may have oral hearings.

Furthermore, current legislation contains sanctions that are seldom used: liability for damages/ compensation/ redress, penalties and administrative orders (that is an order for an act to be stopped or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions or reprisals cease and to prevent their repetition). This makes sanctions in practice less effective than their legislative potential.

11.7 Equality body

The organisation and mandate of the Norwegian equality bodies were changed under the EAOA, in force from 1 January 2018. The Equality Ombud²¹³ no longer functions as a first instance complaints mechanism, but provides advice to victims of discrimination and others. In 2019, the Ombud decided to provide assistance in a few cases before the Equality Tribunal,²¹⁴ as it was seen to be necessary to ensure that the complainants' side of the story is adequately described and argued before the Equality Tribunal, and thus to achieve effective access to justice.²¹⁵ However, this approach is limited to a small number of cases and to issues that affect many people.

²¹² In Case 7/2012, the Equality Tribunal warned the hotel that if it did not follow the order given by the deadline of 1 January 2014, a coercive fine might be issued.

²¹³ See the Equality Ombud website in English: <http://www.ldo.no/en/>.

²¹⁴ See the Equality Tribunal website in Norwegian: <http://www.diskrimineringsnemnda.no/nb/innhold/side/forside>.

²¹⁵ Equality and Anti-Discrimination Ombud (2019) Annual report 2018, p. 8. Available at: <https://www.ldo.no/ombudet-og-samfunnet/om-ombudet/arsmeldinger/arsmelding-2018/>.

The Equality Ombud is funded by annual grants financed until late 2018 by the Ministry for Children and Equality, then by the Ministry for Culture after the Christian Democrats entered the Government and took over the former ministry.

The funds allocated through the state budget for 2019 as income for the Ombud were approximately NOK 48 020 000 (approximately EUR 4 278 065), while the budget in 2018 was NOK 42 929 000 (approximately EUR 4 300 000). The Equality Ombud has reported that in 2019 it received a total of 1 988 enquiries on all discrimination grounds regarding guidance in discrimination cases and political work within the scope of the Equality Ombud's remit. Of these, there were 659 enquiries regarding sex discrimination.^{216 217}

There is recent evidence of both positive political support for and political hostility to the designated bodies. On the one hand, one of the political parties in the current multi-party Government has several times stated that it does not want equality bodies, and the Progress Party, the second largest party in the Government coalition, has had two Ministers for Justice who have repeatedly made racist comments, with apparently limited reactions from the Prime Minister. The Progress Party left the Norwegian Government in January 2020. On the other hand, the same Government has changed the EAOA so as to give the Tribunal the power to give redress for breaches of the act (as of 1 January 2018), as well as giving the Equality Tribunal the authority to assess cases of sexual harassment. It is assumed that this will lead to greater effectiveness of the legislation as well as increasing access to justice for victims of discrimination.

The Equality Tribunal is the only equality body in Norway that investigates complaints. Its members are appointed by the Ministry of Culture for a term of four years, with the possibility of reappointment. The chair must fulfil the requirements prescribed for judges. The Equality Tribunal has a secretariat, whose staff are public employees. The 2019 budget for the Equality Tribunal and its secretariat was NOK 22 260 000 (approximately EUR 1 983 127) and in 2018 it was NOK 18 611 000 (approximately EUR 1 860 000).²¹⁸

In 2019, the Equality Tribunal received a total of 291 complaints on all discrimination grounds, with 103 cases concerning sex discrimination (including pregnancy, parental leave and cases concerning caring responsibilities, gender identity and gender expression).²¹⁹

Until recently, there were few consequences for breaches of the anti-discrimination legislation. The changes in the EAOA as of 1 January 2018 giving the Equality Tribunal the power to award non-monetary damages in cases concerning employment has partly overcome this barrier.²²⁰ In 2019 the Equality Tribunal awarded compensation for the first time, though in just one sex discrimination case.²²¹

²¹⁶ Email from a representative of the Equality Ombud of 23 March 2020.

²¹⁷ Figures from the national budgets of 2018 category 11.10, at: https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at: https://www.statsbudsjetten.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

²¹⁸ Figures from the National budgets of 2018 category 11.10, at: https://www.regjeringen.no/no/dokumenter/prop.-1-s-bld-20172018/id2574097/sec2?q=ombud#match_2, from 2019 at: https://www.statsbudsjetten.no/upload/Statsbudsjett_2020/dokumenter/pdf/GULBOK.pdf.

²¹⁹ See the Equality Tribunal's website on statistics for 2019: <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/sokstatistikk>.

²²⁰ See the legal preparatory works: Proposition to Parliament, Prop 80 L (2016-2017) *Lov om likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven)*, (Equality and Anti-Discrimination Ombud Act) developing the paper sent for public hearing in 2016: www.regjeringen.no/contentassets/14dd1daa159348c88de5dbe043feb0a4/horingsnotat.pdf. This proposal builds on an assessment of the structure and mandate of the equality bodies finalised in March 2016, see: <https://www.regjeringen.no/contentassets/04bd6c545ae74c4e4bea246f44dcf4942/utredning-av-handhevings--og-virkemiddelapparatet-pa-likestillings--og-diskrimineringsfeltet.pdf>.

²²¹ Statement of 4 October 2019 from the Equality Tribunal in Case 2018/410.

Due to processing delays, cases are not always dealt with promptly and effectively. An issue of concern, at least in part due to the large number of cases as well as the recent reorganisation and move of the Tribunal from Oslo to Bergen, is the very high number of cases that are closed and dismissed: 144 of a total of 244 decisions in 2019, i.e. 59 %. Many of these appear debatable, but the facts described in the publicly available decisions are often too sparse to say for sure. The Equality Tribunal publishes its decisions in an online database and systematically registers some other statistical data. Decisions were made in 244 cases in 2019.²²²

So far, no research has been carried out to analyse the case work of the Equality Tribunal over the last few years.

Purpose and competence of the bodies:

The Equality Ombud's primary responsibilities are to:

- promote equality and prevent discrimination on the basis of sex and gender, pregnancy and parental leave, care work, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age, in all areas of society;
- provide advice about discrimination law; and
- monitor the implementation of the UN conventions CEDAW, CERD and CRPD.²²³

The Ombud runs courses and presentations on discrimination issues and participates in campaigns with both civil sector and public agencies. It has recently started to provide legal assistance in a few cases before the Equality Tribunal and, since 2018, it has also acted as *amicus curiae* at the request of a lawyer in discrimination cases before the courts.²²⁴

From 1 January 2018 the Ombud's mandate has been to provide advice to anybody who contacts it (Article 5(2) of EAOA), victims and defendants.

As mentioned in Section 3.3.4, the Parliament has approved amendments to the GEADA on 'activity and reporting duties', including for companies.²²⁵ This means that, from 1 January 2020, the public administration's duties to work proactively against discrimination will be strengthened significantly, which could prove positive in terms of making the gender equality legislation more visible.

At the same time, the duty of employers to report on their efforts to promote equality was significantly strengthened, see Articles 26, 26a, 26b and 26c of the GEADA. This duty was removed by the right-wing government some years ago, but has now been reintroduced by the same government, together with increased funding for the Equality and Anti-Discrimination Ombud to provide guidance and revisions of the reports by employers and public administration regarding their efforts (Article 5(4) of the EAOA).

²²² Statements were made in 157 cases in 2018, and in 58 cases in 2017. Equality Tribunal (2018) Annual Report for 2017 and Equality Tribunal (2019) Annual Report for 2018, available at: <http://diskrimineringsnemnda.no/nb/innhold/side/rapport>.

²²³ EAOA, Article 5.

²²⁴ A case regarding pregnancy and discrimination, Borgarting Court of Appeal, Case No. 18-159246ASD-BORG/01. Emails to the author from the Ombud (5 April 2019 and 15 May 2019).

²²⁵ Link to the legal decision from the parliament with the amendment: <https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/>. The text has not been translated into English and there is no English summary. See also Flash report of 30 July 2019 available at: <https://www.equalitylaw.eu/downloads/4947-norway-amendments-to-the-act-on-the-equality-and-anti-discrimination-ombud-and-the-equality-and-anti-discrimination-tribunal-and-gender-equality-and-anti-discrimination-act-pdf-77-kb>.

This revision also included changes to the Act on Annual Accounting (Accountancy Act, Article 3-3c),²²⁶ stating that large enterprises must report on their efforts regarding anti-discrimination and human rights.

The Equality Ombud's role in connection with the increased duty of activity and accountability is stated in Article 5, fourth paragraph, of the amended EAOA. The Equality Ombud can, among other things, review the gender equality reports and conduct follow-up visits to companies.

The need for guidance for individuals from the Equality Ombud and for it to run more courses will probably increase, since the Equality Tribunal, as of 1 January 2020, will treat individual complaints of sexual harassment. The Ministry of Culture has also stated that the main focus of strengthening the counselling and assistance services should be directed towards preventive and structural work, cf. in the mandate of the Equality Ombud. It is now explicitly stated in Article 5, second paragraph, of the EAOA that anyone can turn to the Ombud for guidance, even in individual cases. The reference to individual cases is made to make it clear that people who have experienced sexual harassment should have a place to go for guidance.

The Equality Ombud has recently also started to assist victims in cases before the Tribunal, but only a selected few. In its strategy, it states that it gives priority to cases that will have an effect for many people,²²⁷ which may prove a problem for small groups such as LGBT groups and minorities within minorities.

In 2019 the Ombud also sent its first complaint on its own initiative to the Equality Tribunal on the facilities for female prisoners in Tromsø fengsel, a prison for both male and female inmates.²²⁸

The Equality Tribunal is the only administrative body with the competence to issue independent recommendations on discrimination issues in relation to private parties but does not have a mandate to issue binding recommendations in relation to other public agencies, according to Article 14 of the EAOA. The decision of the Equality Tribunal is a legally binding administrative decision if the case is against a private party as per Article 11 of the EAOA. However, the Tribunal may not make an administrative decision establishing that an administrative decision of another public administrative agency breaches provisions in the anti-discrimination acts, but may issue a statement as to how the Tribunal evaluates the case in relation to the anti-discrimination legislation (see Article 14 of the EAOA). The Tribunal does not have the competence to evaluate the actions of the Parliament or courts and their administrative branches, according to Article 1(3) of the EAOA. This also means that it cannot evaluate laws or judgments. However, regulations made by the ministries do fall under its jurisdiction.

According to the Article 10 of the EAOA, the Equality Tribunal has the power to dismiss a case if the case has been decided by a court or been brought before a court for adjudication. The Equality Tribunal also dismisses a case if the conditions for processing it are not met. Furthermore, the Tribunal may dismiss a case if the matter is more than three years old.

Administrative decisions and decisions pursuant to the first and second paragraphs may be made by the Equality Tribunal chair.

²²⁶ Act on Annual Accounting of 17 July 1998 No. 56 (*regnskapsloven*) at: <https://lovdata.no/dokument/NL/lov/1998-07-17-56>.

²²⁷ See the Equality Ombud website: <https://www.ido.no/ombudet-og-samfunnet/om-ombudet/arsmeldinger/arsmelding-2016/>.

²²⁸ See the Equality Ombud website: <https://www.ido.no/ombudet-og-samfunnet/siste-nytt2/kriminalomsorgsdirektoratet-og-tromso-fengsel-inn-til-diskrimineringsnemnda-ny/>.

The Equality Tribunal may also close a case if the matter is trivial in nature, the subject matter of the complaint is obviously not contrary to the provisions specified in the EAOA (Article 1, second paragraph) or the submitted evidence fails to elucidate the case sufficiently. Reasons must be given for any decision to close a case.

As mentioned in Section 3.1.1 and 3.7.6, with the amendment as of 1 January 2020 the Equality Tribunal will have mandate to treat individual complaints concerning sexual harassment.

In connection with the change in EAOA, the provision on the organisation of the Tribunal in Article 6 of the Act was also amended, so that the number of departments in the Tribunal can be expanded if necessary. Furthermore, the Tribunal's duty to dismiss cases is extended in Article 10 of the EAOA. The Tribunal shall dismiss cases that are under investigation by the prosecuting authorities and cases where charges have been pressed against the victim in sexual harassment cases for false statements. The Tribunal may also dismiss cases where the matter dates back more than three years.

Grounds covered by the designated bodies

The mandates of the Equality Ombud and the Equality Tribunal cover all legislative discrimination grounds covered by Article 6 of the GEADA. From 1 January 2020 sexual harassment is also under the Tribunal's mandate. The mandate of the Equality Ombud also involves ensuring that Norwegian legislation and administrative practice are in accordance with Norway's obligations according to CEDAW and the other UN conventions.²²⁹

Impact on addressing gender inequality problems

Both the Equality Ombud and the Equality Tribunal clearly have an impact when it comes to addressing gender inequality problems in Norway, but in different ways.

The Equality Ombud arranges courses and presentations on discrimination issues and participates in campaigns with both the civil society sector and public agencies. As mentioned before, it has also recently started to provide legal assistance in a few cases before the Equality Tribunal.

In Norway, the Equality Ombud registers the number of inquiries received, complaints of discrimination made and decisions by ground and field, but has only published statistics up to 2015 on its website.²³⁰ More detailed statistics are available upon request. In 2019, the Ombud provided advice in a total of 1 988 cases (compared to 2 035 in 2018).²³¹

The Equality Ombud also conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Equality Ombud publishes annual reports and relevant reports on the status of equality. In 2019 the Equality Ombud published a summary report on Discrimination Law and cases.²³²

²²⁹ Convention on the Rights of People with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

²³⁰ <https://www.ldo.no/nyheter-og-fag/ldos-statistikk/>. Except for in the 2018 report, the Ombud has published an overview of the number cases according to grounds of discrimination and field in its annual report.

²³¹ Email from the Equality Ombud 23 March 2020. In 2018, 378 cases concerned disability; 243 ethnicity (including language, where there were 37 cases); 86 age; 62 religion; 18 sexual orientation; 332 concerned other grounds (such as membership of a trade union, political views or grounds not covered); and 152 concerned several grounds (the number of cases that actually concerned multiple discrimination is unknown). In addition, 339 cases concerned pregnancy and/or parental leave, 380 cases sex and/or gender, 21 care responsibilities, and 24 cases gender identity.

²³² See report from the Equality Ombud 'Diskrimineringsretten 2019, en gjennomgang av året som har gått' (Discrimination Law, summary of 2019): https://www.ldo.no/globalassets/ldo_2019/03_ombudet-og-samfunnet/rapporter/diskrimineringsrett/diskrimineringsretten-2019.pdf.

With the new amendment entering into force 1 January 2020 it is now explicitly stated in Article 5, second paragraph, of the EOAO that anyone can contact the Equality Ombud for guidance, even in individual cases.

The Equality Tribunal is the only low threshold complaints system for discrimination cases and the parties do not need the assistance of lawyers. It is not a precondition for filing a discrimination case with the courts that the issue at stake has already been through the Equality Tribunal system. The Tribunal's opinions are binding. It may also impose stoppages, remedial measures or other measures in order to bring an end to the discrimination, harassment, instructions or retaliation, and to prevent it from happening again. If the defendant does not comply with the instruction within the given deadline, the Equality Tribunal may decide to impose a coercive fine.

If a party disagrees with the Equality Tribunal's decision, the case may be brought to the Court system for a full trial of the case.²³³ The parties can also bring a case to court without going through the Equality Tribunal system first, but this is not common in cases of discrimination.

However, the Equality Tribunal may only provide redress/compensation for non-monetary loss in connection with employment and can only make decisions about compensation for concrete financial losses in simple cases.²³⁴ Redress and compensation claims must otherwise be filed before the ordinary courts. When the Equality Tribunal handles matters concerning regulations or administrative decisions made by a public administrative body, the Equality Tribunal can only issue a 'statement' on contravention of the GEADA, not a 'decision'.²³⁵ It is not mandatory to lodge complaints with the Equality Tribunal before going to the ordinary courts. However, very few discrimination cases are brought before the courts.²³⁶ Few cases of gender discrimination are taken further to the courts and the Equality Tribunal's statements are important sources of law in the gender equality field in Norway.

If a party does not pay compensation in accordance with the decision of the Equality Tribunal, the parties to the case may bring an ordinary complaint before the courts, as described above.

There is no way of appealing a decision of the Equality Tribunal other than by bringing it to the ordinary courts.

The Equality Tribunal follows up those cases where it had issued an order. The decisions of the Equality Tribunal are generally well respected.

For several reasons, the effectiveness of the recommendations still leaves a lot to be desired. The Equality Tribunal used its increased powers to award sanctions in very few cases in 2019, only one on gender equality.

Access to justice remains a key concern as reported last year. Firstly, there is the new opportunity for the Equality Tribunal to close cases on the basis of their being clearly not in breach of the prohibitions against discrimination (EOAO, Article 10(2)). A number of the decisions to close cases made by the Equality Tribunal in 2018 and 2019 appear

²³³ See the website of Norwegian Court administration: <https://www.domstol.no/om-domstolene/de-alminnelige-domstolene/> (Norwegian text only).

²³⁴ 'Simple cases' means cases when the complainant is not asserting anything but the inability to pay or other obvious unsustainable objections.

²³⁵ Norway, Equality and Anti-Discrimination Ombud Act, LOV-2017-06-16-50, Article 14, The authority of the Equality Tribunal relative to other public administrative agencies. Norwegian version: <https://lovdata.no/lov/2017-06-16-50/§14>; English version: <https://lovdata.no/NLE/lov/2017-06-16-50/§article14>.

²³⁶ McClimans, E. (2008) *Rettspraksis om diskrimineringslovgivning* (Legal practice on anti-discrimination law (NB: the author's own translation)). Submitted to the Anti-Discrimination Law Committee.

questionable. In 2018, 30 of 157 cases were dismissed or closed, and in 2019 144 of 244 cases were dismissed or closed. A significant proportion were closed on the basis of the exception 'clearly not a breach of the prohibition against discrimination' as provided by Article 10 of the EAOA.²³⁷

Secondly, many of the cases brought before the Equality Tribunal concern discrimination in various parts of the public administration. It is a cause for concern that the Equality Tribunal rarely chooses to provide 'opinions' in such cases, when it has a mandate to do so. However, the Equality Tribunal does follow up the cases where it issues an order.

Thirdly, with the reorganisation of the anti-discrimination institutions, on 1 January 2018 the Equality Tribunal moved from Oslo to Bergen, with the result that almost the entire staff of the Tribunal secretariat are new to the job. Even though the move was two years ago, this still raises concerns regarding both the quality and the efficiency of the work of the Tribunal. It takes time to build the necessary competence.

Besides the Equality Ombud and the Equality Tribunal, the Directorate for Children, Youth and Family Affairs (Bufdir) also has a department responsible for obtaining and disseminating knowledge about most of the protected grounds of discrimination both within the public sector and to the general public (gender, sexual orientation, gender identity, people with disabilities and ethnicity).²³⁸ However, the department is not independent and also serves as an advisory body for the ministries and implements Government policies.²³⁹

11.8 Social partners

A number of initiatives have been taken in relation to promoting dialogue between the social partners to give effect to the principle of equal treatment through workplace practices, codes of practice and workforce monitoring. This is done through initiatives by the Ministry, the Equality Ombud and trade unions.

Good practice by social partners in addressing the gender inequality problem

Although there are no formal rules in the anti-discrimination legislation on the dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a long tradition in Norway of regularly undertaking public consultations with NGOs and the social partners. NGOs and the social partners are in general invited to participate in reference groups when new legal proposals are being drafted and are recipients of White Papers and legislative proposals for consultative purposes before an Act is enacted. The various action plans initiated are usually drafted and implemented in close collaboration with NGOs and the social partners.

11.9 Other relevant bodies

Several NGOs in Norway are engaged in enforcement of gender equality law.

When it comes to strategic litigation, in particular, it is relevant to mention NGOs and gender equality groups related to gender identity and gender expression and trans issues. Examples of organisations that are engaged in the enforcement of gender equality law are: *Landsforeningen for lesbiske, homofile, bifile og transpersoner* (Association of

²³⁷ See for example Case 19/103 mentioned in Section 3.2.2.

²³⁸ See the Bufdir strategy for 2017-2020 at: https://bufdir.no/globalassets/global/bufdir_strategi_2017-2020_digital.pdf and its website: <https://www.bufdir.no/Inkludering/>.

²³⁹ Email from Bufdir, 16 April 2019.

Lesbian, Gay, Bisexual and Transgender People)²⁴⁰ and *Foreningen for kjønns-og seksualitetsmangfold (FRI)* (Gender and Sexual Diversity Association).²⁴¹

11.10 Evaluation of implementation

As mentioned earlier in the report, it may be a grave sign that the GEADA itself is relied upon in so very few cases before the courts. This may be a result of a combination of reasons:

- 1) most discrimination cases are brought to the Equality Tribunal system and not the courts as it has a low threshold and is free of charge;
- 2) lawyers in the country are not particularly trained in discrimination law;
- 3) there is no extraordinary support such as free legal aid in discrimination cases.

11.11 Remaining issues

The most relevant topics concerning enforcement and compliance have been discussed already.

²⁴⁰ See the organisation's website: <https://skeivtarkiv.no/skeivopedia/landsforeningen-lesbiske-homofile-bifile-og-transpersoner-llh>.

²⁴¹ See the organisation's website: <https://www.foreningenfri.no/>.

12 Overall assessment

As concluded in the various sections in the report, the author finds that Norwegian legislation is generally in line with the EU gender equality *acquis*. There are, however, some areas of concern, as was also the case last year, and it is mainly the same recurring concerns.

The following enforcement issues are of particular concern:

1. The Equality Tribunal does not have the power to award effective remedies in all types of cases. This means that some cases must still be taken to court in order for victims to have access to effective remedies.
2. In cases concerning (sexual) harassment outside employment, the Equality Tribunal lacks the opportunity to award redress, and the criminal procedure, which must be instigated by the police, is the only real means of enforcement.
3. In cases concerning the employer's duty to prevent harassment and sexual harassment, the Equality Tribunal lacks the opportunity to award redress.
4. Too many cases brought before the Equality Tribunal are still dismissed or closed.
5. The Equality Tribunal's widespread use of the exception 'clearly not a breach of the prohibition against discrimination' in Article 10 of the EAOA, especially in cases regarding transgender people is of particular concern.
6. The Equality Tribunal rarely chooses to provide 'opinions' in cases regarding discrimination in public administration, when it has a mandate to do so.

The following transposition problems were also mentioned in this report:

1. The Pregnant Workers Directive 92/85/EEC may not be correctly implemented, as mothers are still not guaranteed a specific 14 weeks of independent maternity leave.²⁴²
2. In Article 13 of GEADA on sexual harassment it is a criterion that the sexual attention is unwanted from the victim's perspective. Even though it is not an absolute requirement according to the GEADA, it requires that the harasser, by a word or action, must be made aware that their action is unwanted. This is not a requirement under EU law. The GEADA and the courts' interpretation of it may not be in accordance with EU law on this matter.

²⁴² See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See CJEU cases C-519/03 para. 32 and C-342/01 para. 41 and the Pregnant Workers Directive 92/85/EEC.

Bibliography

- Aune, H. (2013), 'Fedrekvoten. Normer og stereotype kjønnsroller. – Noen ganger kan jussen være en spydspiss i rettsutviklingen' ('The father's quota. Norms and gender stereotypes – How the law can sometimes spearhead development'), *Festskrift til Asbjørn Kjøenstad 70 år*, Universitetsforlaget 2013.
- Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet' (Maternity leave a fact. Maternity leave a legal truth), *Nordisk tidsskrift for Sosialrett*, 20 September.
- Aune, H. (2011) 'Deltidsarbeid - stereotype kjønnsroller i arbeidsliv og privatliv. Videreutvikling av vernet mot diskriminering på strukturelt grunnlag – neste trinn i diskrimineringsjussens utvikling?' (Part-time work – stereotypical gender roles in working life and private life), Svensson et al.: *På vei: Kjønn og rett i Norden*. Macadam, pp. 51-72, Kompendium.Aune, H. and Hellum, A. (eds.) (2017) *Ketch me if you can – sociale rettigheter og likestilling* (Catch me if you can – social rights and equality), Karnov Group, pp. 196-209 (Kompendium).
- Blaker-Strand, V. (2015), 'Forenklingsjuss – En trussel mot individers vern mot kjønnsdiskriminering?' ('Simplified law – A threat against the individual protection against gender discrimination'), *Lov og Rett*, Vol. 54. 8, pp. 449-470, ISSN 1504-3061- online.
- Hellum, A. and Ketscher, K. (eds) (2008), *Diskriminerings- og likestillingsrett* (Anthology of various aspects of discrimination law), Universitetsforlaget.
- Teigen, M. (2015), 'Virkningen av kjønnskvolter i norsk næringsliv' ('The effects of the quota rule/affirmative actions in the Norwegian employment market'), Gyldendal Akademisk.
- Hellum, A. (2016) 'Vernet mot diskriminering på grunnlag av kjønn, seksuell orientering og kjønnsidentitet og kjønnsuttrykk: noen utviklingslinjer i internasjonal og norsk rett' ('Discrimination based on sex, sexual orientation, gender identity and gender expression') *Festskrift til Aslak Syse*, Gyldendal, pp. 191-215, Kompendium.
- Hartlev, M., Jørgensen, S.

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