

SWEDISH POLICY AND REGULATION ON DISABILITY AND WORK

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RESUMEN: A pesar de que el mercado laboral sueco ha permanecido relativamente intacto durante la crisis económica en los últimos seis años, la

integración de personas con capacidad laboral reducida a causa de discapacidades es significativamente menor que la de otros grupos sociales. La legislación sueca sobre discapacidad y trabajo cubre varios aspectos en medidas de integración, antidiscriminación y disposiciones para conservar el empleo. Lo más relevante es el sólido sistema de protección laboral, el cual sólo permite el despido de empleados enfermos o discapacitados si ya no pueden desempeñar ninguna tarea relevante para la actividad desarrollada por el empleador. Suecia ha ratificado la Convención sobre los Derechos de las Personas con Discapacidad, y ha implementado la Directiva 2000/78/CE sobre discriminación, que incluyen la igualdad de trato y el deber del empleador de acometer ajustes razonables. Sin embargo, todavía no existe una jurisprudencia establecida que defina qué se consideran ajustes razonables. Para las personas con capacidad laboral reducida, la legislación sueca ofrece una serie de medidas positivas para la integración, que van desde financiar los ajustes necesarios en el espacio de trabajo hasta empleos subvencionados e incluso protegidos. En Suecia no existe, y nunca ha existido, un sistema de cuotas para discapacitados. Las políticas para la obtención de empleo se canalizan principalmente a través de la Agencia Sueca de Empleo, que ofrece oportunidades para desempleados con discapacidad. Los centros de orientación profesional de las universidades suecas no disponen de programas especiales para la integración de discapacitados y están menos desarrollados que en países similares.

ABSTRACT: Even though the Swedish labour market has been more or less intact during the financial crisis in the past six years, persons with reduced working capacity due to disabilities are significantly less integrated in the labour market than other groups in society. Swedish legislation on disability and work provides for a number of different aspects of integrative measures, anti-discrimination and provisions for maintaining employment. Of most significant importance is the strong employment protection scheme, which only allows employers to dismiss sick or disabled permanent workers if they can no longer perform any duties of importance to the employers business. Sweden has ratified the CRPD and implemented the EU directive 2000/78/EC on discrimination law, covering both equal treatment as well as the employer duty to undertake reasonable accommodation. There is, however, not yet an established case law on the reasonableness of adjustments. For persons with reduced working capacity, Swedish legislation offers a number of integrative positive measures, stretching from financing workplace adjustments to supported and even sheltered employments. There is not, and never has been, a disability quota scheme in Sweden. Job-placement activities are primarily effectuated through the Swedish Labour Agency, opening opportunities for unemployed persons with disabilities.

Career centers at Swedish universities do not have special programs for disability integration and are, in relation to comparative countries, less developed.

PALABRAS CLAVE: derecho laboral, leyes de discapacidad, discriminación por discapacidad, mercado laboral, legislación de la UE, Directiva 2000/78/CE, mercado laboral sueco.

KEYWORDS: labour law, disability law, discrimination on the grounds of disability, labour market, EU-legislation, Directive 2000/78/EC, Swedish labour market.

1. PREFACE

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

The Swedish labour market has not experienced as desperate problems as many other European countries recently have. Even though unemployment has increased over the past five years, the percentage of workers outside the labour market is still comparatively low.¹ This is of some importance to keep in mind, since workers with a less established position on the labour market, such as workers with disabilities, are likely to be more exposed to labour market fluctuations than “core workers”.

The definition of disability in Swedish labour and employment law and the application of the concept of disability based on different labour market regulations are not founded on one singular definition. On the contrary, several definitions or variants of disability are applied in the different parts of labour market regulation. This is partly related to the purpose of the specific regulation, but also to the sequential development of legislation supporting disabled workers and job applicants over time. The most significant distinction which can be unveiled in this respect monitors the different concepts of, primarily

- positive, active measures of the integration of disabled at work, and secondly,
- equality of opportunity, as it is manifested in anti-discrimination law

In Sweden, as in most other European countries, the primary concept of specially designed measures to promote integration has a long, but not necessarily successful, history through a good part of the 20th century, while anti-discrimination legislation is dated much later, currently provided for by the development in EU law.²

Swedish debate on the disability concept reflects the international discourse with the distinction between medical impairment and social construct of disability. Even though the Parliament has adopted the idea of disability as a social construct, the existing legislation nevertheless shows a reluctance to finally abandon the medical

¹ The unemployment rate is currently (July 2014), in the range of 8 per cent, see further the agency Statistics Sweden, www.scb.se.

² The first Swedish Disability Discrimination Act (1999:132) was introduced in 1999 and merged, in 2009, with other discrimination acts into a broader and more general Discrimination Act (2008:567).

perspective of disability.³ In Swedish active measures, the disability criteria mainly relates to the decreased working capacity of the individual worker or applicant. In order to benefit from such measures, regardless of those being associated with publicly funded supported employment schemes or specially designed provisions under employment protection legislation, the job applicant or employee is required to prove reduced working capacity. The general regulation on supported employment schemes, which creates the legal base for a number of different schemes, entails the mandatory inclusion criteria is *disability which results in reduced working capacity*.⁴ As the supported employment schemes are arranged in a progressive scale, the Swedish Public Employment Service (*Arbetsförmedlingen*) will, when applying the provisions for decision-making in the individual case, also examine the difficulties the disabled applicant or employee is expected to face in relation to regular employment.⁵

Swedish employment protection legislation has been under massive debate ever since the introduction of the legislation in the mid-1970s. Three aspects of this legislation are of particular interest when discussing the definition of disability and inclusion regarding legal protection in different situations. First of all, the Employment Protection Act does not cover individuals who (for reasons related to reduced working capacity) are employed in sheltered employment programmes.⁶ A significant number of those in sheltered employment are, however, covered by some employment protection under collective agreements.⁷ In Swedish employment protection legislation the concept of fair dismissal has been significantly scrutinised especially since the legislation was introduced in the mid-1970s. Leading case law from the Labour Court has repeatedly stated that sickness and reduced working

³ Even in this regard the difference between "old" measures and "new" anti-discrimination legislation are significant. a Governmental Inquiry, SOU 1997:176 p. 104 ff, which predated the implementation of the first Disability Discrimination Act 1999, and in numerous other documents, are references to the 1980 WHO *International Classification of Functioning, Disability and Health* (ICIDH). For further legal academic reading from a Swedish point of view, see, Sahlin, 2004, p. 35 ff., as well as Inghammar, 2007, pp. 27-30.

⁴ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, my translation from Swedish, *förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*.

⁵ 1 § Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda åtgärder för personer med funktionsnedsättning som medför nedsatt arbetsförmåga*).

⁶ 1 § Employment Protection Act (1982:80), (*lagen om anställningsskydd*).

⁷ The main provider of sheltered employment is the public body of Samhall AB. This company, wholly owned by the Government, employs appr. 18 000 persons with reduced working capacity.

capacity as such would not constitute a ground for fair dismissal unless the employer can prove that the employee is unable to perform any duty of value for the employer.⁸ Since this principle has been significantly honoured in courts in relation to sickness and reduced working capacity, the definition of disability has not come to play such an important part of this critical issue. The burden of proof has provided for the employers to manifest that the disabled employee's capacity *in relation to work available with the employer* is massively reduced before a dismissal can be considered fair and valid. In relation to redundancies, also under the Employment Protection Act, a special provision explicitly states that disabled employees, who have reduced working capacity, and for this reason are employed under special arrangements, shall be excluded from the selection of persons made redundant.⁹ This special provision does also take reference to the reduced working capacity as inclusion criterion in relation to disability.

The disability definition in the Discrimination Act (2008:567) is based on a broader, more inclusive criterion with no direct correspondence to reduced working capacity.¹⁰ For the understanding of the discrimination law, disability is defined as:

*“Disability: permanent physical, mental or intellectual limitation of a person’s functional capacity that as a consequence of injury or illness existed at birth, has arisen since then or can be expected to arise.”*¹¹

The understanding of the criterion “permanent” is not necessarily taken literally, since the outspoken ambition of the legislator has been to provide for an inclusive definition of disability, and definitions of disability in other acts refer to disablement exceeding 12 months of duration.¹² There is, however, not yet any Swedish disability discrimination case law which defines the concept of permanent.¹³ Disabled persons who are rehabilitated and (re)gain the capacity will, from the time of the completion of the recovery, not be covered by the disability definition in the Discrimination Act.¹⁴ Under Swedish law, progressive conditions, such as HIV infection, Multiple Sclerosis

⁸ The relation to Employment Protection Act (1982:80) will be further discussed below in this article.

⁹ 23 § Employment Protection Act (1982:80).

¹⁰ The reduced working capacity might, however, play a significant role for the establishment of a case of discrimination, but the inclusion criteria on the definition of disability is broad.

¹¹ 1 Chapter 5 § p. 4 Discrimination Act (2008:567), available in English at www.government.se/sb/d/574/a/118187 2014-07-11.

¹² See prop. 1997/98:179 p. 34 as well as Inghammar 2007, pp. 282-283.

¹³ See also European Union Court of Justice, Case C-13/05 *Sonia Chacon Navas v. Eurest Colectividades SA*.

¹⁴ Prop. 1997/98:179 p. 34, also Inghammar 2007, p. 283.

and Cancer are included in the definition of disability even at stages where they have not yet resulted in such permanent impairments as otherwise stated in the Act.¹⁵ It is explicitly said in the Government Bill that the existence, not the severances, of a disability constitutes the inclusive criterion.¹⁶

1.2. Job placement statistics regarding disabled workers, particularly referring to women and young people

The most recent significant Swedish compilation of labour market statistics on persons with disabilities refers to the situation in 2013.¹⁷ According to this investigation the Swedish labour market includes approximately 987,000 persons with disabilities, of which slightly more than 650,000 consider their working capacity to be reduced.¹⁸ In 2014 the Swedish labour force between 15 and 75 years consisted of approximately 5.17 million individuals whereof 4.76 million were employed, resulting in an unemployment rate of 8%.¹⁹ Unemployment rate amongst people with disabilities is significantly higher: 10%.²⁰

¹⁵ There has been one case of Multiple Sclerosis related to disability discrimination in the Swedish Labour Court, AD 2005 nr 32. In this case the applicant in his 30s successfully argued that he had been discriminated against due to his recently discovered Multiple Sclerosis in a redundancy situation. The Court concluded that such progressive illnesses would fall under the disability definition in relation to discrimination. Interestingly, there are cases from our neighboring country Denmark pointing to MS not being a disability under Discrimination law.

¹⁶ SOU 1997:176 p. 107, also Fransson, Stüber, *Diskrimineringslagen, En kommentar*, Stockholm 2010.

¹⁷ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04. This publication has a 5 page summary in English.

¹⁸ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 7.

¹⁹ Statistics Sweden, www.scb.se. 2014-07-11.

²⁰ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 8. Note, however, that a huge number of severely disabled individuals never enter the labour market but benefit from social insurance and early retirement schemes.

Active on the Swedish Labour Market, 2013. Disabled with or without reduced working capacity, non-disabled and the population in total. Male and female. (Including employed and unemployed)

	Male		Female		Total	
Disabled total	65,5	± 3,2	58,4,0	± 3,3	62,0	± 2,2
-with reduced work. cap.	58,1	± 3,9	51,7	± 3,9	54,7	± 2,8
-without reduced work. cap.	79,3	± 4,7	77,7	± 5,7	78,6	± 3,6
Non-disabled	81,1	± 0,8	77,6	± 0,9	79,4	± 0,6
Total population	78,6	± 0,8	74,4	± 0,9	76,5	± 0,6

Figure 1. Source: *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04 page 40.

The rate for disabled persons participating in the labour market, as employed or unemployed, part-time or full-time, is significantly lower than for non-disabled (61.8% in relation to 77.1%, see sheet below). The difference appears to almost exclusively relate to the reduced working capacity of disabled persons. Between the group *disabled without reduced working capacity* and non-disabled, there is almost no overall difference.²¹ In all sub-groups, but for the disabled with reduced working capacity, there is a statistically significant difference between men and women. The overall rate of women participating in the labour market (both in figures 1 and 2) is significantly higher than in many other EU-members. Disabled women are less active than non-disabled women but, as for disabled in general, the differences are primarily related to reduced working capacity.

As is shown in Figure 2 (below), the relationship between the different sub-groups is similar when looking at the percentage actually employed (part-time or full-time).

²¹ This finding is supported by, and corresponds to, the previous publication in the same statistical series, year 2008, 2006 and 2004 (and even in a longer perspective).

Unemployed, 2013. Disabled with or without reduced working capacity, non-disabled and the population in total. Male and female. (Including part-time and full-time)

	Male		Female		Total	
Disabled total	10,5	± 2,4	9,9	± 2,5	10,2	± 1,7
-with reduced work. cap.	11,6	± 3,1	10,0	± 3,0	10,8	± 2,2
-without reduced work. cap.	9,0	± 3,7	9,7	± 4,5	9,3	± 2,8
Non-disabled	8,4	± 0,7	7,6	± 0,7	8,0	± 0,5
Total population	8,7	± 0,7	7,9	± 0,7	8,3	± 0,4

Figure 2. Source: *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, page 43.

Disability is not equally distributed in the working age population. Most disabled persons in working age, 40.2%, are found between 50-64 years, while another 37.6% are between 30-49 years. Only 22.2% are in the age 16-29.²² Statistics indicate that persons with disabilities which result in reduced working capacity, compared to non-disabled, face difficulties in entering the labour market already as young as that. Disabled workers in ages 30-49 seem to be significantly more active in the labour market than disabled in both younger and older (50-64) categories. Gender is reported not to pose a significant issue between the different age sub-groups.²³

²² *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 29. Note that these statistics, in contrast to most other referred statistics in this article define the working population between 16 and 64 years of age.

²³ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, p. 29.

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

2.1. The influence of European Union and International Law in Sweden

The influences of European Union and International Law of Swedish policies on job placements have not been of significant importance. Labour market regulation had a history in Sweden long before the country entered into the EU in 1995, and in relation to EU policies the most evident labour market regulation area which affects disabled workers or applicants is discrimination law.²⁴ The Swedish job placement and employment support system have, where applicable, been focused on balancing the reduced working capacity of the individual by supplementing the employer financially to re-distribute the risk of such reductions. This has, over the last centuries, been undertaken in three major schemes:

- Financial support for the accommodations and adaptation at the specific workplaces.
- Financial support, so called *Lönebidrag*, to compensate the employer in relation to reduced working capacity of the disabled employee's salary.
- Sheltered employment, primarily by the public Samhall AB or within public bodies through the Public Sheltered Employment Scheme.

Even though, it has been discussed whether these schemes are efficient, and to what extent they constitute objections to free labour market competition, as addressed in the European *Commission Regulation No 2204/2002 of the 12 December 2002 on the application of the Articles 87 and 88 of the EC Treaty to State aid for employment*. However, the schemes applied in Sweden are developed only to provide financial contribution in relation to the reduced working capacity. Even if the application in every individual case might not have fulfilled these expectations and indeed "over compensated", there has not, as far as I am aware, been any legal action undertaken against any of these schemes under state aid provisions.

²⁴ EU disability discrimination principles, primarily under directive 2000/78/EC are considered to be fully implemented in Swedish legislation through the Discrimination Act (2008:567).

2.2. Constitutional Law Principles

The Swedish Constitution states that the State shall *secure the right to work* and *combat discrimination* on the grounds of, among other grounds, *disability*.²⁵ Now, the “right to work” is in Swedish law an explicit right without a corresponding duty for anyone, and the role of the State as provider of the commodity “work” is indeed limited and the right to work impossible to exercise legally.²⁶ While the right to work under constitutional Swedish law is recognised but not sanctioned, the constitutional protection against discrimination has emerged into a significant discrimination law body, as mentioned above, under the important influence of EU-law. The discrimination law does not, however, focus on job placement, but on equal opportunity.

2.3. National legislation

Swedish legislation and other provisions on job placement policies for the promotion of work for persons with disabilities aim to balance the negative effects of reduced working capacity, not by force or quotas, but by introducing financial incentives for employers hiring disabled workers.

The main legal act regulating current job placement policies is the Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen [2000:630] om särskilda åtgärder för personer med funktionsnedsättning som medför nedsatt arbetsförmåga*). The Regulation covers the Swedish Public Employment Service (*Arbetsförmedlingen*) job placement program for persons whose disabilities reduce their working capacity, and who face or are likely to face difficulties to achieve or maintain a regular employment contract. Support under the Regulation is only provided for employment which respects regulations on health

²⁵ 1 chapter 2 § section 2 and 5 of the Swedish Constitution (*Regeringsformen*).

²⁶ The balance between the right to work and any corresponding duty to facilitate the exercise of this right has been discussed in terms borrowed from Hohfeld's famous articles, Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning, *Yale Law Journal*, 1913 pp. 16-59 and Hohfeld, Fundamental legal conceptions as applied in legal reasoning, *Yale Law Journal*, 1917, pp. 710-770, see also Inghammar 2007, pp. 21-26.

and safety at work, and where remuneration is in accordance –or in line with– applicable collective agreements.²⁷ The most important efforts are the following:

- Financial support to the employer to cover (partly) the cost of workplace adaptations and aid.
- Special efforts for the visual- and hearing impaired.
- Special support assistance for introduction and follow-up at a new workplace.
- Wage support (supported employment with private or public employers), which also includes the more specific Development employment as well as Safety employment.
- Sheltered employment.

The general idea all through the job placement program is a stepwise increase of activities, reserving the more comprehensive efforts to disabled persons most far from the regular labour market. This result in a program where sheltered employment, as being the most comprehensive effort, can only be granted if less extensive measures would not be sufficient. Subsequently, the different versions of wage support will not be applied if introductory support or support for workplace adaptations would secure the employment of the disabled worker.

Financial Support to the Employer to cover workplace adaptations and aid is granted, if needed, up to a level of 100,000 SEK (approx. 12,000€) to the employer and/or the employee each year. Only assistance discovered during the first 12 months of employment is covered. In special circumstances, or if the support comprises computer-related aid, even higher amounts can be accepted.²⁸

Special efforts for the visual-and hearing impaired can amount to up to 50,000 SEK (6,000€) per year to cover adjustments of literature or workplace education needed for the performance of the employment contract, or to cover costs related to interpreter services for the deaf.²⁹

²⁷ 8 § Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

²⁸ 11-15 §§ Regulation (2000:630) on special measures for persons with disabilities which result in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*). See, Inghammar 2007, pp. 72-74.

²⁹ 16-17 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

Special support assistance for introduction and follow-up at a new workplace can be provided when a disabled person is introduced at a new workplace as an employee or on probation. The assistant is appointed and employed by the Swedish Public Employment Service and is only granted for a maximum of 6 months.³⁰

Wage support (lönebidrag) and the corresponding *Development* and *Safety Employments* are financial support schemes directed to employers who employ a disabled worker who would otherwise not be able to achieve or keep the employment position. The employment contract is between the private or public employer and the employee, but the wage support is calculated to compensate for the disadvantages that result from the person's reduced working capacity. The compensation is intended to be gradually decreased and is roofed at a maximum of 4 years (for *development employment* only 12 months). The support can be, and is repeatedly, extended after special examination even beyond the first 4 years. Any cost associated with the salary to the employee, such as total income, social security fees, vacation benefits and pension schemes under collective agreements are included, but only as far as they correspond to a gross income of 16,700 SEK per month (approx. 2,000€ per month).³¹ There is no minimum wage legislation but 16,700 SEK per month would be at the very lowest end of unqualified work. The Wage Support system, including the figures for *Development* and *Safety Employments* has covered in the range of 45,000-60,000 employees during the past decades.³²

Sheltered Employment, being the most comprehensive job placement program relates to employment within the publicly owned Samhall AB Group (similar to Remploy in the UK) or *public sheltered employment* (offentligt skyddat arbete, OSA) with other public bodies such as local municipalities, authorities and the like. Samhall, which is the main actor in sheltered employment, employs 21,000 people, mainly persons whose disabilities reduce their working capacity.³³ Disabled employees at

³⁰ 20-21 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

³¹ 25-31 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

³² The most recent figure from 2011 show that 46 000 are included in the ordinary wage support scheme while 18 000 are in sheltered employment and 3 000 in development employment, see *Information om arbetsmarknadsläget, Arbetsmarknadsåret 2011*, Arbetsförmedlingen, www.arbetsformedlingen.se 2014-07-11, See, for a brief discussion about the development of wage support, Inghammar 2007 pp, 65-68.

³³ Samhall Annual Report 2013, see www.samhall.se, 2014-07-11.

Samhall are excluded from the Employment Protection Act but are to some extent covered by collective agreements with similar content.³⁴ Public sheltered employment with public employers other than Samhall employs only 4,000 individuals (2011). This particular program is monitoring especially persons with social-medical disabilities, long-term and severe psychiatric illness or some specific groups of severely disabled. Contrary to employment within Samhall *public sheltered employment*, it is only available if the services provided by the organisation are clearly outside sectors open for private competition.³⁵ In 2011 the Swedish government initiated a public inquiry with the aim to investigate the current situation and future strategies for disabled workers' integration in the labour market. The inquiry presented the report SOU 2012:31, *Sänkta trösklar – högt i tak. Arbete, utveckling, trygghet*, in May 2012, but there have not yet been any changes in the legislation proposed on the basis of the report.

2.4. Regional or local regulations

Sweden is a centralised country and not a federation. Nevertheless, there are regions (counties) with some decentralised responsibilities. Health care is the main such responsibility. Labour market regulations are not decentralised and, compared to other countries such as Germany, the importance of the regions when it comes to labour market regulation is very limited. At both regional level and at municipalities (city councils), there have been efforts in relation to labour market integration under national law. These efforts have reflected a delegated authority to implement national legislation, but still the competence for labour market regulation is national and lies with the Parliament, being the Government and the labour market authorities responsible under the Government.

2.5. Collective agreements

In Swedish labour law, collective agreements are not focusing on job placement strategies for disabled workers. As mentioned in the presentation of sheltered employment, the public corporation of Samhall AB, which employs 20,000 disabled workers under the sheltered employment program, has a collective agreement which

³⁴ 1 § 2 section Employment Protection Act (1982:80).

³⁵ 34-35 §§ Regulation (2000:630) on special measures for persons with disabilities which results in reduced working capacity, (*förordningen (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga*).

provides for employee rights, particularly since disabled workers at Samhall AB are excluded from the Employment Protection Act.

Other collective agreements could address issues only partly related to disability issues, such as Health and Safety at work and therewith associated topics such as sick leave and rehabilitation of employees returning to work after sick leave.

2.6. Leading cases

The job placement programs presented in this chapter are run and financed by the Swedish Public Employment Service. The decisions by this public body (in relation to supported or sheltered employment) have not been subjected to appeal in courts of law. Consequently there are no leading cases in this field.³⁶

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

In Swedish labour law, the impact of the unfair dismissal provisions of the Employment Protection Act (1982:80) is significant, especially in relation to dismissal related to the individual employee. While redundancies are comparatively easily undertaken in Sweden, dismissals related to illness or disabilities are significantly more complex.³⁷ Based on a number of reported cases and the explicit counsel of the government upon the introduction of the Employment Protection Act, an employee can only be dismissed due to illness or disability if the employer can prove that the employee is no longer able to perform “any duty of importance” to the employer.³⁸ The employer has an obligation to facilitate the rehabilitation of the employee and will, in court, be responsible to show that necessary rehabilitating measures have been

³⁶ This situation has indeed been criticized (see Inghammar 2007 p. 112), but there has not been any dramatic improvements in this regard, even though a change in the legislation in relation to re-examination of decisions was passed recently.

³⁷ For two comparisons in Swedish of different angles of employment protection law in Sweden, England and Germany, see Rönmmar, *Arbetsledningsrätt och arbetskyldighet: en komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext* 2004 as well as Inghammar 2007. For a slightly older presentation in German, see Gotthardt, *Kündigungsschutz im Arbeitsverhältnis im Königreich Schweden und in der BRD*. Baden-Baden 1999. For an English text on Swedish Labour Law, see Eklund, Sigeman, Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008.

³⁸ Prop. 1973:129 p. 126, AD 1993 nr 42, Ad 1994 nr 94, AD 1999 nr 26, also, Lunning, Toijer, *Anställningsskydd. En lagkommentar*, 10 upplagan, Stockholm 2010, pp. 466-474.

taken. Furthermore, the dismissal will be considered unfair where it is reasonable to require the employer to provide other work with the employer for the employee. The burden of proof in both these regards lies with the employer.³⁹ For disabled already in employment these provisions are apparently of significant importance, and the interpretation of the specific criterion has been developed in case law since 1974 in numerous law cases and academic comments.⁴⁰ Indeed, one could say that most of the efforts on promoting the position of employees with reduced working capacity have been focused on employment protection law and not on discrimination law. Naturally, this also has implications for those who are not (yet) in employment. Their cases cannot be heard under employment protection law, to the contrary, their situation could be even worsened since employers might be reluctant to employ disabled due to the fact that the employment protection legislation would make dismissals far-fetched.

As previously discussed, disability discrimination legislation was first materialised in Sweden in 1999 and reshaped in 2009 into the new Discrimination Act (2008:567). The observance of the law is a task for the disabled individual who would primarily report and seek advice and legal counsel from his or her trade union. Supplementary to the trade union, the Discrimination Ombudsman could investigate the case and support the individual in legal action against the employer. Thirdly, the individual might take legal action on his or her own, if neither the trade union nor the Ombudsman are willing to participate. However, bearing in mind that the Swedish labour market is characterised by a decreasing but still high trade unions density (71 per cent in 2010), trade unions are likely to handle most of the discrimination cases.⁴¹ Due to the strong position of trade unions and the elaborated negotiation system between the industrial partners even at local level, most employment disputes never end up in court. The Swedish Labour Court reports approximately 150 cases per annum, of which 50 per cent are related to employment protection and a handful – between 5 and 10 cases– deal with discrimination.⁴²

³⁹ 7 § Employment Protection Act (1982:80). For a version in English, see Eklund, Sigeman, Carlson, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008, p 488.

⁴⁰ See also Westregård, En analys av samspelet mellan arbetsrätt och rehabiliteringsregler vid uppsägning och omplacering, *Juridisk Tidskrift*, 2006-07 nr 4 pp 876-888.

⁴¹ Kjellgren, The Decline in Swedish Union Density since 2007, *Nordic Journal of Working Life Studies*, Vol. 1. Nr. 1. Aug. 2011, pp. 67-93.

⁴² The Labour Court hears, as first and final tribunal, almost all cases where the employee is represented by a trade union. In other employment cases, the Labour Court is appellate court to the District Courts. The cases are reported in Swedish only and available at www.arbetsdomstolen.se.

In 1 Chapter 4 § the Discrimination Act defines:

“1. *Direct discrimination*: that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

2. *Indirect discrimination*: that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.

3. *Harassment*: conduct that violates a person’s dignity and that is associated with one of the grounds of discrimination sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

4. *Sexual harassment*: conduct of a sexual nature that violates someone’s dignity.

5. *Instructions to discriminate*: orders or instructions to discriminate against someone in a manner referred to in points 1–4 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person.”⁴³

3.1. Case Law

There has not been all that many disability discrimination cases reported in the Swedish Labour Court so far, and a number of aspects of the Law, primarily indirect discrimination and reasonable accommodation, still need significant clarifications in case law.

In AD 2003 nr 47 the Labour Court heard the first Swedish case on direct disability discrimination. The plaintiff sued the employer for direct disability

⁴³ A translation into English is available at www.government.se/sb/d/574/a/118187 2014-07-11.

discrimination since he, for reasons related to his diabetes, was not employed as a technical operator at a petroleum industry. Due to the specific health and safety issues at the industry and furthermore based on a general provision (or rather recommendation) on diabetes related issues related to irregular working hours from the Swedish Work Environment Authority (*Arbetsmiljöverket*), the employer was reluctant to hire the job applicant. The working conditions entailed both irregular working hours, including nights, and work performed by the employee alone. The corporate physician who examined the applicant recommended an employment with a probation period in order to find out whether or not the person's diabetes in combination to his working conditions would constitute a threat to his health situation. Probation employment was, however, not allowed under the collective agreement, and therefore the management decided not to employ the job applicant with diabetes. The Labour Court concluded that diabetes –as a long-term impairment– fell under the concept of disability, and that the reason not to employ the person was related to that disability. A *prima facie*-case of disability discrimination was established. The Labour Court went on and found that the employer should have consulted the applicant's private physician who, in court, testified that the diabetes was well under control and would not constitute a problem for the employment situation. The Labour Court ruled in favour of the plaintiff.⁴⁴

The second Swedish case of disability discrimination, AD 2003 nr 76, concerned an employee (guard) at a State prison who had been deprived of some of his supervising work tasks. The employee argued, among other things, that the employer had repositioned him because of his disability, a back and shoulder impairment he suffered due to a car accident. Based on the evidence in the case, the Labour Court found that there was no relation between the action taken by the employer and the disability and hence ruled in favour of the employer.

In AD 2005 nr 32, the third and more frequently quoted case, an employee in his 30s charged the employer with unfair dismissal, unfair redundancy and disability discrimination, since he had been dismissed shortly after informing the Management that he had been diagnosed with Multiple Sclerosis (MS). The Labour Court found that the reason for the dismissal was related to redundancy and that the employer in principle had observed the provisions of the Employment Protection Act as such. However, the Labour Court proceeded to conclude that Multiple Sclerosis was a long term condition and therefore constituted a disability even though the condition had

⁴⁴ Under Swedish discrimination law a job applicant who has been discriminated against can only receive damages for injury of feelings. In this case the Labour Court ruled decided on 30,000 SEK (approx. 3,300€).

not yet resulted in any reduced working capacity. The Court went on and found that the employer, under the “*shared burden of proof*” concept in discrimination law, could not prove that there was no correlation between the disability and the dismissal. Since the overall picture of the situation, the Court concluded, pointed in the direction of a correlation between the disability and the dismissal and the employer could not refute that properly, the Court ruled in favour of the employee and determined the damage for injury to feelings to 100,000 SEK (approx. 12,000€) and additional damages for loss of income.⁴⁵

The Labour Court ruled in the fourth disability discrimination case, AD 2006 nr 47, that a Lutheran priest, who had applied with the Church of Sweden for a position as evangelist in Brazil, had been discriminated against in a recruitment situation. The priest suffered from a rare form of allergic reaction to certain fruit and some root vegetables. The court considered the condition to fall under the definition of disability. The employer had refused to hire the priest with respect to the risk of exposure to such food, and the negative effect (though not life threatening) on his health condition he could end up with during the work in Brazil. The Labour Court found that the employer had directly discriminated the priest by not employing him due to his allergy. The damages for injury to feelings were set at 50,000 SEK (6,000€).

In AD 2010 nr 13 the Labour Court decided on a case where a visually impaired person applied for employment with the Swedish Social Insurance Agency, a very large nationwide public body which administers social security and rehabilitation. The Agency argued that appropriate accommodations to meet the needs of the disabled applicant would represent 20,000 working hours, mainly with re-writing computer programs. The Labour Court ruled this to be outside the scope of “reasonableness” even with respect to the financial and organisational strength of the employer’s organisation.

A special situation concerning recruitment of a trainee for practical experience was examined in the Labour Court case AD 2011 nr 11. The plaintiff, an unemployed person who was subject to job placement activities for young unemployed by the Swedish Public Employment Service had been refused training for practical experience with a care centre for persons with severe mental disorder for reasons related to his vision impairment. The plaintiff was totally blind on one eye and only had 6% vision on the other. In the case, the Labour Court examined whether the care centre, by not offering the plaintiff the training, by not asking him relevant questions at a meeting

⁴⁵ This case has been repeatedly discussed in the doctrine, see Rönmar, *Diskriminering vid arbetsbristuppsägningar*, *Juridisk Tidskrift*, 2006-07, Nr 3, pp. 630-645, Lunning, *Toijer* 2010, p. 87, Inghammar 2007, pp 286-289.

held prior to the possible training, had acted in a directly discriminatory way against him. The Labour Court found that the plaintiff would not have been able to fulfil the pivotal part of the duties at the care centre, and that he therefore was not in an equal situation to a person without such disabilities applying for the same position.

The latest reported disability discrimination case from the Swedish Labour Court is AD 2012 nr 51. In this case a disabled employee, who had a permanent impairment in one arm, was dismissed from a position as assistant with a major super market corporation which employed 7,000 people nationwide. While the plaintiff argued that the dismissal was unjustified and due to her personal situation, or related to her disability and directly discriminatory, the Labour Court found in the ruling that the dismissal was for redundancy reasons and fair under the Employment Protection Act (1982:80). Contrary to the case of AD 2005 nr 32, the Court concluded that there was no finding of discrimination.

3.1.1. Discrimination cases and legitimate justifications

The number of reported cases from the Labour Court on disability discrimination is very low and, as mentioned above, there are still significant aspects of the law that need interpretation in further cases.

One of the most important issues to address relates to the concept of reasonable accommodation.⁴⁶ Since there has not yet been any clarifying Swedish case law about the interpretation of “reasonable” or even “accommodation”, other sources or law and interpretations from other fields of law might be applicable, at least for preliminary guidance.⁴⁷ When proposing the new legislation to the Swedish Parliament the Government made some statements about reasonable accommodation.⁴⁸ The Swedish Government explicitly examines the provisions of Directive 2000/78/EC. It is a prerequisite for the application of the duty to perform reasonable accommodation that such accommodation would bring the disabled person to an “equal situation” with someone able-bodied.⁴⁹ The duty shall apply continuously throughout the employment period and will be related to a number of aspects, such as the employer’s

⁴⁶ 2 chapter 1 § p. 4 Discrimination Act (2008:567), see also Section 5, Directive 2000/78/EC.

⁴⁷ In the Labour Court case AD 2010 nr 13 the Court found that it was not reasonable under the discrimination legislation to demand from the Swedish Social Insurance Agency, as employer, to undertake accommodative measures amounting to approximated at 20,000 working hours in order to facilitate the recruitment of one single, visually impaired job-applicant.

⁴⁸ Prop. 2007/08:95, pp. 142 ff.

⁴⁹ Prop. 2007/08:95, p. 151.

financial situation as well as the form and duration of the employment relation.⁵⁰ The financial landmarks for scrutinizing the “reasonableness” are, however, not yet obvious.⁵¹

3.1.2. Direct and indirect discrimination

The Swedish disability discrimination legislation has catered to the concept of both direct and indirect discrimination since the first legislation was introduced in 1999, with the explicit ambition to copy the concept in sex discrimination legislation. While direct discrimination, however difficult to prove in a case of law, is more commonly understood as discrimination, the concept of indirect discrimination, especially in relation to disability (and indeed age), is more complex.⁵² A number of criteria (or even procedures), which appear as neutral, will *de facto* have specific implications in relation to competence and capability, aspects that could potentially be related to disability. In relation to most other grounds of discrimination the balance between relevant and irrelevant criteria will be much more difficult to manoeuvre when applied to disability. The Swedish case law, so far, has not scrutinised any significant aspect of indirect disability discrimination even though in working life, in recruitment, as well as in selection for advancement, pay raise or other managerial decisions, is very likely to put “neutral” criterion harsh for persons with certain disabilities.⁵³

⁵⁰ Prop. 2007/08:95, p. 152, and also prop. 1997/98:179 pp. 51-55.

⁵¹ There is no case law to clarify this particular topic and other sources of law, primarily the Government proposal to parliament does not make any such statement. One could under these circumstances suggest an analogous interpretation where the financial support for workplace adjustments offered under other legislation could serve as some sort of indicator, see Inghammar 2007, pp. 294-295 and 354-355. See also, Waddington, Hendricks, *The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, *The International Journal of Comparative Labour Law and Industrial Relations*, 2002, pp. 403-427.

⁵² Much have been said about indirect discrimination already, for instance by Christensen, *Structural Aspects of Anti-Discriminatory Legislation*, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague 2001. Direct and indirect discrimination is defined in 1 chapter 4 § Discrimination Act (2008:567) .

⁵³ Prop. 2007/08:95 pp. 100-103, prop. 1997/98:179 p. 44, Inghammar 2007 pp. 288-290.

4. SECTION III. EMPLOYMENT POLICIES OF EACH MEMBER STATE AND JOB PLACEMENT FOR DISABLED PEOPLE

This article has previously described the most vital Swedish job placement programs for persons with disabilities, as well as some labour market statistics related to disability in workforce. The current chapter will draw some conclusions on issues related to these programs and policies.

4.1. Labour market crisis and active employment policies

Swedish labour market has suffered a significant blow due to the financial crisis, and the unemployment rate is untraditionally high. However, the country does not experience the same dramatic blow as other countries, mainly southern European countries. The national finances are in impressively good order with a decreasing and much controlled national debt. The backbone of industry such as steel, wood, mining and production of heavy vehicles (trucks and buses), is still very profitable even though the fixed stars of the last two decades, mobil/telecom and pharmaceutical industry have been in decline for some years. For those in employment, taxes have been reduced and salaries increased in most sectors, even during the crisis, while people on the outskirts of the labour market, especially young people and immigrants, have faced decreased changes of employment.

A special feature of the Swedish labour market for the last 10-15 years, which I believe has implications for the integration of disabled workers, is the “raise and fall” of long term sick leave under the sickness benefit legislation. The number of employees on sick leave increased dramatically from 1997 to 2003, in fact the figures almost doubled in those few years, with a total number of 8.2% of men and 12.2% of women receiving long term sickness benefit in 2004.⁵⁴ In 2006, 2007 and 2008 the new liberal-conservative majority in the Swedish Parliament issued a number of provisions –primarily changes to sickness benefit– with the ambition to counteract this development. The changes resulted in a situation where it is much more difficult to get long term sickness benefit. Indeed a significant portion of groups who could

⁵⁴ The result was not equally distributed in the country. In some smaller cities in the north of Sweden almost 25 per cent of the women was on long term sickness benefit but only 4,4 per cent in privileged areas of Stockholm. See Edling, *Alla behövs. Blott arbetsmarknadspolitik skapar inga nya jobb*. The publication of the report was initially cancelled by the Swedish Labour Organisation (where the author Jan Edling was Labour Market Resercher), but is available at [www.timbro.se/pdf/Alla behovs 2.pdf](http://www.timbro.se/pdf/Alla_behovs_2.pdf) 2014-07-11.

previously count on such benefits are now supposed to apply for employment. This development has taken the political –and to some extent the legal– focus away from a more constant but less intense discourse on disability job placement strategies. Not only have the groups previously on long term sick leave been in the interest of media and politics, but when returning to the labour market and actively seeking employment, they are likely to displace marginalised groups like disabled workers.

4.2. Job-placement for the disabled and gender-related issues

The main focus of the Swedish job placement programs for disabled workers are arranged as financial incentives for employer when hiring a disabled person with reduced working capacity. The programs, like the Wage Support Scheme, are supposed to compensate the employer in relation only to the reduced working capacity, and the question of effects of displacement of able-bodied workers is considered in the legislative process. However, there has repeatedly been massive criticism against the job placement programs for being inefficient.⁵⁵ Another criticism brought forward against the sheltered employment program within Samhall AB relates to the fact that women are underrepresented in the group of sheltered workers that transfers to open labour market employment. This is of particular interest since women's possibilities to undertake such transfers are supposed to be specially monitored by Samhall AB.⁵⁶

Sweden has never had any quota-legislation for the integration of disabled workers. The country remained neutral and did not fight in the 1st or 2nd world wars and was subsequently spared the number of war injured workers that forged the disability quota schemes in countries like Germany and Britain. The only comparable legislative “burden” to employers in this regard is a rarely used legislation from the 1970s on the promotion of disabled workers.⁵⁷ The more explicit and far-reaching provisions of the act whereby employers can be forced not to employ unless employing

⁵⁵ For further references to this criticism see Inghammar 2007, p. 109 and the reports from the Swedish National Audit Bureau (Riksrevisionen), RiR 2007:24 *Utanförskap på arbetsmarknaden. Funktionshindrade med nedsatt arbetsförmåga*, Stockholm 2007, and, RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna*. Stockholm 2008.

⁵⁶ RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna*. Stockholm 2008, p. 39.

⁵⁷ Employment Promoting Measures Act (1974:13), *lagen om vissa anställningsfrämjande åtgärder*.

a disabled worker have never been exercised, even though they had already been implemented in the mid-70s.⁵⁸

The importance of privately owned employment agencies in job placement strategies in general is increasing.⁵⁹ With regard to the specific job placement programs for disabled workers which are referred to above in this article, the absolutely dominating actor is the Swedish Public Employment Service. Even if the decisions on financing and placing of sheltered or supported employment remain with the Public Employment Service, private employment agencies, can be involved with efforts and services related to job finding for disabled workers on contractual basis.

4.3. Economic dislocation and company crisis as a limit for the placement of disabled workers

As in most other western countries the portion of employees in the industrial sector has decreased over the past while the service sector has increased. A significant number of low skilled industrial jobs have been dislocated to primarily other European or Asian countries. Due to high standards, a comparatively rigorous welfare system and high income and social security taxes, “labour” is expensive in Sweden.⁶⁰ According to statistics in Sweden, persons with disabilities are, to a slightly larger extent than able-bodied, employed by public bodies, primarily local authorities (city councils). However, the majority in both groups are privately employed.⁶¹ There has been no specific Swedish political debate on the impact of dislocation of workplaces in relation to disabled workers, but rather in relation to “core workers”. The absence of such a debate would not affect the opinion that dislocation could have specific implications for disabled workers. Since the early 1990s when Sweden went through a very dramatic economic crisis, much like the one seen in southern Europe in 2012, a number of employments with low qualification has disappeared, both in the private and public sector. The downscaling of such jobs is likely to have provided further

⁵⁸ Inghammar 2007 p. 74-77, and SOU 1992:52 p. 300.

⁵⁹ Lundin, IFAU Rapport 2011:13, *Marknaden för arbetsmarknadspolitik: om privata komplement till Arbetsförmedlingen*. Uppsala 2011.

⁶⁰ Income taxes even on low income starts at 30 per cent and employers pay mandatory social security contributions of at least 32 per cent (additional if collective agreements are applicable) of the gross salary.

⁶¹ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 48-49.

difficulties for persons with disabilities since the level of education, particularly for people with reduced working capacity, is significantly lower than for able-bodied.⁶²

4.4. Connection between welfare state and active labour market policies: could the first be more of a discouragement than an aid for the latter?

The question in the heading of this section monitors some very intriguing relations, that of welfare provisions and active labour market strategies –but, I would add, beneath this– with the role of the individual in relation to the state. The fields of legislation described more in detail in this presentation, discrimination law and job placement schemes, together with the briefly described changes to the welfare system (primarily long term sickness benefit), are all results of a political (and economic) alertness to combat “idleness” by different means.⁶³ The State does, to a less extent than previously (at least in Sweden), offer an “opt-out” possibility from the labour market, but as a preliminary or temporary solution wherein the individuals are expected to “adapt, retrain, rehabilitate and re-educate themselves”.⁶⁴ Even if the general ambition behind the welfare system has been in line with these statements for decades, the factual implementation has not.

From a Swedish perspective, I would conclude that there is a significant connection between the social security systems developed in the Welfare State and the active labour market policies. This connection is, however, reciprocal in the way that solutions in one of the systems will affect the outcome of the other, but not necessarily in line with expectations. As has been discussed previously, the changes to the sickness benefit legislation in Sweden altered the landscape of demographics in job placement policy. A significant number of people who had previously been subject to “opt-out” strategies were suddenly supposed to be re-entering the active labour market, with a possible effect of balancing out other groups –such as the disabled– with legitimate expectations in relation to work and employment.

⁶² *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 29.

⁶³ Stendahl describes this in Stendahl, *Employment support – a normative step backward, forward or nowhere?* In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*. Gothenburg 2008, pp. 178-180.

⁶⁴ Stendahl, *Employment support – a normative step backward, forward or nowhere?* In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*. Gothenburg 2008, p. 179.

I would also like to make a comment on the apparently different normative functions of active job placement schemes for disabled job-applicants and disability discrimination. While the job placement schemes are derived from an *equality of outcome*-perspective, the disability discrimination legislation is linked to the *equality of opportunity*-perspective.⁶⁵ These two different perspectives constitute significantly different normative points of departure, have very alternate implications and are, in the field of disability, not aiming at the same outcome. In my personal opinion, one of the most fundamental differences are related to how we construct “actors” and “recipients”. Where most job placement policies, at least in Sweden, construct disabled workers as “recipients”, disability discrimination more significantly refers to disabled as “actors” with a mandate, and first call, to exercise their right individually. Since the paradigm of discrimination law has overwhelmingly prevailed in European labour law in the past decades –and understand me correctly, I do not argue against discrimination law– individuals not able, willing or otherwise capable of successfully exercise their anti-discrimination rights have been increasingly neglected.⁶⁶

5. SECTION IV. UNIVERSITY: CAREER COUNSELING AND JOB PLACEMENT FOR DISABLED STUDENTS

Swedish Universities, which are publicly run but for a few exceptions, have significant obligations in relation to disabled students and promote accessibility to campus, courses and accommodations in relation to literature (for vision impaired) as well as exams. Apart from a general duty to all groups of students, the Discrimination Act (2008:567) covers also higher education. The percentage of disabled in higher education has increased over the years, but is still lower than for able-bodied.⁶⁷

⁶⁵ There has been a legal Nordic/Swedish discourse on the *Normative Patterns of Labour and Social Law* over the past decade where aspects like these have been discussed by different scholars. See for instance, Christensen, Structural Aspects of Anti-Discriminatory Legislation, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague 2001, Stendahl, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*. Gothenburg 2008, p. 176, Numhauser-Henning, *Legal Perspective on Equal Treatment and Non-Discrimination*, The Hague 2001, and in relation to disability issues, Inghammar 2007.

⁶⁶ Inghammar, From a given – into a task, in, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*, Gothenburg 2008, pp157-164.

⁶⁷ *Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1* (Situationen på arbetsmarknaden för personer med

Sweden has no specific programs for job placement for disabled and in fact, Swedish Universities are only to a minor extent oriented towards job-coaching of students even in general. Most Universities, however, have job-coach offices, but these are not particularly engaged, on a regular basis, in job placement for disabled students.⁶⁸

6. APPENDIX

6.1. Main sources of law

European Union

- European Commission Regulation No 2204/2002 of the 12 December 2002 on the application of the Articles 87 and 88 of the EC Treaty to State aid for employment.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Government Bills (Propositioner)

- Proposition 1973:129 Lag om anställningsskydd m.m.
- Proposition 1997/98:179 Lag om förbud mot diskriminering i arbetslivet av personer med funktionshinder.
- Proposition 2007/08:95 Ett starkare skydd mot diskriminering.

Government Inquiries (Offentlig utredningar)

- SOU 1992:52 Ett samhälle för alla.
- SOU 1997:176 Förbud mot diskriminering i arbetslivet av personer med funktionshinder.
- SOU 2012:31 Sänkta trösklar – högt i tak. Arbete, utveckling, trygghet.

funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04, pp. 28-29.

⁶⁸ My Alma Mater, Lund University, has this very autumn initiated a collaboration with the local branch of the Swedish Public Employment Agency, but no specific measures have yet been taken.

6.2. Cases

European Union Court of Justice

- C-13/05 *Sonia Chacon Navas v. Eurest Colectividades SA.*

Swedish Labour Court (Arbetsdomstolen)

- AD 1993 nr 42

- AD 1994 nr 94

- AD 1999 nr 26

- AD 2003 nr 47

- AD 2003 nr 76

- AD 2005 nr 32

- AD 2010 nr 13

- AD 2012 nr 51

6.3. Bibliography

CHRISTENSEN, Structural Aspects of Anti-Discriminatory Legislation, in, Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague 2001.

EDLING, *Alla behövs. Blott arbetsmarknadspolitik skapar inga nya jobb.* www.timbro.se/pdf/Alla_behovs_2.pdf 2014-07-11.

EKLUND, SIGEMAN, CARLSON, *Swedish Labour and Employment Law: Cases and Materials*, Uppsala 2008.

FRANSSON, STÜBER, *Diskrimineringslagen, En kommentar*, Stockholm 2010.

GOTTHARDT, *Kündigungsschutz im Arbeitsverhältnis im Königreich Schweden und in der BRD*. Baden-Baden, 1999.

HOHFELD, Some fundamental legal conceptions as applied in judicial reasoning, *Yale Law Journal*, 1913, pp. 16-59.

HOHFELD, Fundamental legal conceptions as applied in legal reasoning, *Yale Law Journal*, 1917, pp 710-770.

INGHAMMAR, *Funktionshindrad med rätt till arbete? En komparativ studie av arbetsrättsliga regleringar kring arbete och funktionshinder i Sverige, England och Tyskland*. Lund 2007.

INGHAMMAR, From a given – into a task, in, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*, Gothenburg 2008.

KJELLGREN, The Decline in Swedish Union Density since 2007, *Nordic Journal of Working Life Studies*, Vol. 1. Nr. 1. Aug. 2011, pp. 67-93.

Labour Market Situation for people with disabilities, 2013. Information on Education and the Labour Market 2014:1 (Situasjonen på arbetsmarknaden för personer med funktionsnedsättning 2013, Information om utbildning och arbetsmarknad 2014:1), SCB-tryck, Örebro 2014.04.

LUNDIN, IFAU Rapport 2011:13, *Marknaden för arbetsmarknadspolitik: om privata komplement till Arbetsförmedlingen*. Uppsala 2011.

LUNNING, TOIJER, *Anställningsskydd. En lagkommentar*, 10 upplagan, Stockholm 2010.

NUMHAUSER-HENNING, On equal Treatment, Positive Action and the Significance of a Person's Sex, in, Numhauser-Henning (ed), *Legal Perspective on Equal Treatment and Non-Discrimination*, The Hague 2001.

RiR 2007:24 *Utanförskap på arbetsmarknaden. Funktionshindrade med nedsatt arbetsförmåga*, Stockholm 2007.

RiR 2008:28 *Skyddat arbete hos Samhall. Mer rehabilitering för pengarna*. Stockholm 2008.

RÖNNMAR, *Arbetsledningsrätt och arbetskyldighet: en komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext*, Lund 2004. (Rönnmar 2004).

RÖNNMAR, Diskriminering vid arbetsbristuppsägningar, *Juridisk Tidskrift*, 2006-07, Nr 3, pp. 630-645. (Rönnmar 2006).

SAHLIN, *Diskrimineringskydd för personer med funktionshinder inom utbildningsområdet: en offentlighetsrättslig studie*, Stockholm 2004.

STENDAHL, Employment support – a normative step backward, forward or nowhere? In, Stendahl, Erhag, Devetzi, *A European Work-First Welfare State*. Gothenburg 2008, pp. 173-192.

WADDINGTON, HENDRICKS, The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination, *The International Journal of Comparative Labour Law and Industrial Relations*, 2002, pp. 403-427

WESTREGÅRD, En analys av samspelet mellan arbetsrätt och rehabiliteringsregler vid uppsägning och omplacering, *Juridisk Tidskrift*, 2006-07 nr 4 pp. 876-888. Stockholm 2006.

6.4. Internet

iii [SdLWVa_efaWzW](#)

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Information om arbetsmarknadsläget, Arbetsmarknadsåret 2011,
Arbetsförmedlingen,

www.arbetsformedlingen.se

www.samhall.se

www.scb.se

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