

# DANISH DISABILITY LAW AND POLICY IN THE FIELD OF EMPLOYMENT

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Fecha de recepción: 23-10-2014

Fecha de aceptación: 06-11-2014

**SUMMARY:** 1. PREFACE. 1.1. Definition of disabled worker beneficiary of the employment policies and related juridical issues. 1.2. Job-placement statistics. 2. SECTION I: JOB-PLACEMENT POLICIES. LEGAL FRAMEWORK AND CASE LAW. 2.1. The influence of European Union Law and International Law in Denmark. 2.2. Constitutional Law principles. 2.3. National legislation. 2.4. Employment with wage subvention 2.5. Support for persons with disabilities in employment. 2.6. Collective agreements. 3. SECTION II: DISABILITY DISCRIMINATION AND EMPLOYMENT. ACCESS TO WORK AND TERMINATION OF EMPLOYMENT. 4. SECTION III: EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB-PLACEMENT FOR DISABLED PERSONS. 4.1. Labour market crisis and active employment policies. 4.2. Job-placement for disabled persons and issues relating to gender. 4.3. Connection between welfare state and active labour market policies. 5. SECTION IV: CAREER COUNSELING AND JOB-PLACEMENT FOR DISABLED STUDENTS.

**RESUMEN:** En Dinamarca, el mercado laboral se ha regido tradicionalmente por el modelo danés de flexiguridad, que consiste en una protección relativamente débil contra el despido, y un apoyo relativamente firme a las personas que no tienen empleo. En consecuencia, una capacidad de trabajo reducida se ha considerado, por regla general, una justa causa de despido. La Directiva Marco de Igualdad de la UE cuestiona la laxitud tradicional en relación con los despidos vinculados a la capacidad de trabajo reducida cuando ésta tiene su causa en una discapacidad. Tradicionalmente, los programas de promoción de empleo destinados a la contratación de personas con discapacidad han sido relativamente generosos. Sin embargo, las nuevas medidas de

austeridad han provocado recortes en estos programas. En suma, el modelo danés de flexiguridad está siendo cuestionado, tanto en lo relativo a la flexibilidad como en lo tocante a la seguridad.

**ABSTRACT:** In Denmark, the labour market has traditionally been governed by the Danish flexicurity model consisting of relatively weak protection against dismissal and relatively strong support for persons who are not in employment. Consequently, reduced working capacity has, as a rule, been considered a just ground for dismissal. The EU Framework Equality Directive challenges the traditional laxity in relation to dismissals due to reduced working capacity when it is related to disability. Traditionally, employment promotional schemes targeting the employment of persons with disabilities have been relatively generous. However new austerity measures have led to cut-backs in these schemes. In sum, the Danish flexicurity model is being challenged both as regards flexibility and security.

**PALABRAS CLAVE:** discapacidad, política de empleo, Dinamarca, derechos humanos.

**KEYWORDS:** Disability, employment policy, Denmark, human rights.

## 1. PREFACE

The Danish labour market is based on the so-called “flexicurity” model which in Denmark consists in relatively weak protection against dismissal and relatively strong support for persons who are not in employment. It seems that this model of regulation of the labour market has led to a non-inclusive labour market towards persons with disabilities.<sup>1</sup> In spite of relatively generous employment promotion schemes targeting persons with disabilities, persons with disabilities do not enjoy high rates of employment.

### 1.1. Definition of disabled worker beneficiary of the employment policies and related juridical issues

The definition of disability in Danish laws relating to disabled persons on the labour market vary according to the purpose of the legislation in question with the most relevant definitions being found under legislation relating to employment promotion legislation and anti-discrimination legislation.

For example the Danish Act on Active Employment Effort, which provides for wage subvention to persons with disabilities in order to promote their employment, limits the use of wage subvention to persons “who have permanent or long-lasting reductions of their working capacity”.<sup>2</sup> The legal act does not require that the reduction in working capacity is related to an impairment.

Another legal act on support for persons with disabilities on the labour market which provides i.a. special support for persons with disabilities who have taken an education which lasts longer the 18 months, does mention disability directly.<sup>3</sup> The aim of this act is to promote employment of “persons who may experience difficulties in obtaining or keeping employment due to disability”.<sup>4</sup> The legal act does not provide more detail on the meaning of “disability” in this regard.

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<sup>1</sup> M. LIISBERG, “Disability and Employment – A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy”, Intersentia, 2011.

<sup>2</sup> Danish Act on Active Employment Effort, Section 69(1), LBK nr 415 af 24/04/2013.

<sup>3</sup> Danish Act on Compensation for Persons with Disabilities in Employment, Section 2, LBK nr 727 af 07/07/2009.

<sup>4</sup> Ibid.

In Denmark, the adoption of a prohibition of discrimination on the ground of disability only occurred after Denmark was required to do so under the Employment Equality Directive.<sup>5</sup> On 22 December 2004, the existing Act Prohibiting Differential Treatment on the Labour Market was amended to cover also age and disability.<sup>6</sup> Since 2009, an Equal Treatment Board has considered individual complaints of discrimination on the ground of *inter alia* disability.<sup>7</sup> The interpretation of the concept of “disability” by the courts is a good illustration of how reticently the legal protection against discrimination on the ground of disability was, at least initially, interpreted in Denmark. The Danish Act on Differential Treatment on the Labour Market does not provide a definition of “disability”, and the Preparatory Works give an unclear picture of the intended scope of the term. The Preparatory Works explain that the concept of disability must be understood as “physical, psychological or intellectual impairment [which] must be compensated in order for that person to function on an equal footing with other citizens in a similar situation”.<sup>8</sup> However, the meaning of “compensation” is not provided, although it is stated that “it is not a requirement for protection against differential treatment on the grounds of disability that there is a specific need for compensation”.<sup>9</sup>

In the first two cases decided by a High court relating to the disability provisions of this Act, the Western High Court found that two women, who had Multiple Sclerosis and Post-Traumatic Stress Syndrome respectively, were not disabled under the Act on Differential Treatment on the Labour Market.<sup>10</sup> Both women were employed in ‘flexjob’ positions, which meant that they worked reduced hours and that

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<sup>5</sup> Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. The deadline for national implementation of the provisions regarding disability was 2 December 2003, which could be extended to 2 December 2006, cf. Article 18.

<sup>6</sup> Legal Act amending Act Prohibiting Differential Treatment on the Labour Market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), L 1417 of 22 December 2004. Latest version of Act Prohibiting Differential Treatment on the Labour Market, LBK 1310 of 16 December 2008.

<sup>7</sup> Legal Act on the Equal Treatment Board (*Lov om Ligebehandlingsnævnet*), Lov nr. 387 of 27/05/2008.

<sup>8</sup> Danish Preparatory Works, Proposal L92 of 11 November 2004, 4.1. Handicapkriteriet and Bemærkninger til de enkelte bestemmelser, ‘Til no. 2’.

<sup>9</sup> *Ibid.*

<sup>10</sup> Danish Western High Court Judgment of 11 October 2007, published in UFR2008.306V (Multiple Sclerosis). Danish Western High Court Judgment of 11 October 2007, No. B-2722-06, unpublished (Post Traumatic Stress Syndrome).

special consideration had to be given to their reduced working capacity, while the employers received a reimbursement of approximately half of their salary. In later cases however, the Danish courts seem to have broadened their interpretation of “disability” under the Danish Act and have considered persons in supported employment to be disabled without requiring that they have an additional need for adjustments.<sup>11</sup> In April 2013, the Court of Justice of the European Union passed a judgment in a case referred to it by the Danish Maritime and Commercial Court decided to refer a question on the definition of “disability” under the Employment Equality Directive, as implemented by the Danish Act on Differential Treatment on the Labour Market.<sup>12</sup> The CJEU rejected the narrow definition of disability applied to date by the Danish courts and it underlined that the concept of disability in the sense of the Directive, “must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person’s state of health is covered by that concept.”<sup>13</sup> Following this judgment by the CJEU, the Danish courts can be expected to be in conformity with the CJEU as regards the definition of disability under the Employment Framework Directive.

In conclusion, the concept of disability is not clearly defined under Danish law and it varies according to the purpose of the legislation. The definition of disability under the Danish anti-discrimination legislation started out as linked to the medical model of disability. However, a recent EU judgment will force Danish courts to interpret the concept more in line with the social model of disability and the UN Disability Convention on the Rights of Persons with Disabilities.

## **1.2. Job-placement statistics**

Job placement statistics are made on a regular basis in connection with the Labour Force Surveys. According to the most recent survey concerning 2012

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<sup>11</sup> See e.g. Danish Eastern High Court Judgment of 5 May 2010, 18. Afd., no. B-2215-09 (unpublished).

<sup>12</sup> Judgment of the CJEU of 11 April 2013, Joint Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S and Jette Ring v. Dansk almennyttigt Boligselskab DAB.

<sup>13</sup> Para. 47.

approximately 17.5% of persons between the age of 16 and 64 years consider that they have a “longer-lasting disability or health problem”.<sup>14</sup> Approximately 3.5 million persons are between the age of 16 and 64 years and this means that approximately 625.000 of them would consider that they have a longer-lasting disability or health problem. The rate of employment for persons with disabilities was 44% in 2012 compared to 78% for persons without disabilities.<sup>15</sup> For persons with a disability and a reduced working capacity, the employment rate was 27%.

Women are strongly over-represented among persons between the ages of 16 and 64 years who consider themselves to have a longer-lasting disability or health problem. Women constitute 56% of persons with disabilities, whereas among persons without disabilities they amount to 48%.<sup>16</sup> Women with disabilities are less likely to be employed than women without disabilities. Logistic regression of probability of employment for persons *with* disabilities between the ages of 16 and 64 is 0.4 for men, and for persons *without* disabilities, the probability of employment for men is 0.3.<sup>17</sup>

## **2. SECTION I: JOB-PLACEMENT POLICIES. LEGAL FRAMEWORK AND CASE LAW**

### **2.1. The influence of European Union Law and International Law in Denmark**

Denmark joined the European Community in 1973 and, following a referendum in 1992, a majority of voters rejected the Maastricht Treaty which was only ratified by Denmark following the adoption in December 1992 of a Protocol on the Position of Denmark. This protocol provides that Denmark will not be bound by legal acts in the areas of i.a. justice and home affairs. This protocol does not limit the participation in relation to employment policy. When Denmark became a member of the European Community, the aim was to retain the special Danish labour market model, whereby the regulation of the labour market is the prerogative of the social partners. However, the Danish labour market has become increasingly “Europeanised” in the sense that a

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<sup>14</sup> M. MØLLER KJELDEN, H. S. HOULBERG and J. HØGELUND, “Handicap og Beskæftigelse. Udviklingen mellem 2002 og 2012.”, SFI 2013:01, Danish Social Research Institute, Copenhagen 2013, p. 14.

<sup>15</sup> *Ibid.*, p. 10.

<sup>16</sup> *Ibid.*, p. 135.

<sup>17</sup> *Ibid.*, p. 141 and 142.

number of laws have been adopted to implement EU law in Denmark, including for example legal acts on prohibition against discrimination on the grounds of gender, race and disability.<sup>18</sup> Thus, the introduction of protection against discrimination on the grounds of disability on the labour market in Denmark is the result of the influence of EU laws and policies.

Laws on wage subvention for promotion of employment of persons with disabilities are in line with Danish disability policy as well with the Danish flexicurity model, and they are not the result of influence from the EU.

Denmark ratified the UN Convention on the Rights of Persons with Disabilities in 2009. The ratification of the CRPD has not led to a change in Danish employment law and policy relating to persons with disabilities.

## **2.2. Constitutional Law principles**

The Danish Constitution dates back to 1953 and it does not contain a prohibition against discrimination. Section 75 provides that the State should strive to ensure that all citizens who are capable of working have the possibility of working under proper conditions. As indicated by the wording of this Section, the Constitution does not grant a right to employment.

## **2.3. National legislation**

The Danish job-placement schemes fall into two groups: employment under special conditions which relates to the employment contract between the employer and the employee, and support schemes for persons with disabilities which are not related to the employment contract. The first type of job-placement scheme in the form of employment under special conditions includes both supported employment in the form of wage subvention in the open labour market, and protected employment outside of the open labour market. The most widely used type of employment under special working conditions is employment with wage subvention, called “flexjob”, which will be described more in detail below. The other types of job placement schemes which are not related to the employment contract consist of five different schemes: personal assistance at work and in-job training, support for assistive devices, short-term wage subvention for persons with disabilities who have finished 18 months

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<sup>18</sup> Liisberg 2011, p. 154.

of education and preferential treatment of persons with disabilities for employment with public employees.<sup>19</sup> These schemes are also described in more detail below.

#### **2.4. Employment with wage subvention**

In Denmark, the main employment promotion scheme for persons with disabilities, both in terms of persons concerned and costs of the scheme is the “flexjob” scheme.<sup>20</sup> Approximately 20% of persons with disabilities who are in employment are employed under special conditions, and 83% of these are employed in a “flexjob”. Less than 4% of persons with disabilities in employment are employed in protected employment.

A reform of the “flexjob” scheme entered into force on 1 January 2013.<sup>21</sup> Before the reform, a person employed in a ‘flexjob’ would work approximately one third of a full-time position, but receive the same salary as a person employed in a full-time position. The employer of a person in the ‘flexjob’ scheme received a wage subvention, which amounted to two-thirds of the salary usually offered.<sup>22</sup> According to the new Act, persons who are employed in a new flexjob position will receive pay from the employer for the work they perform. In addition they will be entitled to support up to the level of unemployment benefit and not up to the level of ordinary full-time pay, as was previously the case.<sup>23</sup> Moreover, as a starting point flexjob will only be granted for a five year period, and not as previously on a permanent basis. In addition, an employee will not be permitted to convert an ordinary employment to a flexjob position with his or her current employer. The reform intends to avoid that persons who could otherwise be employed on the ordinary labour market with adjustments are unable to do so because of the removal of economic incentives and restrictions on the access to employment in flexjobs. This relatively low threshold on the support given under the flexjob scheme means that persons in flexjobs will earn significantly less, as a rule, than persons employed in ordinary positions. In addition, it is problematic from an equal treatment perspective that the authorities will have to determine the worth of

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<sup>19</sup> Act on Compensation for Persons with Disabilities in Employment, mentioned in the Preface.

<sup>20</sup> Kjeldsen et al, p. 92.

<sup>21</sup> Amendment Act no. 1380 of 23 December 2012 (lov om ændring af lov aktiv beskæftigelsesindsats).

<sup>22</sup> *Ibid.*, p. 93 and p. 95.

<sup>23</sup> Section 70e of the new Act on Employment Promotion, LBK 706 of 28 December 2012, (lov om aktiv beskæftigelsesindsats).



the work of the individual employee in a flexjob. It is difficult to see how such an assessment can be made on an objective and fair basis in all cases.

## **2.5. Support for persons with disabilities in employment**

As mentioned above, the Act on Compensation for Persons with Disabilities in Employment provides for short-term wage subvention up to 12 months for persons with disabilities who have difficulties obtaining employment and who have completed 18 months of education.<sup>24</sup> This scheme is called the “ice breaker scheme”. Unfortunately, no new statistics are available on the use of this scheme because it is used very little.<sup>25</sup> In a study from 2007, only 6% of working-age persons with disabilities had heard about this job-placement scheme.<sup>26</sup> In comparison, 80% of the persons asked said that they were well-informed about the flexjob scheme.

The Act on Compensation for persons with disabilities also provides for preferential treatment in relation to employment with public employers.<sup>27</sup> The Act provides firstly that public employers must call applicants with disabilities for a job interview if they fulfill the minimum requirements for the job, and that public employers must employ applicants with a disability if they are equally well qualified for a position than non-disabled applicants. The applicant must inform the potential employer that he wishes to make use of this preferential treatment. However, as is the case with the ice-breaker scheme, this right to preferential treatment is practically unknown in Denmark and consequently it is used very little.<sup>28</sup> Almost 85% of working-age persons with disabilities who were asked about their knowledge of this scheme had not heard of it.

## **2.6. Collective agreements**

Practically all collective agreements contain Social Chapters according to which employees with reduced working capacity may be employed for a lower wage than persons who are not employed under the Social Chapters. According to a survey from

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<sup>24</sup> Act on Compensation for Persons with Disabilities in Employment, Chapter 5.

<sup>25</sup> KJELDSEN et. al., p. 95.

<sup>26</sup> MIILER, HØGELUND and GEERTSEN: Handicap og Beskæftigelse, Udviklingen mellem 2002 og 2005. Social Research Institute, SFI 2006:24, p. 62.

<sup>27</sup> Act on Compensation for Persons with Disabilities in Employment, Chapter 6.

<sup>28</sup> MIILER et al., p. 60.

2012, less than 5% of persons with disabilities who are employed under special working conditions are employed under a Social Chapter.<sup>29</sup>

The use of employment under Social Chapters is expected to rise after the amendment of the main wage subvention scheme, flexjob, in 2013. According to the amended Act on an Active Employment Effort, persons who are employed in an ordinary job whose working capacity is reduced may only obtain wage subvention for continued employment with the same employer after employment for one year under a Social Chapter.<sup>30</sup>

### 3. SECTION II: DISABILITY DISCRIMINATION AND EMPLOYMENT. ACCESS TO WORK AND TERMINATION OF EMPLOYMENT

In Denmark, the adoption of a prohibition of discrimination on the ground of disability only occurred after Denmark was required to do so under the Employment Equality Directive.<sup>31</sup> On 22 December 2004, the existing Act Prohibiting Differential Treatment on the Labour Market was amended to cover also age and disability.<sup>32</sup> Since 2009, an Equal Treatment Board has considered individual complaints of discrimination on the ground of *inter alia* disability.<sup>33</sup>

In Denmark, a component that is often considered the cornerstone of the flexicurity model is that employers enjoy extensive freedom to dismiss employees.<sup>34</sup> According to the OECD's indicators of individual employment protection, Denmark

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<sup>29</sup> SFI 2013:01, p. 95.

<sup>30</sup> Act on an Active Employment Effort, Section 70b.

<sup>31</sup> Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. The deadline for national implementation of the provisions regarding disability was 2 December 2003, which could be extended to 2 December 2006, cf. Article 18.

<sup>32</sup> Legal Act amending Act Prohibiting Differential Treatment on the Labour Market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), L 1417 of 22 December 2004. Latest version of Act Prohibiting Differential Treatment on the Labour Market, LBK 1310 of 16 December 2008.

<sup>33</sup> Legal Act on the Equal Treatment Board (*Lov om Ligebehandlingsnævnet*), Lov nr. 387 of 27/05/2008.

<sup>34</sup> J. C. BARBIER, F. COLOMB and P. KONGSHØJ MADSEN, 'Flexicurity – An Open Method of Coordination at the National Level', *Documents de travail du Centre d'Economie de la Sorbonne (Paris I)*, (2009), no. 09046, 6.

has the 7<sup>th</sup> most lenient protection against dismissals of permanent employees of all OECD countries, following countries such as the United States and several Commonwealth nations.<sup>35</sup> In contrast, countries such as Sweden, Germany and the Netherlands feature at the top of the list among those with strong individual employment protection. In Denmark, a significant number of persons are not covered by employment protection under law or collective agreements. Danish employment protection legislation is incorporated into three different laws, covering white-collar employees, sailors and public servants.<sup>36</sup> Many persons who are not covered by these legal acts will be covered by collective agreements but, according to a survey from 2001, around 30% of blue-collar workers in the private sector were not covered by a collective agreement either. In addition, employment protection only applies after nine months of employment. In sum, a significant number of employees on the Danish labour market do not enjoy protection against unfair dismissals other than anti-discrimination protection.

Secondly, for those employees who are covered by employment protection under law or collective agreements, the protection afforded is relatively weak. The regulation of the employment market is, to a large extent, based on the assumption that, in the long run, it is in the best interest of both employers and employees that the only limitations on the managerial prerogatives of the employer are a result of free negotiations between employers and employees on a collective and an individual basis.<sup>37</sup> Interference from the State in this balance of interests is seen as detrimental to a stable economy and employment market. As a consequence, contractual principles dominate the practice of limiting the employer's right to dismiss their employees.<sup>38</sup> In order to determine whether a dismissal is fair (in relation to dismissals on the grounds of reduced working capacity), a concrete assessment is made, assessing the burden placed on the employer as a result of continued employment of the individual in question and whether it is reasonable that the employer should suffer this inconvenience. The prevalence of contractual principles implies that the employer

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<sup>35</sup> Organisation for Economic Co-operation and Development, *Employment protection in OECD countries and selected non-OECD countries in 2008*, (OECD, 2008), available at: <<http://www.oecd.org/employment/protection>> (accessed 1 June 2012).

<sup>36</sup> Funktionær, sømænd, tjenestemand, Legal Act on White Collar Employees (Funktionærloven), LBK nr 81 af 03/02/2009, Legal Act on Sailors (Sømandsloven), LBK nr 742 af 18/07/2005, Legal Act on Public Servants (Tjenestemandsløven), LBK nr 488 af 06/05/2010.

<sup>37</sup> L. NIELSEN AND R. ROSEBERRY, *Dansk Arbejdsret*, (DJØF, 2008), 479.

<sup>38</sup> R. NIELSEN, *Lærebog i Arbejdsret*, (DJØF, 2005), 17; J. Bruun, *Usaglig Afskedigelse*, (Thomson GadJura, 2003), 32.

may, as a rule, expect from the employee that he or she delivers the initially agreed working targets. Thus, under many collective agreements such as, for example, a collective agreement which covers the production industry, an employer is permitted to dismiss an employee after 120 days of absence due to reduced working capacity.<sup>39</sup> Moreover, the collective agreement does not mention any duties for the employer to place the employee in another position or provide any other adjustments for his or her reduced working capacity.

This so-called “120–day rule” illustrates an underlying presumption that an employer should not be made to bear the burden of having employees who have restricted working capacity. According to Section 5(2) of the Act on White Collar Employees, an employer and an employee may agree that the employee can be dismissed with a shorter notice of one month, when he has been absent due to sickness for 120 days within a period of 12 months. The 120 days must be calculated as calendar days and not as working days and the dismissal must take place while the employee is still absent from work.<sup>40</sup> The Danish Supreme Court has established that a dismissal which takes place with reference to such an agreement will normally be considered reasonable.<sup>41</sup> The case in question concerned the dismissal of a shop assistant who had been employed for 13 years, and had developed a problem with her back. She was dismissed after being absent from work for 4 months and the dismissal was found to be reasonable. The Supreme Court stated that dismissals with reference to the 120-day rule: ‘will ordinarily be deemed reasonable so that compensation for a dismissal on unreasonable grounds will only be relevant under very special circumstances. Such very special circumstances are not in our opinion present in this case’.<sup>42</sup>

According to its wording, the 120–day rule applies when the 120–day absence is due to *sickness* and, until the implementation of the Employment Equality Directive, there was no doubt that also absences related to disability would warrant a dismissal with shortened notice. However, in 2011, questions on compliance of the 120–day

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<sup>39</sup> Section 29 of the Collective Agreement in the production industry (*kollektivt overenskomst på industriens område*).

<sup>40</sup> Danish Maritime and Commercial Court judgment, UFR 1951.156 SH. J. Paulsen, *Afskedigelse*, (GadJura, 1997), 598.

<sup>41</sup> Danish Supreme Court judgment, UFR 2002.2626 H.

<sup>42</sup> Danish Supreme Court judgment, UFR 2002.2626 H; One judge dissented and stated that ‘very special circumstances’ did not have to be present in order to find that a dismissal in accordance with the 120–day rule was unreasonable. In his opinion, a simple assessment of all the available facts could well lead to the conclusion that such a dismissal was unreasonable.

rule with the EC Employment Equality Directive were referred to the CJEU by the Danish Maritime and Commercial Court.<sup>43</sup>

In its judgment of 11 April 2013, the CJEU found that application of a shortened notice for dismissal with reference to the 120-day rule constituted discrimination on the grounds of disability if the reason for the sick-leave was that the person in question had not been given reasonable accommodation. The CJEU left it up to the Danish Court to decide whether the 120-day as such constituted indirect discrimination on the grounds of disability.<sup>44</sup> In January 2014, the Danish Maritime and Commercial Court decided that the use of the 120-day rule in the two cases amounted to direct discrimination on the grounds of disability. The Maritime and Commercial Court underlined that the sick-leave had not been a result of the disability of the two employees, but had become necessary because the employers had not provided reasonable accommodation for the two employees.<sup>45</sup> These judgments illustrate how difficult it can be to reconcile Danish legislation based on contractual principles and anti-discrimination legislation based on principles of inclusion and equal treatment of persons with disabilities.

#### **4. SECTION III: EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB-PLACEMENT FOR DISABLED PERSONS**

##### **4.1. Labour market crisis and active employment policies**

The employment situation has not been affected as much as in many other European countries by the economic crisis following the banking-crisis in 2007 and 2008. In addition, it would seem that persons with disabilities as a group have not been hit harder than persons without disabilities. The employment rate of persons without disabilities fell from 82% in 2008 to 78% in 2012 and for persons with disabilities it fell from 51% to 44%.

However, persons with severe disabilities have experienced a significant reduction in their employment rate from 2010 to 2012. Thus, the employment rate of persons

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<sup>43</sup> Joint Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S and Jette Ring v. Dansk almennyttigt Boligselskab DAB, judgment of 13 April 2013.

<sup>44</sup> *Ibid.*, para. 93.

<sup>45</sup> Danish Maritime and Commercial Court judgments of 31 January 2014, F-13-06 HK for A mod DA for Pro Display A/S and F-19-06 HK for A mod DA for Dansk Almennyttigt Boligselskab, not yet published.

with significant disabilities fell from 31% to 26% from 2010 to 2012, while their employment rate had not fallen from 2008 to 2010.<sup>46</sup> This indicates that there may have been a delay in the effect of the economic crisis on the employment of persons with disabilities, and that it has affected not the whole group, but especially persons with severe disabilities.

During the last few years a number of spending cuts have been made to unemployment benefits with the aim of motivating persons without employment to seek employment. No specific cuts have been made to welfare schemes for persons with disabilities who are unemployed or outside of the labour market. However, as mentioned above, the most widely-used type of wage subvention for supporting the employment of persons with disabilities has been cut significantly so that persons under this scheme will no longer receive subvention above the level of unemployment benefit. Previously, they would have been entitled to subvention up to the level of wages set by collective agreements.

In sum, it would seem that no specific cuts have been made to welfare benefits intending to motivate persons with disabilities to seek employment. General cuts in benefits are however likely to affect persons with disabilities hard, as they may experience more difficulties than others in achieving employment.

#### **4.2. Job-placement for disabled persons and issues relating to gender**

As explained above, women are more likely to consider themselves disabled than men, and women with disabilities are also more likely to be unemployed than men with disabilities. Although a study by the Social Research Institute has pointed out this problem, the authorities have not taken specific steps to target job placement policies to women with disabilities.<sup>47</sup> The study points to a number of possible explanations for the lower employment rate of women with disabilities including that women are more likely to have lower-paid jobs with low levels of self-determination when they are employed than men, and that it may be socially more acceptable for a woman not to work than it is for a man.

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<sup>46</sup> KJELDSEN et al., p. 16-17.

<sup>47</sup> LARS BRINK THOMSEN & JAN HØGELUND: *Køn, handicap og beskæftigelse i 2010*. SFI – Det Nationale Forskningscenter for Velfærd, 11:36.

### **4.3. Connection between welfare state and active labour market policies**

In Denmark, the rate of persons receiving permanent welfare disability benefits in the form of invalidity pension and flexjob wage subvention has risen from 18% of persons with disabilities in 2003 to 45% in 2012.<sup>48</sup> In 2002, the employment rate of persons with disabilities was 51% and this fell to 46% in 2012.<sup>49</sup> Surprisingly, the rate of persons on unemployment benefit has fallen from 9% in 2003 to 6% in 2012. The rate of persons on means-tested income-replacement benefit has been constant around 10%. The significant rise in the rate of persons with disabilities on permanent disability benefits is partly due to the rising age of the Danish population, which means that the degree of the disability of the Danish population is likely to have become more severe. It is also due to the availability of early-retirement schemes and the availability of the flexjob-scheme, which use has practically exploded during this period. A study of the group of persons with disabilities who received welfare benefits in the period from 2003 to 2012 shows that approximately one third has a relatively strong connection to the labour market with few, short lapses of time on welfare benefits, and one third has a very weak connection to the labour market with practically no employment periods. The last third have a medium connection to the labour market.<sup>50</sup>

As mentioned above, a reform of the wage-subvention scheme has entered into force in 2012. In addition, a reform of the invalidity pension scheme was also adopted. The main changes consist in only permitting time-limited invalidity pension to persons under the age of 40 years.

In sum, there has been a significant rise in the persons with disabilities on permanent disability welfare benefits in Denmark from 2003 to 2012. With reference to the need for economic austerity and the aim of promoting employment of persons with disabilities, reforms of both the wage subvention scheme and invalidity pension have been undertaken in 2012. This reform will make it more difficult to qualify for invalidity pension for persons under 40, and will make the flexjob scheme less attractive and more difficult to obtain for persons with disabilities.

It is difficult to say whether these changes will affect the employment rate of persons with disabilities. It is possible that the rate of employment is not affected so

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<sup>48</sup> KJELDSEN et al., p. 64.

<sup>49</sup> The employment rate of persons with disabilities in Denmark does not exist for 2003, the closest available year is 2002.

<sup>50</sup> *Ibid.*, p. 72.

much by the availability of, for example, wage subvention and that many would be employed, but with a lower pay, if it were not available. Presumably the economic situation affects the employment rate more strongly.

## **5. SECTION IV: CAREER COUNSELING AND JOB-PLACEMENT FOR DISABLED STUDENTS**

The Universities in Denmark do not traditionally provide strong career counseling or job-placement for their students. Instead, the unemployed graduates may receive help from the ordinary job-placement services who will in some cases have special programmes for unemployed academics. However, no specific career counseling or job placement programmes exist with the exception of the ice-breaker schemes mentioned above. Unfortunately, however, this scheme is hardly ever used.

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