THE RIGHT TO WORK FOR DISABLED WORKERS IN FRANCE

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SUMMARY: 1. PROMOTING THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: THE LEGAL FRAMEWORK. 2. THE DEFINITION OF DISABLED WORKERS. 3. THE OBLIGATION TO EMPLOY DISABLED WORKERS: THE QUOTA POLICY. 4. DISCRIMINATION ON GROUNDS OF DISABILITY AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT. 5. UNIVERSITIES.

RESUMEN: Las políticas francesas de discapacidad y empleo se basan en dos pilares complementarios: la obligación de las empresas de que la plantilla incluya al menos un 6% de trabajadores con discapacidad, y la prohibición de cualquier discriminación directa o indirecta por causa de discapacidad. Sin embargo, aunque la Ley de 2005 ha contribuido sin duda a mejorar la situación de los trabajadores con discapacidad en el mercado laboral, las personas con discapacidad siguen expuestas al riesgo de exclusión del mercado laboral. En términos de discriminación, el concepto de "ajustes razonables" se ha incorporado a la legislación francesa. Hasta la fecha hay poca jurisprudencia sobre este asunto, y por lo tanto no es posible todavía analizar cómo pueden pronunciarse los jueces sobre esta cuestión y, particularmente, sobre lo que puede constituir una carga desproporcionada para el empleador.

ABSTRACT: The French disability and employment policy is based on two complementary pillars: the obligation for companies to ensure their workforce includes no less than 6% of disabled workers, and the prohibition of any direct or indirect discrimination on the grounds of disability. However, although the 2005 Act has certainly contributed to improving the labour market situation of disabled workers, disabled people continue to be exposed to the risk of exclusion from the labour market. In terms of discrimination, the concept of 'reasonable accommodation' has been transposed into French law. To date, there have been very few cases on this issue, and it is therefore not yet possible to analyse how judges may rule on this issue and, particularly, what may constitute a disproportionate burden for employers.

PALABRAS CLAVE: discapacidad, empleo, discriminación, Francia.

KEYWORDS: disability, employment, discrimination, France.

1. PROMOTING THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: THE LEGAL FRAMEWORK

According to the French Constitution, "all people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society".[1] This provision establishes the State's duty of solidarity towards people with disabilities, and is the constitutional foundation for the legal framework on disability. Over time, this legal framework has been further refined, aiming to promote the labour market integration of disabled people.

Act No. 57-1223 of 23 November 1957 was the first step towards establishing a recruitment policy for disabled people as recognised by the State. Some 20 years on, the failure to implement this policy was to lead to the adoption of a new Act, Act No. 75-534 of 30 June 1975 (Framework Law for People with Disabilities). The Act aims to establish a new, comprehensive approach to disability, looking at the social integration of disabled persons regardless of age and whatever their disability. The Act made education, training and career guidance for disabled children and adults a national obligation. The State and local government are responsible for ensuring the maximum level of autonomy for disabled individuals and, where possible, to ensure disabled people are integrated into the mainstream environment, both at school and at work. French employment policy continues to be based on these two pillars: the guarantee of a minimum income and the promotion of social and vocational integration of disabled workers. The Act also highlights the transition from an assistance-based approach to one based on solidarity.[2]

Since 1975, several other legislative initiatives have pursued the same goal of improving the effectiveness of the provisions adopted. For example, the 1975 Act was amended by Act No. 87-517 of 10 July 1987 on the employment of people with disabilities, which redefines the obligation for companies with more than 20 employees to employ disabled workers. Other important laws include Act No. 89-486 of 10 July 1989 on educational reforms which addresses integration of young disabled

[1] Paragraph 11 of the Preamble to the Constitution of 27 October 1946, which has constitutional status in France.

[2] P. Didier-Courbin, P. Gilbert, 'Eléments d'information sur la législation en faveur des personnes handicapées en France: de la loi de 1975 à celle de 2005', *Revue française des affaires sociales*, 2005/2 p. 207.

people in schools; Act No. 90-602 of 12 July 1990 on the protection of individuals against discrimination on the grounds of their state of health or disability, as amended by Act No. 2001-1066 of 16 November 2001; Act No. 91-663 of 13 July 1991, which includes several measures aimed at improving disabled access to housing, workplaces and public buildings; and Act No. 2002-73 of 17 January 2002, the Social Modernisation Act, which enshrines the right of disabled people to compensation for the consequences of their disability, regardless of the cause and nature of their impairment, age or lifestyle, and guarantees a minimum income to cover all the essentials of everyday life.

This legal framework was thoroughly updated by Act No. 2005-102 of 11 February 2005 on equal rights and opportunities, citizenship and participation of persons with disabilities. This Act marked a turning point in the understanding of disability in France. It emphasises the definition of a life plan by disabled people encompassing all aspects of their social life and establishes a right to compensation by introducing a compensatory disability benefit. The Act brings together, in an overarching legal text, some new provisions with many revised elements of the earlier laws on disability. The new policy is defined according to two major aims: accessibility and compensation. Thus, the Law set 2015 as the deadline for ensuring accessibility to all buildings which are open to the public as well as community facilities and workplaces. However, it now appears that the timescale was too short and that, unfortunately, this level of accessibility will not be achieved by 2015. The economic crisis may provide a partial explanation for this delay.

Article 1 of the Act, codified in Articles L.114-1 and L.114-1-1 of the Family and Social Action Code, expresses the idea of the law: *"All disabled people have the right to the support of the entire national community, ensuring them access to all basic rights recognised for all citizens, as well as to full exercise of their citizenship*". In this context, the term "basic rights" includes education, health, employment, citizenship, freedom of movement, and cultural and social life.

Adoption of the 2005 Act also provided the opportunity to implement European Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, in particular, its provisions on the prohibition of discrimination on the grounds of disability. In particular, the 2005 Act transposes Article 5 of the Directive, according to which employers must take '*appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer*'.

It should be noted that overall transposition of this Directive through Act No. 2008-496 of 27 May 2008 has also influenced the French law of disability. For

example, the general definition of direct and indirect discrimination and the burden of proof of discrimination apply to discrimination on the grounds of disability. The High Authority to Combat Discrimination and Promote Equality (HALDE), an independent public body established by Act No. 2004-1486 of 30 December 2004, now replaced by the Defender of Rights ('*Défenseur des droits*'), is also competent to address all forms of direct and indirect discrimination prohibited by law including discrimination on the grounds of disability.[3] In this regard, the HALDE, and now, the Defender of Rights, have certainly played an important role in combating discrimination on the grounds of disability.

The International Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, was ratified by France on 18 February 2010 and came into force on 20 March 2010, to a relatively indifferent reception. Parliamentary reports, presented during adoption of the Act granting consent for ratification of the Convention, underlined the consistency between the provisions of the Convention and existing French legal provisions. They also pointed out that French law already complied with most of the provisions of the Convention.[4] Nevertheless, in the past texts which purportedly were in line with French law went on to have an impact on the French legal system. It is, therefore, by no means certain that the Convention will not influence the evolution of French law. Indeed, one of the most recent annual

[3] The Defender of Rights has been given various powers to combat discrimination. Complaints may be submitted to the Defender either directly or through a Member of Parliament, by any person who considers him or herself a victim of discrimination. All complaints submitted in writing will receive a written response. The Defender may also, upon his or her own initiative, investigate cases of direct or indirect discrimination brought to his or her knowledge, providing the victim, where identified, has been informed to this effect and has no objection. The Defender investigates the claims received using the investigative powers at his or her disposal and may ask any individual, legal entity or public body for explanations, information or documents. He or she may also conduct on-site inspections and take evidence from any person whose testimony is deemed necessary or helpful. The Defender helps alleged victims of discrimination compile their cases and informs them of the appropriate procedures. At the request of the Parties, or upon their own initiative, civil, criminal and administrative courts may request the Defender to present observations on cases of discrimination submitted to them. The Defender may also request to submit evidence to such courts; in such circumstances the right to submit evidence is automatic. The Defender also carries out communication and information campaigns designed to promote equality and encourages the implementation of training programmes.

[4] M. BACACHE, 'Droit des handicapés – Convention des Nations Unies', *Revue Trimestrielle de droit civil*, 2010, p. 162.

reports from the Defender states that the Defender will contribute to developing a legal culture for implementation of the International Convention on the Rights of Persons with Disabilities so that the Convention becomes the benchmark reference.[5]

To conclude, it can be said that in the field of employment, French policy is based on two complementary pillars: the obligation for companies to employ disabled workers and the prohibition of any direct and indirect discrimination on the grounds of disability (Article L.1132-1 of the Labour Code), strongly influenced by the EC Directive.

2. THE DEFINITION OF DISABLED WORKER

In France, the definition of a disabled worker, first given by the Act of 11 February 2005,[6] was inspired by the new international classification of function, disability and health developed by the World Health Organization. Article L.5213-1 of the Labour Code defines the term 'disabled worker' as any person whose ability to obtain or maintain employment is effectively reduced as a result of an alteration of one or more physical, sensory or mental functions. The French definition is very close to that given by the ECJ in the HK Danmark case.[7] Although not identical, both definitions involve a limitation resulting from physical, mental or psychological impairments and which hinders the individual's participation in professional life. French legislation thus sought to adopt a functional approach towards disability with a two-fold standard: limitation of an individual's abilities and the resulting consequences.[8] A similar definition can be found in Article L.114 of the Family and Social Action Code, according to which a disability *"constitutes any limitation or restriction upon participation in life in society which a person may experience in her or his*

[5] Rapport annuel, 2012, Défenseur des droits. http://www.defenseurdesdroits.fr/sites/default/files/upload/raa-ddd-2012_press02.pdf , last accessed 30 July 2014.
The Defender of Rights was appointed in July 2011 as the independent authority responsible for monitoring the Convention, as provided for by the Convention itself.

[6] Act No. 2005-112, of 11 February 2005 on Equal rights and Opportunities, Citizenship and Participation of People with Disabilities.

[7] ECJ, 11 April 2013, cases C-335/11 and C-337/11 and CJCE, 11 July 2006, case C-13/05.

[8] F. Heas, 'Le contentieux de l'inaptitude à l'emploi en cas de handicap', *Revue de droit sanitaire et social*, 2011, p. 849.

environment, due to a significant, lasting or permanent impairment of one or more physical, sensory, mental, cognitive or psychological functions, multiple disabilities or disabling health condition". This definition clearly stresses the relative nature of disability, based on a social model of disability which recognises that people are not disabled by their impairment alone, but by the environment and society in which they live.[9] The wider context is taken into account, which is not limited to a disability or impairment in itself, but also encompasses the social disadvantages that result from a functional disability or impairment, aggravated by the social, material, human and technical environment. The ECJ case HK Danmark, on discrimination on the grounds of disability, ruled that illness, as such, cannot be regarded as a ground in addition to those prohibited by Directive 2000/78. The ECJ thus made a distinction between illness and disability, although the Court recognised *"that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78"*. The French definition meets this European concept of disability. Moreover, French law also directly prohibits discrimination on the grounds of state of health. It may therefore be less important in the French context to differentiate between the two states. However, the definition of disability remains important in terms of recognition of disabled worker status.

Generally, recognition of the status of a disabled person is the subject of various procedures, depending on the context: the disabled adults' allowance, access to specific social centres for disabled people (adults or children), the disabled children's education allowance, the disability card, or the disability rate. The competent authority for deciding upon disabled status is the Commission for the Rights and Autonomy of Disabled Persons (CDAPH, Article L.5213-2 of the Labour Code). This Commission assesses incapacity levels, and it is at that moment that disputes may arise, and the decisions of the Commission may be appealed against before administrative courts.

The Commission grants the status of disabled worker on the basis of an assessment of the individual's state of health and an assessment of the person's ability to carry out a professional activity.[10] It is important for the Commission to verify the

[9] S. Milano, 'La loi du 11 février 2005: pourquoi avoir réformé la loi de 1975', *Revue de droit sanitaire et social*, 2005, p. 361.
[10] F. Heas, *op.cit.*

worker's actual abilities. For example, the Council of State has ruled that the Commission could not refuse to recognise the status of disabled worker simply because the worker, who had already been recognised as an injured worker, already fell within the compulsory employment measures (see below). This did not mean that he could not benefit from other rights granted to disabled workers.[11] Medical condition and the ability to work are decisive factors in the Commission's assessment. The Commission must analyse the person's employability in the labour market and assess his or her ability to integrate into that market. Taking into account the realistic possibility of labour integration, the Commission rules whether a person can be employed in the mainstream labour market or in a sheltered environment, such as in a sheltered workshop ('*Centre d'aide par le travail*') or an adapted company. Sometimes, the disability will be such that it is not possible for the individual to work in mainstream companies or public administration. It is not really the legal definition of "disabled worker" which is problematic, but the individual assessment, which must be made on a case-by-case basis. Official recognition of the status of disabled worker is important, because it allows people to benefit from measures on the compulsory employment of disabled workers as well as the right to "reasonable accommodation".

A 2008 DARES survey into the employment situation of people with official recognition[12] of their disability found that 6% of the French population aged between 15 and 64 fell into this category.[13] This group is characterised by a larger proportion of men (56%), older workers and a lower level of education than the total population. This is related to the fact that 80% of the disability status related to work accidents concern blue-collar workers. The activity rate for disabled workers is also much lower than that of the general working population (46% compared to 71%), and their unemployment rate, calculated on the basis of unprompted answers, is more than twice as high as that of the working age population (22% compared to 10%). The

[11] CE, 25 Oct. 1996, *RJS* 1996, No. 1334.

[12] Recognition of this status could be for the purposes of receiving an invalidity allowance from the military authorities, receiving an allowance following an accident at work, receiving invalidity benefit due to incapacity to work, receiving the disabled adults' allowance, acquiring an invalidity card, acquiring recognised worker status, and working in a protected or adapted work establishment.

[13] DARES analysis (*Direction de l'animation de la recherche, des études et des statistiques* [French Directorate for Research, Studies and Statistics]) 'La situation sur le marché du travail en 2008 des personnes ayant une reconnaissance administrative de leur handicap', June 2011, No. 040. See S. Mongourdin-Denoix, 'Employment situation of disabled workers', European Observatory of Working Life – EurWORK, 17 May 2012, http://eurofound.europa.eu/observatories/eurwork/articles/labour-market/employment-situation-of-disabled-workers , last accessed 9 November 2014.

unemployment rate of female disabled workers is also higher (24% compared to 21%). For young disabled people (aged between 15 and 29), their unemployment rate is twice as high when a disability has been recognised (40%). Moreover, higher educational qualifications do not seem to guarantee a better outlook, as unemployment rates do not decrease with higher levels of education.

The activity rate is significantly lower for disabled workers. In 2008, more than half of the persons whose disability had been legally recognised and which enjoyed the right to benefit from the obligation to employ disabled workers were not working. Only 46% of this group stated that they were working or looking for work.[14] A quarter of this population works part-time, often on the basis of restricted hours. In four out of ten cases, this part-time work is due to their condition. The current economic and social crisis which has severely plagued France since 2008 has also had consequences on the employment situation of disabled people. According to the Agefiph,[15] the number of disabled jobseekers increased by 13.9% in 2011, while it increased by only 5.3% for all jobseekers.[16]

Although the 2005 Act has certainly contributed to improving the labour market situation for disabled workers, disability continues to expose people to the risk of being excluded from the labour market.[17]

[14] N. Aamrou, M. Barhoumi, 'Emploi et Chômage des personnes handicapées', DARES, Synthèse-Stat, No.1, Nov. 2012 (http://travail-emploi.gouv.fr/IMG/pdf/TH-Stat_6-11-2012.pdf).

[15] The Agefiph (Association de gestion des fonds pour l'insertion professionnelle des personnes handicapées [the Fund Management Organisation for the Professional Integration of People with Disabilities]) has been active in promoting the employment of people with disabilities since its creation in 1987.

[16] Agefiph, 'Les personnes handicapées et l'emploi, chiffres clés', May 2012, (see the Agefiph website: http://www.agefiph.fr/).

[17] F. Heas, 'Etat de santé, handicap et discrimination en droit du travail', *JCP Ed. S*, 2011, 1279.

3. THE OBLIGATION TO EMPLOY DISABLED WORKERS: THE QUOTA POLICY

The obligation for both private and public companies to employ disabled workers is certainly the flagship measure of disability employment policies in France. In 1987, legislation was introduced which obliged all companies with more than 20 employees to ensure that at least 6% their workforce were people with disabilities (Article L.5212-2 of the Labour Code). In particular, the law stipulated that private sector businesses failing to respect the quota would be obliged to pay a levy. It was as a result of this legislation that Agefiph was created, as the organisation responsible for collecting and managing these levies to promote the professional integration of disabled workers. This obligation was redefined by the Law of 11 February 2005 to make it more effective. The 2005 Act reinforced this obligation and the role of the Agefiph with regard to those enterprises who do not fulfil their obligations.

There are five ways in which companies can fulfil their obligation to employ disabled workers. They can hire people recognised as disabled by the State (in line with legal provisions). This can be done directly or indirectly. In the latter case, the employer can enter into contracts with adapted companies or sheltered workshops. They may sub-contract to these companies but this can only be used to meet 50% of the legal obligation. Companies can also employ disabled vocational trainees (for a maximum of 2%), but this option is rarely used. They may also conclude a collective agreement approved by the competent authority (see below) providing for the implementation of a programme dedicated to disabled workers. Finally, employers who do not meet their obligations under the quota system may do so by contributing to a specific fund. Under the 2005 Act, the annual contribution was increased to 600 times the minimum hourly wage per job not filled, depending on the size of the organisation, and has tripled to 1,500 times the minimum hourly wage for companies which have failed to meet the quota for three years. Thus, if during the last four years, an employer has not taken any action, that is to say, has not hired any disabled worker or has not subcontracted with adapted companies or sheltered workshops, and has simply contributed to the fund, the coefficient of 1,500 will be applied. If during this period, the situation has improved even although the quota has still not been reached, the coefficient applied is 400 for companies employing between 20 and 199 workers, 500 for companies employing between 200 and 749, and 600 for the rest. The coefficient may also vary depending on the degree of disability, if the disabled worker faces particular difficulties in accessing employment.

Agefiph resources come from these levies paid by companies with more than 20 employees and which fail to achieve the employment quota of 6%. The Agefiph uses

these funds to promote employment for disabled people and it can finance assistance for companies, including assistance with putting together a career plan, training, compensation measures, and accessing or retaining employment.

According to the DARES, the number of establishments employing at least one disabled worker has increased steadily since 2006. The increase was particularly marked in 2009, which could be a consequence of the 2005 Act. In 2010, 69% of establishments covered by the obligation to employ disabled workers directly employed at least one disabled worker (establishments applying a collective agreement are not included). The proportion of establishments that met their obligation simply by paying a contribution to the Agefiph has decreased significantly since 2009, from 23% in 2008 to 8% in 2010. This decrease could be due partly to the application, from 2009, of hefty penalties for establishments which had taken no positive action regarding disabled workers in the past four years. A certain effectiveness of the existing system can therefore be observed, although in 2010 the proportion of disabled workers remained at 2.8%, far from the 6% provided by the Law.[18]

In the current French economic context, which has seen a significant increase in unemployment, it should also be noted that unemployment among disabled workers, which remains much higher (around 19% compared to 9.5% for non-disabled workers) has increased faster than that of non-disabled workers, and precarious forms of employment have also increased.

French legislation also aims to encourage the social partners to engage in disability issues through collective bargaining to promote the employment of disabled workers. As far back as 1987 the Law which obliged companies with more than 20 employees to employ at least 6% of disabled workers, also allowed these employers to be released from this obligation if they implemented a collective agreement (at sectoral, group, enterprise or establishment level) approved by the competent authority, to establish an annual or multi-annual programme for disabled workers. The 2005 Act aimed to strengthen the social partners' involvement and established an obligation to negotiate measures relating to the employability and job retention of workers with disabilities (Article L.2242-3 of the Labour Code) on a three-year basis at branch level and every year at company level. This negotiation takes place on the basis

[18] DARES Analyses, 'L'emploi des travailleurs handicapés dans les établissements de 20 salariés ou plus du secteur privé: bilan de l'année 2010', Novembre 2012, No. 079. However, it is not always easy for companies to find workers whose skills and qualification suit their needs (see N. MAGGI-GERMAIN, (dir.), *Construire l'insertion des travailleurs handicapés: le rôle de la négociation collective*, Maison des sciences de l'homme Ange Guépin, Nantes, January 2009.

of a report prepared by the employer, presenting the situation of the company regarding the position of disabled workers. The obligation to negotiate does not imply any obligation to reach an agreement. Negotiations must focus primarily on conditions of access to employment, training and career advancement and the working conditions, job retention and employment of disabled workers. At company level, if a collective agreement is concluded and contains such measures, the obligation to negotiate is no longer annual but is extended to three years.

According to the annual report on collective bargaining published in 2012,[19] the obligation to conduct annual negotiations on the employment of disabled workers has resulted in consistent growth in the number of collective agreements dealing with the employment of disabled workers. This trend can also be seen in 2011 (1,251 agreements in 2011 compared to 985 in 2010). Nine times out of ten, the agreements deal with issues other than disability such as, for example, gender equality. The number of establishments covered by an agreement on employment of disabled workers has remained stable and represents about 9% of all establishment which are bound by the obligation to employ disabled workers.[20]

However, although the obligation to negotiate has certainly led to the conclusion of collective agreements on these issues, and although these agreements would perhaps not have been concluded in the absence of such a legal obligation, it is more difficult to obtain information on the qualitative content of these agreements. Furthermore, concluding an agreement on disability does not automatically mean it will be approved by the competent authority. Only when it is approved is the employer discharged from her or his obligation to employ disabled people. Under Articles R 5212-14 of the Labour Code, agreements approved by the administrative authority must provide for the implementation of an annual or multi-annual programme for disabled workers, and must include a plan for recruitment in an ordinary business setting also providing at least two of the following measures: an induction and training programme, a programme to adapt to technological changes, and a retention plan in the event of dismissals. Such an agreement also allows the employer to progressively increase the number of employees with disabilities over a period of two or three years. If these agreements are approved and effectively applied, the employer is released from his or her obligation to ensure that at least 6% of their workers have disabilities.

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[19] Ministère du Travail, de l'Emploi et de la santé, *La négociation collective en 2011*, Bilans et Rapports, 2012, http://travail-emploi.gouv.fr/IMG/pdf/Bilans_et_rapports_-_la_negociation_collective_en_2011.pdf, last accessed 30 July 2014.

[20] Dares Analyse, 'L'emploi des travailleurs handicapés dans les établissements de 20 salariés ou plus du secteur privé : bilan de l'année 2010', November 2012, No. 079.

However, according to a report published in 2009, only few sectors are covered by such an agreement, even although more groups of companies and enterprises exist.[21] According to the findings of this study, several factors combine to explain the signing of such agreements. The Law has certainly played a key role in strengthening obligations on the employer and thus has had an incentive effect. It also appears that the choice to negotiate is motivated by the flexibility it provides, in terms of both defining and implementing the measures. But these choices remain conditioned by the existence of resources, particularly in terms of how these resources are organised, making implementation of the agreement possible.[22]

4. DISCRIMINATION ON GROUNDS OF DISABILITY AND EMPLOYMENT: ACCESS TO WORK AND TERMINATION OF EMPLOYMENT

All discrimination, direct and indirect, on grounds of disability is prohibited during the employment relationship.[23] Discrimination on the grounds of disability is treated in the same way as other types of discrimination: the HALDE and now the Defender of Rights are competent to deal with these forms of discrimination, the rules on the burden of proof have been adjusted, etc. However, some specific provisions apply to discrimination on the grounds of disability, as specified in Directive 2000-78 of 27 November 2000.

Article L.1133-3 of the Labour Code states that differential treatment based on medically-verified inability, state of health, or disability does not constitute discrimination when this difference is objective, necessary and appropriate.

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[21] Thus in 2008, according to this report, only four collective agreements at sectoral level were signed (out of 274 sectors). It is possible that the number of agreements has increased since then as, at the time of the study, the obligation to negotiate on disability had only recently been established.

[22] N. Maggi-Germain (ed.), *Construire l'insertion des travailleurs handicapés: le rôle de la négociation collective*, Maison des sciences de l'homme Ange Guépin, Nantes, January 2009. Voir *Revue de l'IRES*, 2010, No. 67 p. 109 and N. Maggi-Germain and M. Blatge, 'Le handicap: objet de négociation collective ou de communication', *Revue de l'IRES*, 2010, No. 67, p. 95.

[23] See Art. L.1132-1 of the Labour Code which prohibits various forms of discrimination.

Therefore, the decision not to hire a worker can only be justified if the worker is found to be unable to work during the recruitment medical examination. It is also possible for a worker to conceal his or her disability.[24] Still on the subject of recruitment, the Defender of Rights states that, on the basis of the principle of non-discrimination, all job offers shall be open to all, except in the case of medically-verified inability, and that it is also prohibited to restrict certain job offers to disabled persons.[25]

The dismissal of a worker cannot be based on her or his state of health or disability. Here again, only when the inability to work is medically verified and after a certain procedure, is it possible for the employer to dismiss the worker. Furthermore, when an occupational health doctor certifies that a worker no longer has the ability to continue in his or her job, the employer has the obligation to offer the worker another job appropriate for his or her state of health or disability.[26] This obligation to attempt to relocate the employee means that employers must review all possible job openings in all companies and offices in their group. This obligation is strictly monitored by judges. When possible, the employer must offer the worker another job, as comparable as possible to the job previously held. If necessary, the employer must consider a job transfer, changes to the position, or changes to the organisation of working time. Only when there is absolutely no possibility of relocating the employee, can the employer dismiss the worker.

Moreover, Article L.5213-6 of the Labour Code incorporates Article 5 of the 2000-78 Directive on the reasonable accommodation for disabled persons. According to this article, in order to guarantee the principle of equal treatment, employers shall take all appropriate measures, depending on needs in a specific situation, to enable disabled workers to find employment or retain a job matching their qualifications, practice and progress in it, or provide them with training suited to their needs, provided that the responsibilities arising from implementation of the measures are disproportionate, particularly taking account of the grants which can offset all or part of the expenses borne by employers in this respect and which are defined at Article L.5213-10. For an employer, refusal to take appropriate measures is deemed to be a form of discrimination. Still in accordance with the European Directive, Article L.1133-4 of the Labour Code provides that measures taken to promote equal treatment for persons with disabilities, as provided in Article L 5213-6, does not constitute discrimination.

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[24] Cass. soc. 7 November 2006, No. 05-41380.

[25] Deliberation No. 2010-126, 14 June 2010.

[26] Art. L. 1226-10 of the Labour Code when the inability to work is the consequence of an injury or occupational disease, Art. L.1226-2 in the other cases.

Financial assistance has therefore been developed in order to help companies fulfil their obligations. Article L.5213-10 of the Labour Code provides that the State may grant financial assistance from the Fund to promote the employment of disabled people to any employer bound by the obligation to employ disabled workers, including assistance with putting together a career plan, training, compensation measures, business start-ups and takeovers, access to employment and job retention. In the private sector, the Agefiph is responsible for funding these measures, while the competent body in the public sector is the Fiphfp.[27]

HALDE's annual reports (and now those of the Defender of Rights) give an idea on how these provisions are applied. Before the HALDE was established, health and disability (the two were not differentiated) were the second biggest grounds for complaint, the first being origin. These complaints account for over 20% of cases. In one of the most recent annual reports by the Defender of Rights, disability is now differentiated from health. Together, they constitute the biggest grounds for complaint, with disability representing 14.9% of all complaints (health represents about 15.8%).[28]

According to the HALDE in one of its reports,[29] observations made to the Courts[30] have helped to transpose the concept of reasonable accommodation into reality, which aims at compensating for disability by adopting appropriate measures to restore equality of opportunity as far as possible in practice, thus allowing people to be evaluated solely on their skills.

The HALDE has also developed guidance for private sector employers on how to implement the notion of "reasonable accommodation".[31] According to the HALDE, appropriate measures should be considered at all stages of an individual's career. They can be taken at the recruitment stage, they may involve adapting the work station

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[27] Fund for the employment of disabled people in the civil service (Fonds pour l'insertion des personnes handicapées dans la fonction publique).

[28] Annual Report 2013 by the Defender of Rights. http://www.defenseurdesdroits.fr/sites/default/files/upload/rapport_annuel_2013.pdf, last accessed 30 July 2014.

[29] HALDE Annual Report, 2010.

[30] The HALDE and the Defender of Rights can present observations to the courts on cases of discrimination submitted to them.

[31] Deliberation No. 2010-126 of 14 June 2010, Avis de la haute autorité relatif à l'accès à l'emploi des personnes handicapés dans le secteur privé au regard des principes d'égalité de traitement et de non-discrimination. Also see Deliberation No. 2010-274 on public employment.

(supplying for example personalised equipment), or making adjustments to workplace or working time arrangements. Personal assistance, including during the probationary period, may also be provided. Assessing what kind of adjustments are required involves an individual analysis (rather than an abstract one) taking into account the personal situation of the individual, his or her autonomy, and the position or training in question.

The search for appropriate measures therefore requires a case-by-case analysis in order to find practical and appropriate solutions to the disabled person's situation. HALDE adds that the adjustments required by the handicap should, nevertheless, be reasonable, that is to say they should not impose disproportionate costs upon the employer. Each situation must therefore be assessed *in concreto*, taking into account the particular situation of the employer and the availability of public funding, in particular financial assistance which could be granted by Agefiph under Article L.5213-6 of the Labour Code.

The HALDE has implemented these principles and has recognised the existence of discrimination on the grounds of disability where it has been shown that the employer refused to take appropriate measures to enable a disabled person to access employment, training or promotion. A few examples of cases brought before the HALDE and the courts can be cited. The HALDE has thus provided useful interpretations of the "reasonable accommodation" provision.

A first case was about a high-performance athlete with a hearing problem, who had applied for a job as physical education teacher. The Ministry of Education refused his application. Because of his hearing problem he could not dive and therefore could not meet the prerequisites for water rescue. The HALDE had suggested reasonable adjustments, so that the teacher would be replaced by a colleague for activities taking place in the pool, while he replaced the colleague for other activities. The Ministry of Education refused this solution outright, which only required changes to the working times of the physical education teachers in the same establishment who, moreover, had expressed their agreement.[32] The case was referred to the administrative court in Rouen, which awarded 5,000 euros for moral damage to the physical education teacher which the Rouen education office had refused to hire. The court stated that there was no evidence that the disability was incompatible with the job in question or that the administration had sought to take appropriate measures to accommodate the disability. It also held that the appropriate measures did not constitute a disproportionate burden for a service that is only very partially devoted to water

[32] Deliberations 2005-34 of 26 September 2005, 2006-183 of 18 September 2006 and 2008-8 of 7 January 2008.

education activities, and that the complainant was well founded in claiming that this refusal constituted an error which engaged the administration's liability for the ensuing damage.[33]

In a second case, a disabled worker complained to the HALDE because a company refused to hire him as a sales advisor. The worker believed that he was not hired because of his disability. After a series of tests and recruitment interviews, he was called for a pre-recruitment medical examination and was declared fit to work on the condition that reasonable adjustments were provided. However, the worker's application was rejected by the employer on the grounds that he did not fit the job profile. After an investigation, the HALDE stated that the refusal to hire was actually based on the employer's refusal to take appropriate measures to enable the disabled worker to access employment. Thus, the employer's decision constituted discrimination on the grounds of disability under the provisions of Articles L.5213-6, L.1132-1 and L.1133-3 of the Labour Code, which define discrimination. The existence of discrimination in employment was also recognised in the employer's failure to provide any adjustments, and the HALDE recommended compensation for the damage.[34]

The third example involved an insulin-dependent diabetic women who had applied for a job in the National Police. The reason given for refusing to hire her was that her disease could lead to a long-term sick leave. The HALDE held that her state of health could only be assessed in relation to the time of hiring and not on the fact that her disease could potentially lead to sick leave in the future. The administrative court of Lyon awarded 12,000 euros in compensation.[35]

These few examples show that discrimination on the grounds of disability has been recognised in cases where the employer refused to make reasonable accommodation. However, until now they have been very few cases on this issue, particularly concerning the private sector. Moreover, some cases also demonstrate that administrative tribunals may be reluctant to recognise discrimination on the grounds of disability. In a decision of 2008, the Council of State recognised the legality of a decree which did not provided for any specific compensatory measures for disabled

[33] Tribunal Administratif de Rouen, 9 July 2009, No. 0700940-3.
[34] Deliberation No.2009-128 of 27 April 2009.
[35] Deliberation No. 2008-216, 29 September 2008.

persons.[36] It is not yet possible, therefore, to really analyse how judges will rule on this concept and, particularly, what may constitute a disproportionate burden for employers.

5. UNIVERSITIES

Generally speaking, one of the major aims of Act No. 2005-112 of 11 February 2005 on equal rights and opportunities, citizenship and participation of persons with disabilities is accessibility. This also applies to universities. The first University Disability Charter was signed in 2007 between the Ministry of Higher Education and Research, the Ministry of Labour, Labour Relations and Solidarity and the Committee of University Chancellors (*Conférence des Présidents d'Université*), followed by a second one in 2012.[37] The Act and the Charters set down universities' obligations towards their disabled students and increased universities' responsibilities. In addition to accessibility, students with disabilities should benefit from human and material assistance. Universities are responsible for defining their financial needs in terms of collective adjustments and services and submitting an application to the Ministry of Higher Education and Research for funding. A specific reception and support service should be created in each university to assist and support disabled students. This should be done in partnership with the various other university services (Registrar's office, medical service, academic team, etc.) and external services such as the disability centres which have been created in each Department (*Maisons départementales des personnes handicapées*).

At the University of Saint Etienne,[38] a disability support service was created to meet these legal obligations and several measures have been defined. Since then, there has been a significant increase in the number of students with disabilities at the University and some are now studying at Master level which, in the past, was rare. The number of students with disabilities remains low, but this may also reflect, of course, the extent to which young disabled people are integrated into secondary schools. 59

[36] CE, 14 November 2008, Féd. des syndicats généraux de l'Education nationale, req. No. 311312, see. X. SOUVIGNET, 'Le juge administratif et les discriminations indirectes', *Revue Française de Droit Administratif*, 2013, p. 315).

[37] http://media.education.gouv.fr/file/66/8/20668.pdf

[38] This information was collected through an interview with Emmanuelle Volle, who is responsible for the Disability Support Service at the University of Saint Etienne. Similar services now exist in many universities and provide more or less the same services.

disabled students were studying at Saint Etienne in the 2005-2006 academic year, in comparison with 101 in 2010-2011 (of a total of 17,000 students). 41 of these students have language impairment such as dyslexia and the only adjustment needed is to provide additional time for exams (many have up to one-third of additional time in the exam). Other significant disabilities include mobility impairment, vision and hearing impairments, psychological disorders, cognitive disorders, etc.

A personalised analysis of students' needs is carried out by the service and various measures can be taken. These may involve specific visits to the University to address accessibility, support in lessons and tutorials, note taking during classes and exams, and the loan of equipment (specific software, dictaphones, computers, etc.). Specific contracts can be concluded with students who are responsible for taking notes for students who cannot take their own, and for assisting them. Assistance could also be provided by social workers on issues such as housing, which are not directly related to academic life.

This policy seems to produce results, as there has been an increase in the number of students with disabilities and these students are progressing with their studies.

In terms of the transition of these students to the labour market, there is still very little feedback on this issue. A first step is submitting a request to acquire the status of disabled worker, which allows workers to benefit from the compulsory employment measures or to benefit from adjustments for public service entrance examinations. The disability service can also work jointly with the university traineeship service and with non-profit-making organisations to help these students find internships and jobs. For example, meetings between companies and disabled students coul be organised.

6. CONCLUSION

Ten years after adoption of the 2005 Act, some progress has been made. However, this progress has been very slow and was certainly not helped by the economic crisis. The obligation to ensure that 6% of the workforce consists of disabled workers has certainly contributed to the employment of disabled workers but it also has its limitations and some employers prefer to pay the levy rather than employing disabled persons, although the increased penalties have prompted some companies to take measures to improve the situation of disabled workers. The concept of "reasonable accommodation" exists in the French legal system but it has not yet

reached its full potential. Finally, the employment policy towards disabled workers also highlights the particularity of the prohibition of discrimination on the ground of disability. Combating discrimination usually involves not taking into account the prohibited criteria, while in this case, in contrast, disability status has to be taken into account, and denying the disability could be discriminatory. Hence the ambiguity: integration by mitigating difference is one of the goals of the policy while, at the same time, these differences may justify differential treatment in order to achieve equality.

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