# RIGHT TO WORK AND PLACEMENT OF THE DISABLED IN THE LABOUR MARKET: THE ITALIAN LEGAL FRAMEWORK

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SUMARIO: 1. DEFINITION OF DISABILITY IN THE INTERNAL LEGAL SYSTEM IN THE LIGHT OF INTERNATIONAL DOCUMENTS. 2. ANALYSIS OF GENERAL STATISTICAL DATA. 3. THE INTERNAL REGULATION AND THE QUOTA SYSTEM MECHANISM. 3.1. Exonerations, exclusions, suspensions and compensation regarding the obligation of employment per quota. 4. THE AGREEMENT INSTRUMENTS AND THE INCENTIVE EMPLOYMENT POLICIES. 5. THE ROLE OF THE LOCAL AUTHORITIES. 6. THE ANTI-DISCRIMINATION REGULATION AND THE INFLUENCE OF EC DIRECTIVES. 7. ANALYSIS OF NATIONAL CASES. 8. THE ROLE OF UNIVERSITIES IN THE WORK GUIDANCE AND PLACEMENT OF DISABLED STUDENTS. 9. BRIEF CONCLUSION.

RESUMEN: El ensayo ofrece una visión general de los instrumentos legales que tienen como objetivo asegurar la integración y participación de las personas con discapacidad en el mercado laboral y, en última instancia, en la sociedad. El análisis se mueve de un examen de las normativas constitucionales hasta las normas más detalladas. El autor también analiza la influencia y la aplicación de las normas jurídicas internacionales en el derecho italiano y los posibles enfoques diferentes para la definición de discapacidad entre estos dos niveles. El documento también resume las decisiones judiciales más relevantes sobre el tema y describe, a través de datos estadísticos, la situación actual del mercado de trabajo en relación con el empleo de las personas con discapacidad, así como la eficacia de los instrumentos de derecho

analizados. Por último, el autor analiza el papel de las universidades en la colocación de los jóvenes titulados con discapacidad y da ejemplos de las mejores prácticas y programas específicos.

ABSTRACT: This paper gives an overview of Italian legal instruments that aim to ensure the integration and participation of disabled persons in the labour market and ultimately in society as a whole. The analysis moves from an examination of Constitutional standards to a consideration of the most detailed regulations. The author also discusses the influence and implementation of international legal regulations in Italian law and the possible different approaches to the definition of disability between these two levels. The paper also summarizes the most relevant court decisions on the subject and describes the present labour market situation with regard to the employment of disabled persons as well as the effectiveness of the law instruments, analysed by means of statistical data. Finally, the author analyses the role of Universities in the placement of young graduates with disabilities and gives examples of best practises and specific programs.

PALABRAS CLAVE: definición de discapacidad, empleo de los discapacitados, discriminación, eficacia, Italia.

KEYWORDS: Definition of disability, employment, discrimination, effectiveness, Italy.

## 1. DEFINITION OF DISABILITY IN THE INTERNAL LEGAL SYSTEM IN THE LIGHT OF INTERNATIONAL DOCUMENTS

In the Civil law legal systems legislators need to "translate" a social phenomenon into a binding legal definition: a definition that often comes from other sciences such as sociology or economics.

After this first step, it is possible to connect regulations to that definition.

In such cases there is a more pronounced need than usual to fill the gap between changing realities and provisions founded on static definitions that will remain unchanged in lexical terms.

This should be the task of exegetes and judges, but it becomes more and more complicated in proportion to the strictness of the definition.

The definition of disabilities in Italian law could be taken as a paradigmatic case. As will become clear in this work, Italian legislators have approached this problem by avoiding a direct definition of the concept of disability that would provide a basis for the application of legislative measures, but decided to enumerate every single personal condition that is required to access the law, and in doing so made the scope of the law too restrictive. This outdated strict medical approach to disability is a heritage which still remains to be overcome today.

An important step to better explain this issue will be to compare the changes in the international documents about disability as well as in Italian law.

Therefore, highlighting any differences and inconsistencies between the different regulatory levels, this first section will examine the extent to which the regulatory changes in the Italian legal system coincide with various approaches to definition adopted by international organizations over the course of time. In other words, the question that will be examined is whether those organizations have been able to influence Italian legislative reforms on this matter.

The definition contained in the «International Classification of Impairments, Disabilities and Handicaps» published in 1980 by the World Health Organization reflects a medical approach to the issue according to which a *handicap* is a sequential chain which determines, for the individual, an obstacle to the ability to perform an activity in the manner typical of a normally-endowed person. According to the WHO, the origin of this chain lies in a disease that causes an impairment considered as a loss

of a psychological, physiological or anatomical function which in turn results in the limitation of the ability to perform tasks common to people without disabilities. This is the condition causing the *handicap* and the resulting disadvantage.

Since formulating this initial definition, the WHO has given increasing importance to the relationship between personal condition and the general context in which the person lives, adopting in 2001 a new classification system of disability which has the merit of emphasizing that it is a health condition which, at a given time in the life of any individual, determines a relational, working or other difficulty that is the essential meaning of disability.

This definition of disability is in line with that found in the «Convention on the Rights of Persons with Disabilities» adopted by the UN General Assembly on 13th December 2006, and ratified in Italy by Law No. 18 adopted on 3rd March 2009, which states that «Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments [therefore, not necessarily permanent][1] which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others»[2].

In brief, disability is identified as an evolving concept resulting from the interaction between people with impairments (also attitudinal ones) and environmental barriers that prevent them from enjoying full and effective participation in society.[3]

The Convention therefore confirms the almost complete reversal of the traditional view of disability; it is not the natural or health condition itself which is seen both to cause the disadvantage and to hinder the enjoyment of rights, but the standards commonly accepted by society. These standards determine the exclusion of the disabled from the opportunity to participate in and contribute to society.

We can, therefore, say that the trend in the definition of disability is to focus on the environment instead of on the health condition alone.

Having clarified these points, attention can now be focused on the evolutionary framework set by the national provisions.

The «Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate» («Framework Law for the Assistance, Social Integration and Rights of People with Disabilities») No. 104 adopted on 5th February 1992 included a definition

[1] Author's italics.

[2] Article 1, paragraph 2 of the Convention.

[3] Concept expressed in recital e) of the Convention.

of disability which was in line with the WHO classification of 1980[4]. This law represented at least a first step toward replacing the view of disability as exclusively a problem of social welfare in favor of the integration of the disabled person.

The subsequent Law No. 68, adopted on 12th March 1999, undoubtedly contains elements that reflect a turning point in the general conception of disability. This is seen, first of all, in the efforts that the legislators made to provide mechanisms of placement which have their starting point not in the disability itself, but in the skills possessed by the disabled person, which are considered as being of value in the right social and working context, without a lowering of work standards in terms of quality and quantity. This should be emphasized, especially if one takes into account that the original framework of this law, subsequently adjusted in the course of time, preceded both the latest documents of the WHO and the previously mentioned Convention adopted by the United Nations. Also in terms of the language employed, it is noted that the Italian legislation uses the words disabled and disability and marginalizes the use of words such as *handicap* and *handicapped* which are, however, mentioned in the first paragraph of Article 1[5].

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[4] Specifically, Article 3, paragraph 1 of the Law states that «the *handicapped person* is one who has a stable or progressive physical, mental or sensory impairment, which causes learning, relational or work integration difficulties and results in a process of social disadvantage or marginalization».

[5] This paragraph states that: «The purpose of this Law is the promotion of placement and work integration of disabled people on the labor market through support services and targeted employment. It applies to:

*a)* people of working age suffering from physical, mental or sensory impairments and handicapped with intellectual disabilities, resulting in a reduction of working capacity greater than 45 percent, determined by specific committees for the identification of civil disability in accordance with the table indicating the percentages of disability due to impairments and disabling diseases approved in accordance with Article 2 of Legislative Decree No. 509, 23rd November 1988 by the Ministry of Health on the basis of the International Classification of Impairments developed by the World Health Organization;

*b)* disabled working people with a degree of disability greater than 33 percent, assessed by the National Institute for Insurance against Accidents at Work and Occupational Diseases (INAIL) in accordance with the provisions in force;

*c)* people who are blind or deaf and dumb, as mentioned in Laws No. 382 adopted on 27th May 1970, as amended, and No. 381 adopted on May 26th, 1970, as amended;

This leads us to the main point, because the latter Article contains a list of beneficiaries which defines its scope of application; in doing this it indirectly provides a definition of disability that is not otherwise to be found in the law. It is no coincidence that it has been the subject of scrutiny by the European Court of Justice[6].

The definition of disability was not a matter of contention, but in the opinion of this writer the analysis of the legal case and the Commission's findings, the subsequent defense of the Italian Republic and the final decision of the Court are useful in illuminating the as yet incomplete transformation of the way in which disability is viewed by the internal legal system.

The European Court of Justice confirmed through its rulings[7] that the definition embraced by the European Union was to be found in the UN Convention. This provides a universal definition of disability that is essentially applicable to any able-bodied person depending on the changing circumstances and accidents of life. On this basis the European Commission criticized what it deemed the restricted scope of the Italian regulation.

In reality a number of points can considered to explain the approach adopted by Italian national law.

First of all the legislator could have been more prudent in enlarging the scope of the law because beneficiaries of these provisions are likely to become a financial burden on the State. It should also be emphasised that, quite apart from the previously mentioned fact that the definition of disability to be found in international documents is actually preceded by that used in Italian national regulation, precisely because of the highlighted characteristics it is more difficult to assimilate the former into an internal legal system if, in order to leave less room for interpretation, the approach to drafting the law is too traditional - something which could easily occur in a Civil-law legal system.

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*d)* war disabled, civil disabled and disabled ascribed to service from the first to the eighth category of the tables annexed to the consolidated text of the rules regarding war pensions, approved by Decree of the President of the Republic No. 915 adopted on 23rd December 1978, as amended».

[6] Ruling of the Fourth Chamber of the Court of Justice adopted on July 4th, 2013 in Case C-312/11 which was actually focused on the correct transposition of Article 5 of Directive No. 78/2000, which will be analysed here in the continuation of the discussion.

[7] It refers to the case mentioned in the previous note and to the judgment of the Second Chamber 11th April 2013 (HK Denmark) in joined Cases C-C-335/11 and 337/11.

Article. 1, paragraph 1 of the above-cited Law is a typical example inasmuch as it defines disability indirectly through preset paradigms which can be applied to specific concrete cases according to schematic "in or out" criteria.

Conversely a definition of disability like that adopted by the UN, which we might consider teleological rather than analytical, also needs an active role by the exegete in integrating the standard, and so the exercise of greater discretion in its application to individual cases than is normally regarded favourably in countries with a system of Civil-law.

In this circumstance, a judge-made law system would probably be more effective in the transposal of the EU anti-discriminatory directives.

Analysis shows that, in the course of time, both international institutions and, by and large, also national legislators have paid greater attention to parameters that no longer conform to a model of commonly accepted normality, but to the capabilities that each person can express in relation to the specific situations and opportunities he or she experiences. Our next step will be to examine how this framework matches the provisions of the Constitution of the Italian Republic which came into force as far back as 1948[8].

It must be said that the Constitution does not deal directly with the disabled except for one Article in which disability is considered only as a welfare problem, according to an old concept which almost views disabled people as the object of charity.

In fact, under Article 38 «Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the event of accident, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The duties laid down in this article are provided for by entities and institutions established or supported by the State. Private-sector assistance may be freely provided».

If we focus on the language used and the general tenor of this Article, it is clear that they are affected by the elapsed time. From its characteristic social perspective, the Republic directly sought to ensure the livelihood of all those people who, because of old age or physical or social condition, would otherwise have been seen as unable to

[8] On these issues see C. COLAPIETRO, "*Diritto al lavoro dei disabili e Costituzione*", *Giornale di diritto del lavoro e di relazioni industriali,* Vol. 124, No. 4, 2009 pp. 606-632, who considers the national provisions consistent with the Constitution.

obtain adequate means for their living needs under the standard of normal productivity. It is no coincidence that the Article is included in Title III - Economic Relations and suggests a tendential underlying presumption that the contribution of the so-called *incapacitated and handicapped* to productive activities is of non-economic utility.

Nowadays this Article should be reinterpreted in the light of the observations previously made in this work.

In view of the emergence of a new understanding of disability which sees it as a social and relational status not necessarily involving an impairment of productive capacity and physical and mental faculties (when valued and expressed within the right context), also Article 38 of the Constitution has to be reread as a means to support the condition of particularly serious cases in which disability completely deprives the person of the opportunity to contribute to the economic and social life of the country or cases of involuntary unemployment due to the difficulty of placement of the disabled person.

There are, instead, other provisions of the Italian Constitution that should be highlighted and which, because of their particular flexibility and abstraction, are absolutely modern also in this context. The Constitution's distinguishing feature is its focus on the primacy of the human being, who is considered not as an abstract individual, but as a relational individual who truly fulfils himself or herself, realizing his or her personality only in the social dimension.

Thus, Article 2 states, «The Republic recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed» and at the same time requires every citizen to contribute to the well-being of the community by fulfilling «fundamental duties of political, economic and social solidarity».

For this reason, the principle of equality is conceived not only as a formal proclamation of the equal dignity of all people regardless of personal status (Article 3, first paragraph), but is also declared to be a substantive right which obliges the Republic to «remove obstacles of an economic and social nature, which constrain the freedom and equality of citizens, impede the full development of human personality and the effective participation of all workers in the political, economic and social development of the country» (Article 3, second paragraph).

Within this framework, work becomes the keystone on which the founding fathers built the structure of the society they envisaged since through work, on which the Republic is founded (Article 1), citizens are enabled to express their personalities

and at the same time, according to «their potential and their choice», they must contribute «to the material or spiritual progress of society» carrying out «an activity or function». Through work, in short, the citizen obtains for himself or herself the fulfillment of the promise of the Republic, but at the same time contributes to the Constituents' vision for the whole of society. It is within this legal framework that the Italian legislator should consider the situation of disabled people.

Like everyone else, the disabled are part of the osmotic exchange of rights and duties, but what differentiates their situation is the balance between assets and liabilities.

Clearly, the duty of the Republic to remove material and social obstacles is much more significant in the case of the disabled. In particular, this duty involves creating the conditions in which a worker's disability is, in a sense, "defused" by ensuring that a disability is neither directly nor indirectly a source of obstacles to the individual's possibility of expressing the working capabilities through which, like every other person, the disabled person develops his or her personality. At the same time, each disabled worker can, in this way, repay his social debt by contributing to the social and material progress of society without being required to give more than that which his or her condition and possibilities allow.

Obviously, this implies precisely the concept of disability which has emerged in recent years: a definition of disability as a social and relational fact and not just as a disablement or impairment which makes the person "unfit" according to the common parameter of *normal* abilities.

In other words, if disability is a health condition in an unfavorable environment, the task of the State is to seek to remove the conditions that determine such a disadvantage, so as to restore to each person equal dignity as a citizen in the full and complete sense (a status that also involves the duty of social participation).

## 2. ANALYSIS OF GENERAL STATISTICAL DATA[9]

The most recent data on this subject dates back to 2011. This data was collected and prepared by two different institutes namely ISTAT[10] and ISFOL[11]. These statistics are not completely comparable to each other as regards the objectives of the research itself and as regards the aggregate results and sample used. In the case of the former aspect, the ISTAT research aims at assessing the social inclusion of people with every kind of limitation in personal autonomy, and therefore has a more general range than the ISFOL research, which has the specific aim of assessing the impact of regulatory instruments set up by the legislator with regard to the employment of people with disabilities.

For this reason, it is necessary to "cross-read" the available data and, in particular, the data that coincide at least in terms of the subject concerned and which have the aim of assessing the employment status of the disabled in Italy.

However, also in this case, the diversity of the statistical results can be explained primarily by the sample to which the questionnaires were administered.

In fact, the section of the ISFOL study specifically relating to the above-mentioned aspect concerned all those individuals who perceive themselves as disabled, with the result that it covered a wider number of cases than that of the similar ISTAT study. This specific part of the ISFOL survey also dates back to 2008 while the section of the ISTAT survey dedicated to the similar area of research is based on more recent data of 2011.

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[9] In order to ensure a better treatment of the topic it is considered more useful to report in this section only the general statistical data concerning the phenomenon, whereas more specific data will be reported with the analysis of the regulatory data presented throughout the notes.

[10] *Istituto Nazionale di Statistica (National Institute of Statistics)*, the Italian public research institution that deals with social and economic censuses and surveys. The research in question, entitled «Inclusione sociale delle persone con limitazioni dell'autonomia personale» (Social inclusion of people with limited personal autonomy) referring to 2011 was published on 14th December, 2012. It can be downloaded from the website www.istat.it.

[11] *Istituto per lo sviluppo della formazione professionale dei lavoratori (Institute for the Development of Vocational Training of Workers)*. This is a public research institution supervised by the Ministry of Labour and Social Policies. The data used here is supplied by the «Sixth Report to Parliament on the State of Implementation of Law No. 68 March 12th, 1999, Related to 2010-2011» which may be viewed on the website http://bw5.cilea.it.

According to the ISFOL data, the percentage of disabled people in employment amounts to 58% (compared to 70% of the Italian population), while according to the ISTAT data, 28% of people with functional limitations are in employment while occupied residents in Italy amount to 56.8%.

In both cases the age group between 15 and 64 is taken as a reference.

The ISTAT survey also shows that compared to the total population and given an equal number of unemployed people, among people with limited personal autonomy, the inactive are proportionately fewer, while the datum that makes the difference is the number of those who "dropout" of the market and who represent 40% of the sample, whereas among the total population the figure is less than 10%.

The ISFOL data is, however, interesting for other reasons, since it is a way to understand the entry paths to the labour market for the disabled and how long they are able to remain within it.

It is observed how much more difficult it is for the disabled to achieve higher educational qualifications, since only 5% have a university degree compared to 12% of the working age population, and 40% of the disabled end their educational career at middle school compared to 34.8% of the total population.

The influence of the protection provided by the legislator in favor of the disabled emerges clearly from some significant statistical data. For example, they are predominantly "dependent" (in 81.7% of cases compared to 75.4% of employment in Italy as a whole) and a lot of them are employed in the service sector, within which the public sector is still a particularly significant employer. This is confirmed by the modalities through which employees with disabilities find employment. While it is true that among unemployed people with disabilities it is more common to turn mainly to family and friends as well as to recruitment centers[12] in order to find employment, it is equally true that, apart from personal acquaintances, the most effective channel through which employment is actually found is through open public recruitment competitions[13].

[12] In the latter case, in a manner which is more than proportional with respect to the population as a whole (25.9% vs. 15%).

[13] The main channels of access are, firstly, friends, relatives and acquaintances in 32.9% of cases (compared to 33.4% for the total population) and alternatively public exam competitions in 22.7% of cases (compared to 18.5% for the total population), despite the fact that only 4% of people with disabilities seek employment through the latter channel. The employment services

## 3. THE INTERNAL REGULATION AND THE QUOTA SYSTEM MECHANISM

Although it was far from being immune from criticism or inconsistencies, Law No. 68[14] adopted on 12th March, 1999 entitled *Standards for the Right to Work of Disabled People* led to a significant cultural and legal-regulatory shift in Italy, replacing the previous law on compulsory employment, namely Law No. 482 of 2nd April, 1968. While the earlier law was essentially based on numerical job placement, the 1999 Law introduced the concept of "targeted" employment.

The precise aim of the law is to build «technical support tools that permit the proper assessment of the capacity to work of people with disabilities and to place them in the appropriate post» (Article 2). The purpose of this is to restore to each disabled worker the opportunity to play an active and productive role in society through the opportunity to perform a job in which the specific residual capacities of each individual are best expressed.

The purely welfare-based logic which existed in the past, for which the regulations were seen as a way to enable the disabled to sustain themselves through any job "offered" by employers, who were in effect being asked for a sort of solidarity contribution through the employment of disabled workers, has been replaced by a form of promotion of employment through forms of "contracted" recruitment, tailored in relation to the subjective qualities of the worker and the real needs of the company which employs him or her.

From this different perspective, each disabled person can perform a job that is appropriate to their individual characteristics and allows them, to all intents and purposes, to have an active role in society as «integral and integrated parties of the social and production system of the country»[15].

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are useful only in 10.1% of cases, which proves the limited effectiveness of this public body (considering that 26% of unemployed people with disabilities apply through them)

[14] Among the earliest analytical comments on the 1999 Reform see D. GAROFALO, *Disabili e lavoro, Profilo soggettivo*, *Inserto di diritto&pratica del lavoro*, No. 37, 1999, pp. 3-23 and *Id*, *Disabili e lavoro, Profilo oggettivo e sanzioni*, *Inserto di diritto&pratica del lavoro,* No. 38, 1999, pp 3-29. For a complete, although not fully up-to-date analysis, of the provisions related to the access of the disabled to labour see F. LIMENA, *L'accesso al lavoro dei disabili*, Cedam, Padova, 2004.

[15] F. LIMENA, *ibidem*, p. 19.

For people with disabilities, the provisions of Law No. 68/99 are a crucial element in the overall regulatory framework[16], because they specifically aim at facilitating their access to the labour market[17].

The starting point of this legislative construction is the obligation for public and private employers to hire disabled workers in a variable amount that depends on the total number of human resources of the company. Thus, if the company employs more than 50 employees, the quota is 7%; if it employs from 36 to 50 employees, the quota is 2 workers; finally, if it has between 15 and 36 employees, one disabled person is sufficient to meet the requirements[18]. While small businesses with under 15

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[16] The judicial framework is first of all composed of the "Framework Law for the assistance, social integration and rights of the *handicapped* No. 104/1992" which, as regards the question of labour law, contains provisions which promote educational integration and vocational training for disabled people and delegate to the Regions and Local Authorities the rules relating to benefits for individual "handicapped" people to help them to reach their workplace or to start up and carry out activities of self-employment, as well as the regulation of incentives, concessions and subsidies for employers, also in order to adapt the workplace to meet the needs of recruited "handicapped people" (Article 18), and for service cooperatives (Article 38).

To complete the picture, mention should be made of the Law on Social Cooperatives, whose aim is facilitating the work placement of disabled persons (according to this law, at least 30% of their members should be disadvantaged people) and Laws No. 63 and No. 42 of Legislative Decree 81/2008 on Safety in the Workplace, respectively, related to the obligations of the employer in establishing structures which take into account the access needs of disabled people, and in adapting work tasks in the event of unexpected unsuitability to the tasks being performed.

[17] The legislator wanted to focus on two key features: flexibility in the hiring process (connected to recruitment procedures that could be programmed and agreed upon between the institutions responsible for management of the mandatory employment and employers obliged to employ) and training, incentivized also during the employment relationship, which should ensure qualification or re-qualification of the disabled without the necessary expertise.

[18] According to the statistics provided by ISFOL in the report mentioned above in the paper, the main area receiving disabled workers is composed of firms with over 50 employees, while the size class of firms which registered the highest rate of available positions, is the one including firms with from 15 to 35 employees with rates of about 25% in 2010 and 23% in 2011, while public administration authorities with more than 50 employees develop more than 96% of the reserve share and indicate a percentage of available positions of approximately 19% in both years (see pp. 47-48).

employees obviously have the option to employ disabled people, they are not obliged to do so.

The criteria to calculate the reserved quota was changed with Law No. 92 adopted on 28th June, 2012, which introduced significant exceptions and clarifications regarding the previous general rule according to which all "subordinate" workers under a contract of paid-employment are computed in order to determine the number of disabled people to hire. Specifically, it was decided to exclude from the computation disabled workers recruited compulsorily according to the Law, members of Production and Work Cooperatives, managers, temporary agency workers, workers engaged in activities abroad, home-based workers, and workers employed under fixed-terms for a period of 6 months or less.

Procedurally, the law states that employees ascertained as disabled who aspire to a job must enroll in the appropriate lists held by recruitment centers so that a specific form is compiled for each worker containing «Working skills, abilities, capacities and dispositions as well as the nature and degree of disability» (Art. 8).

As a preliminary act to the actual process that leads to the employment of the worker, employers must send an information prospectus in relation to the employment situation of their company by January 31st each year.

This prospectus should contain information about the total number of employees and specify the number and names of the employees who are already beneficiaries of the measures introduced by Law 68/99, the positions and tasks available and all the information necessary in order to proceed with the introduction to employment for beneficiaries of the regulation in question.

In fact, by comparing this information it is possible to facilitate a match between the effective demand for work and the supply of labour, and at the same time to introduce each disabled person not just to any job, but to an activity suitable for his or her skills and professional qualifications.

Consequently, the start-up of the employment relationship can occur in two ways: The first of these was conceived as the main institutional channel by the legislators, while the second is through the signing of specific agreements. The latter will be discussed below together with the provisions that incentivize its use, but a few words should be said here about the mechanism through which legal requirements are complied with and about the modalities used to choose the workers to place[19].

[19] It is only possible to mention briefly here the previous regulation ex Law No. 482/68 in order to highlight the different logic used in the past. The system then revolved on a numerical placement based on a ranking list of disabled people registered with the employment services.

Within 60 days of the time when the legal conditions are met, each employer obliged to meet the quota has to submit a request for the one or more workers needed. After that, the relevant authorities arrange the placement procedure.

The information prospectus already indicates which tasks or duties are available and, in addition, the employer may specify the category, position and job title of the disabled worker once introduced to work. The registration in the lists, as has been explained, indicates working skills, abilities, capabilities and dispositions as well as the nature and degree of disability of each worker.

Article 9, paragraph 2 also states that «In the case of impossibility of introducing employees with the specific qualification requested or otherwise arranged with the employer, the relevant authorities shall provide workers with similar qualifications, according to the ranking and prior training or apprenticeship [..]».

As is clear at this point of the analysis, *matching* this information between public bodies and employers will tend to remedy the possible negative effects of previous numerical placement system[20].

In addition, and in line with the modalities we have seen, Article 7 allows the employer to choose directly a specific person he wants to hire (this is known as "*assunzione nominativa*"), but this is possible only to meet the following portions of their quota: 50% for employers with between 36 and 50 employees; 60% for employers with more than 50 employees and, finally, employers can fulfill their obligation to employ one disabled person using this option if they have between 15 and 35 people[21].

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The placement took place on the basis of possession of the generic vocational qualification requested by the employer regardless of the correspondence with the professional level of the worker to be employed. The whole process resulted in the mortification of both the worker's capabilities and the company needs. It was, thus, an inefficient and ineffective system with respect to its goal of work integration, which the legislators intended to change entirely.

[20] Although it must be said that the maintenance of a certain proportion of workers placed at work according to the numerical system on the basis of the ranking list and under the control of public bodies should not be seen as an entirely negative fact, because the probable aim of the legislator was a better distribution of job opportunities among workers with disabilities to whom employers would hardly ever turn voluntarily.

[21] Also political parties, trade unions, social organizations and bodies are obliged to employ in this way.

### *3.1. Exonerations, exclusions, suspensions and compensation regarding the obligation of employment per quota*

The obligation under Article 3 of the law is partially mitigated by the cases of exclusions and exonerations granted by Article 5 of the same law. Although this Article was partially remodeled by subsequent reforms, most recently those of the Monti government, its general logic has not been changed and, for this reason, it is still considered in line with anti-discrimination regulations.

The obligations established by the law do not apply to either public or private employers that operate in certain sectors such as building as well as in air, rail, sea and land transportation (but in this case exoneration covers the on-board personnel only). These exclusions evidently reflect the false preconception that certain types of activities are in themselves not accessible for workers with disabilities where the rule works by a kind of "legal presumption" that excludes a more useful case-by-case analysis.

Law No. 92 adopted on 28th June, 2012 expanded the circumstances for exclusion in the building sector when it stated that «Also considered building site personnel are those directly active in industrial or plant installations and in related maintenance works carried out on site» (Article 4, paragraph 27).

In addition, it is important to mention a regulation (Art. 5, paragraph 3) according to which employers whose businesses are involved with unspecified «special conditions of activity» may choose to pay a contribution to the Regional Fund for Disabled Employment instead of entirely meeting their compulsory quota. Despite the vagueness in the wording of this provision, it seems clear, first of all, that it is not possible to be completely exonerated from the duty of employment simply by paying the contribution and secondly that the Article in question applies to exceptional cases only.

Finally, Article 5, paragraph 8 specifies that in the case of private employers taking on disabled workers in different production units and of private employers in companies that are part of a group, the legal obligations laid down in Articles 3 and 18 can be fulfilled by compensating for the smaller number of disabled workers employed in one unit or group with the assumption of a greater number of disabled workers in other factories or other group enterprises established in Italy[22].

[22] Article 9 of Decree Law No. 138, adopted on 13th August 2011, ratified by Law 14 of September 2011, introduced a new system of automatic compensation thereby eliminating the need for the ministerial or relevant provincial body authorization. Therefore, a private employer with personnel in several production units or in different companies of the same

A similar regulation allows public administrations, upon motivated request, to employ in compensation within the same Region provided a specific authorization is obtained (Article 5, paragraph 8-ter) [23].

The legislator has also provided the possibility to suspend the obligation of employment per quota for companies that are in such a critical situation as to have requested the intervention of the Extraordinary Treatment of Salary Integration or that have workers enrolled in the list that ensures a special unemployment benefit (Article 3, paragraph 5).

## 4. THE AGREEMENT INSTRUMENTS AND THE INCENTIVE EMPLOYMENT POLICIES

As mentioned in the previous section, the fulfillment of the obligation pursuant to Article 3 of Law 68/99 can be accomplished through the agreement instruments introduced by the 1999 reform, it being understood that the same instruments are also available to those employers completely excluded from the scope of Article 3 of Law No. 68/1999. As we shall see here, an important role is also played in this by the Regions and by Provincial services.

The "*schedule agreements"* ("Convenzioni di programma") pursuant to Article 11 of Law 68/1999 are particularly important both for the purposes underlying the regulation and the incentives associated with them which have a positive impact on their effective utilization. The legislators' idea in creating these agreements, which are signed between companies and Public employment services to meet the mandatory quota, was to facilitate the gradual integration of people with disabilities and stabilize their employment in the company required by law to employ them.

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group who wants to rely on the automatic compensation has only to submit electronically the information form pursuant to Article 9, paragraph 6 of Law 68/99 to each of the relevant Provincial bodies in which the production units of the company itself or branches of the various group companies are located.

The form should, clearly, point out the fulfillment of the obligation at the national level on the basis of data relating to each production unit or undertaking belonging to the group.

[23] Amendments to paragraph 8 and addition of paragraph 8-*ter* were made through Article 9 of Legislative Decree No. 138, adopted on 13th August 2011, converted into Law No. 148/2011.

A personalized plan of interventions to address most effectively the obstacles encountered when introducing disabled people at work, can be defined through this type of program.

These tools establish times and modalities of employment that the employer agrees to respect. It is also possible to include the option for the employer to choose the workers directly ("chiamata nominativa" as referred to above), to ease the introduction of the disabled at work by means of internships for training or guidance purposes as well as to offer fixed-term contracts, and to conduct trial periods longer than those required by collective bargaining (Article 11, paragraphs 1,2,3).

Therefore, the advantage for the employer is a more favourable management of the circumstances leading to employment than would be the case applying the quota system *sic et simpliciter*, and moreover the chance to plan the entry of disabled workers in the productive system a few at a time without being worried about possible sanctions for non-compliance with the quota required by law.

Article 11, paragraph 4, also provides specific *agreements of labor integration* designed for individuals who have special difficulty in entering the ordinary working cycle. These persons have to be entered on a training path which is an integral part of the agreement and which must be observed periodically by the public bodies in charge of monitoring and control. The regulation requires that the agreement include a detailed explanation of the tasks assigned to the disabled worker and of the manner in which they are to be carried out. Moreover the agreement also includes forms of support, advice and mentoring provided by the appropriate Regional services or vocational guidance centres or bodies, institutions, social cooperatives and voluntary associations, enrolled in the Regional registers, which perform activities to facilitate the placement and labour integration of disabled people.

Article 11, paragraph 5 allows agreements to be stipulated with a number of legal entities involved in social activities such as social integration cooperatives, consortiums at least 70% of each of which formed by social cooperatives set up as cooperative companies, and voluntary organizations enrolled in the Regional registers, etc.

Article 13 of this law also grants the Regions and Autonomous Provinces the responsibility of regulating the procedures and modalities for granting contributions related to the employment process from the *Fund for the Right to Work of People with Disabilities* at the Ministry of Labour and Social Security in favor of employers who employ through the agreements pursuant to Article 11.

Although the economic contribution is also granted to those employers who have no obligations under Article 3, this is in any case only for the permanent employment

of workers who have severe reductions of their working capacity of at least 79% (and in this case the contribution is 60% of the wage cost) or between 67% and 79% (contribution of 25%). A similar contribution, consisting of the partial coverage of the annual wage cost, is also provided to incentivize workers with severe disabilities particularly in their learning abilities. Moreover concessions are provided in social security contributions[24].

To continue the analysis, Article 12 of Law 68/1999 concerns the so-called "temporary placement agreements" ("*convenzioni di inserimento temporaneo*") involving private employers, cooperatives or freelance professionals. This kind of agreement can be activated only in the presence of a verified difficulty with introducing the disabled worker directly into the company, when the person in question is considered to need training in order to be able to work effectively for his employer. This instrument foresees a complex triangular relationship between an employer subject to the obligations of the law, the relevant Provincial authorities, and a "host". The first two sign the convention agreement ("*convenzione di inserimento temporaneo*"). The "host" may be a social cooperative, a disabled freelance professional, a social enterprise, or a private employer not subject to the obligations, and its objective will be the introduction of the disabled person into work. In brief, the employer employs the disabled worker on a permanent basis, but employment remains "frozen" for the duration of the temporary placement agreement. At the same time, with the drafting of this agreement, the worker is introduced to a hosting employer's workplace, integrated in the hosting-company's human resources during a period of time of up to a maximum of 12 months + 12 months, during which the disabled worker carries out appropriate training to prepare for future placement in the production process of the employer.

In addition, the employer is obliged to entrust the "host" with orders or commissions for an amount not less than that which allows the latter to apply the clauses of the national collective bargaining contract (above all the clauses related to

[24] The framework of incentives is completed by letter d) of paragraph 1 of Article 13 of the Law in question, which allows for the partial lump-sum reimbursement of expenses necessary for the transformation of the workplace in order to adapt to the operational capabilities of disabled people with reduced working capacity greater than 50 per cent, or for the provision of telecommuting technologies or the removal of architectural barriers which restrict in any way the labor integration of disabled people. It should be added, for completeness, that the Regions, are entitled to grant service and training subsidies to disabled self-employed people.

wages), to pay social security and welfare contributions in favor of the workers, and to fulfill the functions aimed at introducing the placement of the disabled at work.

The use of this kind of agreement for one disabled worker is allowed when the employer employs fewer than 50 workers, up to a limit of 30% of the mandatory quota when he employs more than 50, but it must be said that in practice this instrument has almost never been used.

Article 12-*bis* Law 68/99 introduced by Law 247/2007 provides for a new type of agreement that is similar to the one described above. The Employment Services may enter into special agreements (only for the employment of the disabled who have particular characteristics and placement difficulties) with private employers subject to the quota system (named "*employer transferor*") and "*recipients*" (such as social cooperatives and their consortiums, social enterprises, and private employers not subject to the obligations of Law 68/99).

In this case, the main difference from the agreement under article 12 lies in the fact that the disabled worker will be hired directly by the "recipient", while in common with the provisions of article 12, the "*employer transferor*" entrusts the "recipient" with orders or commissions for a value amounting to not less than the wage and welfare contributions arising from the assumption including any training and coaching costs.

Such agreements must have a duration of 3 years, extendable only once for a further period of not less than two years. At the expiry of the agreement, the "*employer transferor*" can hire the disabled worker directly with a permanent contract. In this case, the employer will be able to access the National Fund for the Right to Work of Disabled People achieving the right of first refusal in the allocation of resources.

These agreements are permissible within the limits of 10% of the mandatory quota. The employment of the disabled worker is considered fulfillment of the employment obligation pursuant to Law 68/99 during the period of effectiveness of the agreement.

Some of the Regions have regulated the agreement under Article 12 bis of Law No. 68/1999[25] foreseeing validation of the agreement itself by the Region, generally

[25] The statistics related to all agreements types broadly show a majority for use of those under article 11. The agreements of labor pursuant to Article 11, first paragraph, in Italy, were 9,333 (of which 3,759 for women) in 2010 and 9,163 in 2011 (of which 3789 for women). Labour integration agreements pursuant to Article 11, paragraph 4, were 1,545 in 2010 (of which 593 for women) and 1,907 in 2011 (of which 764 for women). The agreement instrument is especially widely adopted in Northern Italy where in statistical terms its use is double that in

on the basis of the respect of four main criteria namely: method of calculation of the unit value of the commission or order, numerical limit in covering the mandatory quota by agreement, modality for adhesion to framework agreement, procedure for the identification of disabled workers with particular placement problems that need to be taken on by the cooperatives in order to take advantage of the framework agreements.

It is appropriate in concluding this point, to make some brief general comments on the legal instruments considered so far.

Especially through the agreement instrument, which is agreed on between the public administration and the private employer, the legislators undoubtedly attempted to overcome the idea that pursuing the objective of removing barriers to the social inclusion of people with disabilities should necessarily pass through measures taken by public bodies. In fact, compulsory measures are frequently deemed by entrepreneurs as intrusive on their prerogatives and entrepreneurial powers, and this can seriously undermine their effectiveness.

The possibility to fulfill the legal obligations related to the quota through agreements or through the direct recruitment of individuals and the greater focus on matching the actual needs of the company with the professional skills and knowledge of the resource to place are suitable measures to reconcile the right to work and the social dignity of the disabled, both analysed as constitutional rights at the beginning of this work, with the employer's private economic initiative that is safeguarded by Article 41 of the Constitution. The necessity of this reconciliation was underlined by the Italian Constitutional Court in a number of important rulings which will be analysed briefly in Section 7.

However, one of the critical points of the current system, particularly regarding the agreements, is its non-uniform application in all parts of the national territory.

The fact that these instruments have been left in the hands of the local authorities has meant that their application has been affected by the different experiences and capabilities of those bodies, as well as by the recruitment centers that are an integral part of the overall employment system. This has meant that effectiveness in achieving

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Central and Southern Italy. The agreements pursuant to Article 12 are virtually unused (only 8 in 2011), while slightly more are those pursuant to Article12bis (15 in 2010 and 22 in 2011). In this case, these agreements were signed by the Regions of Central and North-Eastern Italy.

the final goal has varied according to geographical location, with greater efficiency in the northern regions and greater difficulty in those of the south and on the islands[26].

## 5. THE ROLE OF THE LOCAL AUTHORITIES.

Law No. 68/99 also assigns a role to the Regions and Provinces that has become very important over time, firstly due to the reform of Article 117 of the Constitution concerning the division of legislative powers between the State and the Regions and, secondly, to the reform of employment services, which are now permanently assigned to local authorities following the ratification of Legislative Decrees No. 181/2000 and 297/2002 and Presidential Decree No. 442/2000. This has resulted in the search by the Regions for ways to link the rules of Law 68/99 with the later regulatory instruments, with the inevitable result of solutions that are not always uniform.

In both the private and public sectors the hiring process introduced by Law 68/99 goes through the provincial recruitment centers which are appointed to receive requests from employers for disabled workers to introduce at work. These bodies establish a single ranking list of unemployed disabled people and, following the requests of employers, they take steps to place the workers (Article 8, paragraph 1). There are, however, two exceptions, namely the cases of so-called "internal disabled workers" - workers that become "unfit" for the tasks assigned to them as a result of injury or disease in the course of their work and are not included in the list at all (covered by Article 4, paragraph 4) and disabled people who have been dismissed because of the reduction of personnel or for justified objective reasons and who maintain their position in the original ranking (Article 8, paragraph 5).

The authority to verify infringements of the obligations related to the quota system (Article 9, paragraph 8) and to determine penalties (Article 2, paragraph 15), remains in the hands of a peripheral body of the State, namely the Provincial Directorate of Labour (Direzione Provinciale del lavoro).

The criteria and procedures for the formation of the aforesaid ranking list is also delegated directly to the Regions under Article 8, paragraph 4 of Law 68. Although

[26] Even though the following statistics must be analysed taking into account the general condition of advantage in terms of employment and economic development of Northern Italy compared to Southern Italy and to the islands, it is still useful to note that 67.4% of the successful placements are operated in the North while the Centre achieves 21.6% and the South 10.9% (these figures refer to 2011, but similar data was reported in 2010, (cf. ISOFOL report pp. 60-61).

the criteria used differ from Region to Region, priority is generally given to a) length of inclusion in the list of people with disabilities b) economic and financial circumstances c) family expenses d) the degree of disability and e) difficulties with locomotion.

It is clear that the consideration of additional elements other than disability can often lead to a kind of marginalization or limited recognition of both the degree of disability and of the individual's skills and ability. At the same time, as we have already seen, the percentage reduction of work capacity does have a role both in the employment incentives provided for by Article 13 of Law No. 68, and employment by agreements (Article 12 and 12 bis). On the other hand, socio-economic indicators that are irrelevant in those areas are, indeed, important in the targeted employment process.

As a result of the implementing measures of Legislative Decrees No. 181/2000 and No. 297/2002, a fundamental role is played by the Regions in the establishment, preservation and suspension of the "unemployed status", that is, with regard to the subject of this paper, the essential condition to benefit from a protected employment process.

For these reasons, Regions have the task of coordinating the general provisions with those provided for by Law 68/99. For example, in the case of loss of unemployment *status*, Article 10, paragraph 6 of Law 68/1999 foresees the loss of unemployment subsidy and cancellation from the unemployment list when there is a failure to answer the call or the unjustified refusal of a job matching the worker's professional skills. According to the law, the loss of rights is determined by the Provincial Directorate of Labour, a public body of the State without any authority in employment issues.

Similar and more detailed rules regarding the matching of labor supply and demand were provided by Article 4 of Legislative Decree No. 181 adopted on 21st April, 2000, which placed this matter under Regional and Provincial control.

The regions have, therefore, operated so as to adapt the general discipline to cases of unemployment of disabled workers, acting to resolve the critical situations that result from coordination between the different sources of law.

Consequently and in compliance with the principle of subsidiarity, from the regionally addressed acts comes the responsibility of the provinces for the most minutely bureaucratic aspects such as planning, implementation and monitoring of interventions in favour of the employment the disabled, the management and

preparation of the ranking list, the implementation of actions financed with the resources of Provincial Funds, and the granting of the benefits provided for by Article 13, Law 68/19.

## 6. THE ANTI-DISCRIMINATION REGULATION AND THE INFLUENCE OF EC DIRECTIVES

The analysis of the regulations would not be complete without taking into account the most recent legislation, namely Law No. 67 adopted on 1st March, 2006, regarding measures for the legal protection of people with disabilities who are victims of discrimination, and Legislative Decree No. 216 adopted on 9th July, 2003, which has implemented in the national legal system Directive 2000/78 /EC on equal treatment in employment and working conditions[27]. These two measures partly overlap in terms of regulation, but are complementary in terms of the scope of their application.

In effect, both regulatory instruments adopt the same concepts of direct and indirect discrimination as well as of harassment directly inspired by the European Directive. In addition, in both cases, a specific provision refers to Article 44 of Legislative Decree No. 286/98 (Consolidated Law on Immigration) concerning judicial protection[28].

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[27] For a diachronic analysis of the legal remedies against discrimination, especially as applied in reference to the disabled, from its origins in the United States to the European Union Directives, see G. TUCCI, *La discriminazione contro il disabile: i rimedi giuridici*, *Giornale di diritto del lavoro e di relazioni industriali*, No. 129, 1, 2011, pp. 1-27.

[28] In particular, paragraphs 1 to 6, 8 and 11 of Article 44 of the Consolidated Law on Immigration are recalled.

Thus, for any case of discrimination in the workplace regardless of the discriminatory factor, it is possible to activate a summary emergency judgment trial in order to verify the discrimination and to remedy through a court order in the form of an injunction or *inaudita altera parte* decree in cases of particular urgency, which results in the termination of the behavior and the removal of the effects. It is, therefore, an instrument based on Article 28 of the Workers' Statute to which, as in the case of anti-union conduct, in the event of non-compliance the penalty is connected with the court order. The revision of the decision on appeal is clearly possible.

The reference to paragraph 11 imposes a social clause on companies also based on the one provided for by Article 36 of the Statute of Workers. The verified discriminatory behavior

The complementary nature of these acts lies, however, in the fact that the most recent of the two regulates equality and the prohibition of discrimination against any individual on grounds of religion, personal beliefs, disability, age or sexual orientation, exclusively in the employment context from the beginning until the termination of the working relationship and includes any event related to it.

The most recent Legislative Decree, however, exclusively protects people with disabilities, but has a wider scope in terms of application, being designed to provide them with the full enjoyment of their civil, political, economic and social rights through the prohibition of any discrimination in any field or sphere of social life and relations.

Closer analysis of Legislative Decree No. 216 adopted on 9th July, 2003, shows in the first place that Article 4 of the Decree modifies Article 15 of the Workers' Statute [29], so as to make it the pivotal provision against discrimination deriving from all possible forms of diversity. Article 3 of this Decree specifies its scope. The general principle of equal treatment must be observed with specific reference to the following area where it can be judged directly:

> a) access to employment and work, either self-employment or waged employment (including selection criteria and employment conditions);
> b) employment and working conditions during the relationship (including career advancement, wages and conditions of dismissal);
> c) access to all types and levels of vocational guidance and training, further training and retraining, including practical work experience;
> d) membership and activities in organizations of workers or employers, or in other professional organizations and services provided by these organizations.

Paragraphs 4 and those which follow in the same Article 3, contain a number of exceptions to the general principle, one clause regarding specific work activities or functions of public interest (the armed forces, public order, emergency and prison services) and two general clauses.

The first of these is provided directly by the Directive, but could probably have been detailed better by the legislators. This clause considers that the differences in

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results in the withdrawal of benefits and/or any tax break or benefit as well as public tenders, and in the most serious cases, to the exclusion of the person responsible from the granting of any financial or credit incentives, or from any tender, for a period of two years.

[29] Law No. 300, adopted on 20th May 1970.

*ex* Article 2 when they derive from the necessary characteristics or abilities required of the employee as dictated by the nature of the work itself or the context in which it is carried out. In other words in cases where they are «essential and determining for the purposes of carrying out the activity itself».

However, the legislators went beyond the requirements of the Directive by providing for a quite generic additional exemption according to which differences of treatment that «are objectively justified by legitimate aims pursued through appropriate and necessary means» are not to be considered discrimination (Article 3, paragraph 6) .

Another issue raised by the not quite correct implementation of the Directive in the national legal system, already emphasized by observant authors[30], was the absence, following the transposition, of any reference to Article 5[31] of the Directive and to the related Article 2 b) ii).

In this way the Italian legal system was left without a major tool for change that implies the very definition of "interactional disability" found in the United Nations Convention approved by the European Community[32] and which is aimed at removing the obstacles which substantiate disability within the working environment.

In actual fact, Article 5 of the Directive is the one that requires the employer to provide *reasonable accommodation* for adapting the work environment to concrete situations in order to make it suitable for the best expression of the personal qualities and working capacities of the differently-able person. When the European Commission referred Italy to the Court of Justice for inadequate transposition[33] of the

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[30] M. BARBERA, *Le discriminazioni basate sulla disabilità*, in VV.AA., *Il nuovo diritto antidiscriminatorio*, Giuffrè, Milano, 2007, pp. 77-123.

[31] Article 5, the summary of which is "Reasonable accommodation for disabled people", declares that «in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned».

[32] By Decision 2010/48.

[33] With the infringement procedure IP/ 09/1620. The defense of the Italian Republic was based on trying to prove the correct transposition of the Directive by means of the interpretation of the overall Regulatory Framework in which the Legislative Decree was

Directive, the trial resulted in a condemnation based on the following reasoning[34]. On the basis of a previous similar ruling related to Denmark[35], and contrary to the arguments presented by the Italian Republic, the Court stated that the national regulation had not properly transposed the Directive, on the grounds that it contained only public measures of support for the employability of people with disabilities and excluded any direct and specific charges at the expense of employers. Article 5 of the Directive, on the contrary, is specifically intended to oblige all employers to take tangible measures involving the various aspects of employment and working conditions that are effective with respect to the needs of specific situations[36] that arise and that need a proper action carried out by the employer.

This ruling was followed by the addition of Article 3 *bis* of Legislative Decree 216/03[37], which states that «In order to ensure respect for the principle of equal treatment of people with disabilities, public and private employers are required to find reasonable accommodations in the workplace, as defined by the UN Convention on the Rights of Persons with Disabilities, ratified under Law no. 18 adopted on 3rd March 2009, to ensure people with disabilities full equality with other workers. Public employers must ensure the implementation of this paragraph without new or increased charges for public finance and through human and financial resources available under the current law». The choice to refer directly to the UN Convention rather than to the Directive, and the financial limit imposed in relation to the public employer, must be highlighted.

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inserted. On the contrary, in the view of the Court of Justice, the national regulations could not be considered fully accomplished precisely because of the absence of any provisions of specific obligations for employers.

[34] See note n. 6. For a comment on the judgment see: M. C. CIMAGLIA, *"Niente su di noi senza di noi": la Corte di Giustizia delinea il nuovo diritto al lavoro delle persone con disabilità*, *Rivista giuridica del lavoro*, 3, 2013, pp. 399-414, and M. AGLIATA, *La Corte di giustizia torna a pronunciarsi sulle nozioni di handicap e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, *Diritto delle relazioni industriali*, 1, 2014, pp. 263-268.

[35] Judgment mentioned above in note n. 7, the analysis of which is in the report related to Denmark within the same issue of this journal.

[36] The Court made even practical examples (paragraph 60 of the mentioned ruling) such as the ones related to the arrangement of the premises, the use of equipment, work rhythm, workplace or distribution of tasks in order to put the disabled in a condition to access and perform their jobs meaningfully.

[37] By means of Article 9, paragraph 4 Law Decree 76/13, converted into Law 99/13.

Being an implementation provision of a directive, the legislators should have produced a more comprehensive and detailed regulation and not simply reproduced the general principle and so judges will inevitably take action to meet this failing. Moreover, it can be expected this provision will result in litigation in the coming years. This is even more the case for the fact that, in accordance with Article 3 letter c) of the Directive, it must be applied both to conditions for employment access and to working conditions, including dismissals and wages.

It is therefore likely that the concrete application of this measure will turn into a massive innovation since it will potentially reverse well-established orientations that emerged from court decisions that are based on the supposed absolute immunity of organizational decisions made by entrepreneurs, who have been granted incontestable discretion in this sphere. The latter principles have, in fact, always been safeguarded by the Corte di Cassazione (the Italian Supreme Court; hereinafter the "CdC") also in the interpretation of the relevant provisions of Law 68/99 and those which preceded it.

Specifically, the CdC, stated in the past that also when disability affects the workers during the employment relationship the employer is not obliged to modify the workplace materially or to acquire new technologies to make the condition of the worker compatible with the company organization (*sic* Cass. No. 10339[38] Aug. 5th, 2000), and also that, in the event of the worsening of the health status of a disabled worker employed under Law 68/99, the employer has no obligation to modify or adapt the organization to the worker's new health conditions, even in order to avoid dismissal in the case of unsuitability for the preceding tasks (*sic* Cass. No. 24091/2009), despite Article 10, paragraph 3 of Law 68/99. In fact, according to the Court, in such cases the employer should only check if different tasks which would be suitable for the state of health of the disabled worker, are vacant in the company.

[38] In *Massimario della giurisprudenza del lavoro*, 2000, p. 1208 annotated by FIGURATI, *Questioni in tema di licenziamento intimato durante la malattia: la richiesta di ferie interrompe il rapporto?*, pp. 63-64.

## 7. ANALYSIS OF NATIONAL CASES

The constitutional validity of the system of compulsory employment based on Legislative Decree 3rd October 1947 (concerning the compulsory employment of mutilated and disabled veterans) and later Law No. 482/1968 (replaced in 1999) was challenged, because some believed it restricted the freedom of economic initiative, and of the organization and dimensioning of companies, all elements protected by Article 41, paragraph 1 of the Constitution.

The alleged violation stemmed from the fact that this obligation derived directly from exceeding a certain company size, commensurate with the number of employees, regardless of any other economic and/or organizational consideration. In addition, it was assumed that the costs of the obligatory employment of disabled persons would be borne by certain groups of private citizens, while by their very nature of social public expenditure, these costs should have been a burden on the whole community and therefore on treasury funds pursuant to Article 38 of the Constitution.

The rulings of the Constitutional Court, which had intervened on these issues in order to reject the previously mentioned constitutional findings, are still of current relevance since they affirm valid general principles, *mutatis mutandis*, also in accordance with the regulations in force today.

The first ruling, to which all successive rulings would refer, was No. 38, adopted in 1960, in which the Court stated that the purpose of the rules then in force was not to provide the beneficiaries with charitable maintenance, but to put in place conditions to conclude a real employment contract in which physical fitness for employability was a required basis for the start and continuation of the work relationship.

The Court added that those provisions of the Decree were necessary to remove «in harmony with the spirit and the wording of the second paragraph of Article 3 of the Constitution, the obstacles to the actual participation of all workers in the economic and social development of the country».

Moreover, the Court also considered that it was right, in accordance with Article 4 of the Constitution, that the regulation promoted and implemented the conditions which made it possible for the beneficiaries still in possession of the necessary aptitude and professional skills to return to the work environment, with employment contracts that required the performance of work, offering them the «way to still play a role according to their abilities; [*urging*] the fulfillment of that inescapable duty of

solidarity which is a solemn statement of the fundamental principles of the Constitution (Article 2) [..]»

Similar observations were made in the coeval ruling No. 55 adopted on 11th July, 1961 where the Constitutional Court stated that the regulation on war invalids then in force was not in conflict with Article 38 of the Constitution because it did not dictate assistance in favor of the disabled, but predisposed «a system designed to ensure employment and re-integration in the national economic productive life cycle, for people who, although handicapped, retained a capability to work and were still able to perform».

Also unfounded, for the Court, was the supposed unconstitutionality of the law in question on the basis of Article 41. In the opinion of the Court, the law did not limit or repress private economic initiative because it did not affect the economic organization of companies, since the quota of positions it imposed was modest compared to the total number of employees freely chosen by the entrepreneur[39].

Even after the introduction of laws subsequent to the Legislative Decree of 1947, which updated the instruments in the field of compulsory employment, the Constitutional Court continued to refer faithfully to the "stare decisis" of these first rulings. This was also the case in the most recent rulings No. 449 of 23rd December 1994 and No. 86 of 21st March 1996.

In the light of the *ratio legis* of the above-analysed regulations regarded by the Constitutional Court as fulfillment of the precepts of the Constitution, and bearing in mind the precepts contained in the anti-discrimination measures promoted by the European Union, some authors and a number of judgments by Courts have questioned whether the law imposes on the employer a concrete obligation to conclude an employment contract with the worker who would obviously have a matching right to conclude.

In the specific case of the compulsory employment of disabled people, the issue revolves around the applicability of Article 2932 of the Civil Code which allows a kind of injunction to be obtained (more precisely an order in the form of a judgment which produces the terms and effects of the contract) in the case of refusal by one of parties to conclude a contract despite a previous obligation (normally a preliminary agreement signed before the main one).

[39] The Court, moreover, based its opinions on the overall provision of Article 41 of the Constitution which legitimizes State intervention with «measures protective of social well-being and, at the same time, restrictive of private initiative» (ruling No. 103 of 1957), provided that the private initiative is not cancelled or terminated by such action.

An earlier opinion of the CdC had considered feasible the application of Article 2932 of the Civil Code, when Law No. 482 of 1968 was in force (Cass., October 7th, 1976, No. 3323[40]), on the assumption that the Article of the Civil Code «supposing lack of conclusion of a contract by the obligated party, does not distinguish between contractual or legal obligation, and since it is the same law of 1968 which considers the obligation of the employer enforceable by judicial decision» (Cass. Jan. 22nd, 1979, No. 497[41]).

Subsequently, however, in the rulings of the CdC the exact opposite principle was consolidated, which is still dominant (e.g. March 2nd, 1979, No. 1322[42], May 24th, 1980, No. 3425[43]), according to which, in the event of unjustified rejection of employment by the company, it is not possible to obtain a sentence establishing the working relationship, since to conclude such a contract required the predetermination of the essential elements of the relationship (such as wages, duties and qualifications) which depend on the will of the parties. Therefore, in the event of refusal to employ despite the legal obligation under the law, the disabled worker has only the right to claim for damages (Cass., May 16th, 1998, No. 4953 and lastly Cass. Apr. 20th, 2002 , No. 5766) [44]

The rulings of the CdC on the interpretation of the provisions of law 68/1999 regarding the inclusion of people with disabilities are clearly linked with what was reported above. On this matter, as will be shown in the following example, the Supreme Court recalls in general terms the wording of the Constitutional Court about the effectiveness of the employment relationship. The perspective of the Court seems to seek the application of the general spirit of the law to the balance between, on the one hand, the aspirations of the disabled to find jobs suitable for their skills and, on the other, the needs of profitable placement within the organization.

Therefore, the Court clarified that, once it is assumed that the whole mechanism of the targeted employment system is to guarantee, on one hand, that the employer has a worker in possession of specific qualifications as well as the right technical and

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[40] In *Massimario della giurisprudenza del lavoro,* 1976, p. 714.

[41] In *Foro italiano*, 1979, I, p. 1463.

[42] In *Foro Italiano* 1979, I, 1462 .

[43] In *Massimario del foro italiano*, 1980 and entirely on online database IusExplorer, Giuffrè editore.

[44] In *Massimario del Foro Italiano,* 2002 and entirely on online database IusEXplorer, Giuffrè editore.

professional capabilities in order to be useful in the company organization and, on the other hand, that the worker's dignity is respected and he can express his professional expertise, «[…]the employer is entitled to refuse to employ not only a worker with different qualifications, but also a worker with qualifications "similar" to those he asked for, in the absence of prior training or internship to be carried out according to the procedures provided for by the same Article 12 Law No. 68 of 1999[45]**»** (Cass., Ruling No. 6017 of 12 March 2009).

The CdC reaffirmed this approach with the subsequent ruling No. 15058 adopted on 22nd June 2010 and No. 7007 adopted on 25th March 2011.

Moving on to an analysis of the case law concerning the condition of a disabled person at the time of a dismissal, firstly it must be said that, according to the general rule, a permanent disability of the worker acquired *ex novo* or engendered by the aggravating of disabilities provides grounds for a justified dismissal[46], when it is so significant as to make it impossible to carry out the tasks assigned[47].

However already at the time when the Law in force was No. 482 of 1968, the CdC had introduced the concept, which has become substantially generalized, of dismissal as *extrema ratio* by case law No. 7755 of 1998 Sez Unite[48].

The Court clarified that the breach of the employment contract in this particular case cannot be purely evaluated from the employer's point of view alone for which a severe lowering of the performance in the specified assigned tasks could obliterate his

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[45] Cass., Ruling N.. 6017 of 12th March 2009, in *Massimario del foro italiano*, 2009, p. 604, but also on *Foro italiano* database 1987-2009.

[46] In fact, according to the general principles on the matter, the fairness of dismissal is guaranteed by a duty of justification on the part of the employer. In particular, a dismissal is possible when the employee commits offences (such as theft for example) so serious as to break any fiduciary relationship with the employer, making even temporary continuation of employment impossible (this case is defined as "giusta causa" under article 2119 c.c), or in the case of a considerable breach of contractual obligations or, finally, in the case of «reasons relating to production, work organization or standard functioning of it» (defined as "giustificato motivo" under art. 3 Law n. 604/1966). The impossibility to carry out the task assigned because of a disability is considered in theory to fall within the scope of the last provision.

[47] Among authors see, for a regulatory analysis regarding individual and collective dismissals, S. GIUBBONI, *Il licenziamento del lavoratore disabile tra disciplina speciale e tutela antidiscriminatoria*, *Rivista critica di diritto del lavoro*, Vol. 2, 2008 pp. 427-447.

[48] In *Giustizia Civile*, 1998, I, p. 2451 annotated by GIANCALONE and in, *Guida al diritto*, 1998, iss. 37, p. 58 annotated by D'ORIANO.

contractual interest in the execution of the contract because of a lack of usefulness of the performance itself.

This could not be considered compatible with the system outlined by Law No. 604 of 1966 (that was then in force) and with its purpose.

The Court stated, instead, that an objective assessment of the impossibility to assign the employee to equivalent tasks compatible with his or her residual working capacity was required even though it should not result in a change within the company structure.

The due work performance, argued the Court, was to be found in concrete terms as a result of the interpretation in good faith of the contract, the evolution of the relationship and the business environment in which it was inserted.

It follows that in determining the performance due in cases of permanent partial disability of the employee, it will be necessary to assess the possibility to move the worker to equivalent tasks within that company, this imposition being for the creditor an effect of the contractual good faith which also implies a duty of cooperation with the debtor.

A subsequent ruling No. 10347 of 17th July, 2002, specified some aspects with regard to the above mentioned landmark decision. In the case of assignment of the disabled worker to new tasks, in order to avoid dismissal elements such as other worker's health and safety and workplace safety have to be guaranteed.

In actual fact, the Court wanted to emphasize once again that, even if the employer was obliged to move a disabled worker to equivalent tasks compatible with the new state of infirmity, as just underlined, this should not imply radical changes to the company's organizational structure and staffing.

The rulings analysed above, in actual fact, made reference to a regulatory framework modified by the introduction of Law No. 68, which essentially codified the *acquis* case law under which the CdC had generalized the *repêchage* obligation and the principle of *extrema ratio* as a condition of legitimate dismissal for justified cause.

Article 4, paragraph 4, of Law 68/99 therefore imposes on the employer not only the obligation to move a worker who becomes disabled after their hiring to equivalent tasks, but also to less qualified positions[49]. However, as the law specifies, «in the case

[49] According to the prevailing case law approach, the employer who, in order to avoid dismissal of a disabled worker for objective justified cause, proposes, a downgrading of the employee, must obtain the worker's consent. In addition, the former «is required to objectively justify the

of allocation to lower tasks they [*workers*] have the right to retain the more favorable treatment corresponding to the duties of origin»[50].

A problematic point of this legislation is that it is, literally, in favor of workers who become unable to perform their duties due to injury and illness and not of employees who were already disabled at the time they were employed.

In the event of a worsening of the health condition of people with disabilities who are compulsorily employed that is incompatible with the continuation of their work, Article 10, paragraph 3, provides in the first instance, an unpaid suspension of the activity and, subsequently, the possibility of termination of employment only if «even by implementing possible adjustments, the medical commission[51] finds the definitive inability to reinsert the disabled person within the company».

Given the cases heard by the CdC which have generalized the *repêchage*[52] obligation, Article 10, paragraph 3 of Law 68/99 must be interpreted in the sense that

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downgrading, also on the basis of inability to assign duties that are not equivalent, only when the employee has, […] expressed willingness to accept those duties: this so-called pact of deskilling is the only way to preserve the employment relationship and to exclude the application of Article 2103 of the Civil Code» (Cass. No. 10339 of 2000, but also Cass. September No. 21035 dated 28th September, 2006).

[50] So Article 4, paragraph 4 states in its complete form: «The workers who become unable to perform their duties as a result of injury or illness cannot be counted in the proportion of the reserve quota referred to in Article 3 if they have suffered from a less than 60 per percent reduction of work capacity or, in any case, if they have become disabled due to the employer who has not followed safety and hygiene regulations at work, a circumstance which must be assessed by courts. For the above-mentioned workers injury or illness do not constitute a justified reason for dismissal if they can be assigned equivalent duties or, if not, lower duties. In case of allocation to lower tasks they have the right to retain the more favorable treatment corresponding to the duties of origin. If any of such employees cannot be assigned to equivalent or lower tasks, they are placed by the relevant authorities referred to in Article 6, paragraph 1, in other companies, in activities compatible with residual capacity for work, without inclusion in the ranking list pursuant to Article 8».

[51]This is a public body instituted in the local health authority which has the task of verifying a condition of disability and inspecting the health condition of beneficiaries of the legislation in question in some circumstances directly established by law.

[52] By means of judgments n. 21579, Cass. 13 agosto 2008, in *Massimario di giurisprudenza del lavoro* 2009, p. 159, annotated by C. PISANI, *Il licenziamento impossibile: ora anche l'obbligo di modificare il contratto;* n. 11775, Cass. 12 luglio 2012 in, *Guida al lavoro*, 2012, p. 36; n. 14517, Cass. 1 luglio 2011, *ivi*, 2011, p. 35. Previously, there was only one case in which the burden of proof was on the employer to demonstrate that it would have been impossible to

if it is not possible or is too costly for the employer to adapt the productive organization to the new health situation of the disabled person so as to permit their reintegration, the employee can also be assigned to lower tasks. Only when this solution is impracticable, may he or she be dismissed. Thus any doubt concerning the constitutional legitimacy of Article 3 of the Constitution in terms of unequal treatment of similar situations is avoided.

It must be said that, in any case, disqualification remains a residual hypothesis following the CdC ruling No. 24091 of 2009[53]. While this ruling contrasts with the European Directive 2000/78 about *reasonable accommodation*, as mentioned in the previous section, it remains a decision of particular interest; and it still retains its validity today when it affirms that, if it is deemed necessary to avoid a disabled worker's dismissal, the employer is obliged to redistribute tasks and job positions among workers already in service despite any consideration about the workforce already being complete [54].

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reassign the redundant employee even to lower tasks, avoiding a layoff, namely in case of permanent inability to perform the duties because of disability which occurred during the employment relationship.

Moreover even the burden of proof in relation to the negative result of the probation period is on the employer. In fact, this must be justified, «so that the judge can verify the correctness, or not, of the exercise of power by the employer and consider in particular whether the evidence agreement is not being used to evade the Law» (Cass. 27th November, 1982 No. 6437 in *Massimario del Foro Italiano*, 1982, 16th January 1984 No. 362 in *Massimario del Foro Italiano*, 1984, 4th June 1992 No. 6810, in *Massimario del Foro Italiano*, 1992, 18th February 1994 No. 1560, in *Il diritto del lavoro*, 1994, II, p. 46 ; see also Cass. 1st April 1994 No. 3177, in *Impresa*, 1994, p. 1411; 29th May 1999 No. 5290, in *Massimario della giurisprudenza del lavoro,* 1999, p. 894 annoted by MARETTI, *Sull'obbligo di motivazione del recesso dal patto di prova concluso con l'invalido*, pagg. 896-903; Cass. 30th October 2001 No. 13525, in *Massimario del Foro Italiano*, 2001 and Cass. 18th March 2002 No. 3920, in *Diritto e giustizia,* 2002, iss. 15, p. 25 annoted by BUONOMO).

[53] In *Massimario del foro italiano*, 2009, p. 1417 and entirely on online database Iusexplorer, Giuffrè editore.

[54] As regards the assessment of the conditions that prevent the reintegration of permanently disabled workers, it is worth mentioning the recent ruling of the CdC No. 8450 dated 10th April, 2014, which reiterated that the assessment of the conditions which prevent once and for all the reintegration of the disabled employee are reserved for Medical Commissions set up at the local health wards as third bodies (in the same terms as Cass. No.15269 dated 2012) Cass.

It will be interesting to observe the legal impact which the transposition of the European Directive will have on these issues.

## 8. THE ROLE OF UNIVERSITIES IN THE WORK GUIDANCE AND PLACEMENT OF DISABLED STUDENTS

Law No. 17 of 28th January 1999 made mandatory in each university the establishment of the post of Managing Director for disability, establishing specific guidelines on the activities to be carried out in favor of students with disabilities. The Law also provided for financing from a separate section of the Fund for the financing of universities.

Each university is required to provide services for the integration of students with disabilities, in favour of whom the law itself provides for the use of technical and teaching aids, the establishment of special tutoring services and the personalized treatment for passing exams.

Certain universities including those of Cagliari, Padua, Turin, Bologna and Bari have chosen to establish a disability office specially dedicated to the development of best practices to improve the services that the regulations require.

To this it must be added that under Article 6 of Legislative Decree 276/2003 the public and private universities are authorized to conduct skills matching and intermediation in the labor market.

Specifically, the Universities activate measures to promote the encounter between the supply of and demand for labour by sending out information material, and organizing events such as conferences, seminars, exhibitions and workshops.

The Universities, therefore, act with their *job placement*[55] services as integrated entities in the network of employment services.

In particular, along with traditional training functions, universities increasingly combine guidance activities and organization of internships and apprenticeships in companies both during university courses and within twelve months of graduation.

Further developments include support and promotion activities creating opportunities through a database of graduates' *curricula* and a bulletin board for job

No. 15269 of 2012, in *Massimario del Foro Italiano*, 2012, p. 714 or *Foro Italiano* database 1987-2012).

[55] See various authors on the subject AA.VV., *Le opportunità occupazionali dei giovani: il ruolo del placament universitario*, Adapt, 2011, available on line at www bollettinoadapt.it.

offers. The intermediation platform can be managed by a consortium (i.e., ALMALAUREA[56]) or it may be a University database.

Some universities have activated a newsletter through which the Placement Office sends updates on job vacancies to its subscribers.

From this point of view, therefore, the individual universities do not necessarily offer specific services for their graduates with disabilities, but normally organize *placement* offices which offer their assistance indifferently to all ex-alumni.

There are, however, some exceptions that stand out for innovation and for being aimed specifically at graduates with disabilities.

The University of Insubria offers the "Cald Job" service, which presents internship offers for protected groups through the disability portal of the Universities of Lombardy.

The Universities of Emilia Romagna have set up a committee including Rector's Delegates, representatives of the entrepreneurial community and disability groups, to ensure during the degree course the possibility that the disabled can enter the working world.

The Universities of Veneto have promoted and financed together with the Region the project called “lavorABILE” ("workABLE"), designed by disabili.com, a national reference portal, with the aim of disseminating the *best practices* to enter the working world, starting with the capabilities and individual attitudes of new graduates and comparing them with the needs of companies[57].

Of particular value is the initiative carried out at the University of Florence, which set up a centre of university studies and research regarding disability issues called *Centro di studio e ricerca di ateneo per le problematiche della disabilità (University Center of study and research for disability problems)* which in addition to promoting and coordinating study and research activities, provides disabled students with a range of care, collaboration and integration services necessary to facilitate full participation in the didactic, scientific and social life of the University. In particular, the centre has launched a project called "Altea" (Accompaniment to work between education and

[56] For details see Inter-University Consortium AlmaLaurea, *Condizione occupazionale dei laureati. XIV Indagine 2011*, 2012, (Employment Condition of Graduates XIV Survey 2011, 2012), available on www.almalaurea.it/

[57] Look up www.disabili.com/

autonomy) to promote training and guidance courses to facilitate the employment of disabled students.

In conclusion, the analysis carried out in this section shows a varied situation due to the autonomy granted to public and private universities and to the skills and dedication to this field applied by each university according to individual strategies.

## 9. BRIEF CONCLUSION

The Italian legislation with regard to the disabled has experienced a series of reforms and modifications over the years, and cannot be said to be immune to criticism. The legislation does, however, provide the disabled in search of work with strong protection based on a system which, despite what is foreseen about the opportunities to employ on the basis of agreements, as examined in Section 4 of the present work, is still essentially founded on the obligation of employers to accept a quota of disabled workers (quota system), and suitable anti-discriminatory measures. The effectiveness of the system designed by the legislators is undermined by the lack of a correct culture in society that overcomes discrimination or prejudice towards the effective value of the contribution disabled workers can make in the working context. This explains, for example, the limited utilization of the conventional agreements by employers who, in effect, utilize the possibility of "agreed" integration only when it is accompanied by economic incentives. The modification of the regulations by the legislator according to the concept of reasonable accommodations still appears inadequate, even though it is an extremely significant part of the question, not only because it is able to help the effective integration of the worker in the company, but also because it acts on cultural prejudice according to a virtuous circle. A disabled worker placed in the right situation is, in fact, able to demonstrate that his or her productivity is equal to that of a non-disabled worker. The more similar cases that there are, the more awareness of this will spread in society and amongst employers.

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