

THE RIGHT TO WORK OF DISABLED PERSONS: A COMPARATIVE STUDY ON LEGAL FRAMEWORK AND POLICIES IN SOME EUROPEAN UNION MEMBER STATES

CARLA SPINELLI

*Assistant Professor of Labour Law
University of Bari Aldo Moro, Italy*

Fecha de recepción: 23-01-2015

Fecha de aceptación: 29-01-2015

SUMARIO: 1. EMPLOYMENT OF PERSONS WITH DISABILITY: A HUMAN RIGHTS PERSPECTIVE. 2. DEFINING DISABILITY IN NATIONAL LEGISLATION. 3. CURRENT TRENDS IN DISABILITY LEGISLATION ON WORK AND EMPLOYMENT. 3.1. Quota system. 3.2. Alternative forms of employment: 3.2.1. Sheltered work. 3.2.2. Supported work. 3.2.3. Social enterprises. 4. DISABILITY ANTI-DISCRIMINATION LEGISLATION. 5. SOCIAL POLICY MEASURES TO PROMOTE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES. 6. THE ROLE OF UNIVERSITIES IN THE PROCESS OF TRANSITION OF DISABLED GRADUATES FROM STUDIES TO LABOUR MARKET. 7. CONCLUDING REMARKS.

RESUMEN:

En este artículo se considera el derecho al trabajo de las personas con discapacidad desde una perspectiva comparada. Las tendencias actuales en las legislaciones nacionales en materia de trabajo y empleo para las personas con discapacidad demuestran que, a pesar de que aún no se ha implementado por completo, el modelo social de la discapacidad es cada vez más adoptado por muchos Estados miembros de la UE. Para cumplir con las normas internacionales y europeas, todos los países encuestados han desarrollado una legislación contra la discriminación por motivos de discapacidad. El núcleo de protección de la discapacidad se basa en la obligación

impuesta a los empleadores de proporcionar "ajustes razonables". Las sentencias del TJCE están jugando un papel muy importante en este contexto. A pesar del desarrollo de las legislaciones nacionales, las medidas previstas tienen una baja eficacia. La tasa de participación de las personas con discapacidad en el mercado laboral tiende a ser considerablemente menor que la de otros trabajadores. De hecho, la mayoría de los Estados miembros de la UE aún gastan mucho más en transferencias de efectivo para apoyo a los ingresos que en servicios para promocionar la integración en el mercado de trabajo. El aumento del nivel de educación de las personas con discapacidad requiere el compromiso de las universidades no sólo para garantizar las condiciones adecuadas para su plena participación en el proceso de aprendizaje, sino también para ayudar a las personas con discapacidad en el proceso de transición de los estudios al mercado laboral. Para las personas con discapacidad no es suficiente tener derecho a trabajar, hay que darles los medios para que puedan ejercer ese derecho. El camino hacia la dignidad del trabajo decente en un mercado laboral inclusivo sigue siendo estrecho y lleno de dificultades.

ABSTRACT: This article considers the right to work of people with disabilities from a comparative perspective. Current trends in national legislations on work and employment for disabled people show that, even though it has not yet been completely implemented, the social model of disability is increasingly adopted by many EU Member States. To fulfil international and European standards all the countries surveyed have developed anti-discrimination legislation on the grounds of disability. The core protection of disability is based on the obligation imposed on the employers to provide a "reasonable accommodation". The ECJ judgements are playing a very important role in this context. Despite the development of national legislations the measures foreseen have low effectiveness. The participation rate of persons with disabilities in the open labour market tends to be considerably lower than that of other workers. Indeed, most of the EU Member States still spend many times more on cash transfers for income support than on the services promoting labour market integration. The increasing level of education of people with disabilities requires Universities' commitment not only to ensure appropriate conditions for their full participation in the process of learning, but also to help disabled graduates in the process of transition from studies to the labour market. It is not enough for people with disabilities to have the right to work, they must be given the means to enable them to exercise that right. The pathway towards the dignity of decent work in an inclusive labour market is still narrow and uphill.

The Right to Work of Disabled persons: A Comparative Study on Legal Framework and Policies in Some European Union Member States

PALABRAS CLAVE: discapacidad, derechos humanos, marco legal, discriminación por discapacidad, políticas de inclusión del mercado de trabajo, papel de las universidades en la inserción laboral, estudio comparativo.

KEYWORDS: Disability, Human Rights, Legal framework, Disability discrimination, Labour market inclusion policies, Universities' role in job placement, Comparative study.

1. EMPLOYMENT OF PERSONS WITH DISABILITY: A HUMAN RIGHTS PERSPECTIVE

Over the last century, there has been a major evolution in the way individuals with disabilities are perceived and supported.

For centuries, most people with disabilities have been excluded from mainstream society, based on the notions that disability was something to be feared or pitied, or more recently, that disability was a problem of the individual – something that could be “corrected” to a certain extent through medical and rehabilitative treatment, frequently in specialist and segregated centres.

The policy focus associated with these ways of understanding disability was on charity in the first case, and on the provision of services catering to the medical and associated rehabilitation requirements of the disabled, as well as on welfare and social security provisions, in the second case. These approaches, which are generally referred to respectively as the charity model and the medical model of disability, very often led to the social exclusion of disabled persons.

In recent years, there has been a growing emphasis on the social and physical environmental factors constraining the participation of disabled persons in the world of work and in society more generally. This trend has led to an increasing recognition of the rights of persons with disabilities and their status as citizens.

Consequently there is a transformation in the understanding of disability. Rather than being seen as a personal problem or tragedy, there is now a recognition that many of the barriers to participation arise from the way in which society is built and organized, together with the way in which people think about disability and the assumptions they make.

The *medical model* emphasizes the individual’s impairment, disability and limitations, while the *social model*, pioneered by Oliver¹, seeks to put persons with disabilities at the centre of the services and support they need and it emphasizes capacity – what the person can do as opposed to what they cannot do.

The shift from one model to the other has taken considerable time to filter systematically through to laws and policies. It is a shift from the perception of disability as a social welfare issue, wherein people with disabilities were marginalized within society, to a human rights approach, so that individuals with disabilities have

¹ M. OLIVER, “The Politics of Disablement”, Macmillan, London, 1990.

been afforded more and more opportunity to fulfil their roles in society as productive citizens.

The social model of disability is clearly adopted by the United Nations Convention on the Rights of Persons with Disabilities of 2006 (hereinafter indicated by UN CRPD)². The Convention does not establish new rights, but restates, reinforces and updates rights contained in other international instruments³. It confirms that all such rights apply to persons with disabilities, who include, according to the Convention, “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (art. 1).

The basic idea of human rights law, centred on the concept of human dignity, is that all people have equal and inalienable rights as human beings. All human rights are universal, indivisible, interdependent and interrelated. It is the duty of States, regardless of their political, economic, social and cultural systems, to respect, to protect and to fulfil human rights⁴.

According to the holistic approach to human rights, there is no hierarchy among civil, political and social rights, the latter being recognised as human rights by legally binding provisions of many international treaties and conventions. Labour rights, notably the right to the full enjoyment of the right to work, as social rights share the same foundations of all human rights⁵.

² See V. PIETROGIOVANNI in this issue.

³ For a detailed description of the principal international legal instruments concerning the right to work of persons with disabilities, see A. O'REILLY, “The Right to Decent Work of Persons with Disabilities”, Geneva, International Labour Office, 2007.

⁴ On the difficult question regarding the status and the standing of human rights before their legalization occur, see A. SEN, “Elements of a Theory of Human Rights”, *Philosophy and Public Affairs*, vol. 32, No. 4, 2004, p. 315, <http://www.mit.edu/~shaslang/mprg/asenETHR.pdf>.

⁵ See, *inter alia*, J. BELLACE, “Who Defines the Meaning of Human Rights at Work?”, in E. ALES, I. SENATORI (eds), *The Transnational Dimension of Labour Relations*, Giappichelli, Torino, 2013, p. 111; J. FUDGE, “The New Discourse of Labor Rights: from Social to Fundamental Rights?”, *Comparative Labour Law and Policy Journal*, 2007-2008, 29, p. 35; V. MANTOVALOU, “Are Labour Rights Human Rights?”, *European Labour Law Journal*, No. 3, 2012, p. 151.

The qualification of social rights as human rights remain controversial, see references to the debate in L. RODGERS, “Vulnerable Workers, Precarious Work and Justifications for

As far as work and employment are concerned, States Parties to the UN CRPD recognize the right of persons with disabilities to work on an equal basis with others; this includes the right to the opportunity “to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible”. The States Parties also undertake to take appropriate steps, including those specifically listed in the Convention, to safeguard and promote the realization of the right to work (art. 27).

This provision is one of the cornerstones of the Convention, whose approach towards the right to work of people with disabilities is concerned with dignity and equality and recognizes the principle of State responsibility⁶.

2. DEFINING DISABILITY IN NATIONAL LEGISLATION

With regard to the change of approach to disability according to the human rights perspective, the ratification of the UN CRPD was of great importance for the EU Member States. The European Union itself has become a party to the Convention, with the result that compliance with the provisions of the latter are also binding on the work of EU institutions⁷.

Following the ratification of the UN Convention by the European Union, the European Court of Justice (ECJ) held that the concept of “disability” in compliance with Directive 2000/78/EC had to be understood as referring to a limitation which results in particular from long-term 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 (*HK Denmark*, 11 April 2013, Joined cases C-335/11 and C-337/11, paragraphs 37 to 39).

Labour Law: a comparative study”, *E-Journal of International and Comparative Labour Studies*, vol. 1, No 3-4, 2012, p. 87, Adapt University Press, [file:///C:/Documents%20and%20Settings/pc%20carla/Documenti/Downloads/38-135-1-PB%20\(1\).pdf](file:///C:/Documents%20and%20Settings/pc%20carla/Documenti/Downloads/38-135-1-PB%20(1).pdf).

⁶ For an interesting analysis of art. 27 UN CRPD in the light of critical disability studies and Nussbaum’s capabilities theory, see E. ALBIN, “Universalising the Right to Work of Persons with Disability: an Equality and Dignity Based Approach”, in V. MANTOVALOU (ed.), *The Right to Work*, Hart Publishing, 2014, p. 61.

⁷ European Commission, *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, SWD(2014) 182 final, Brussels, http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf.

The transition from the conception of disability as a natural condition of physical or psychological impairment to a relational concept, resulting from the interaction between persons with impairments and attitudinal and environmental barriers, was used by the Court, following this decision and unlike in the past, as the key to interpreting the rules contained in the Employment Equality Directive.

A similar hermeneutic approach is required for measures of national legislation, which, as they often date back to before the Convention, employ wording that reflects the medical model. A key common element, which is particularly clear from the analysis of national laws, is the considerable difficulty in building a uniform notion of disability.

The protection of persons with disabilities is foreseen by the rules of the *European Constitutions*, which are placed at the foundation of the legislative framework on disability in most countries.

In continental Europe, according to the **French** (sec. No. 11 of the Preamble) and the **Italian** Constitution (art. 38), in the case of inability to work – due to age, mental or physical impairment, economic conditions - every person has the right to obtain from the State appropriate means for his or her existence. These provisions therefore require a duty of solidarity on the part of the State towards people with disabilities, as people excluded from the production system because of their impairments, to balance the negative effects of reduced working capacity.

More recent constitutional norms, as in **Poland** (art. 69) and in **Spain** (art. 49), provide for the social and professional integration of disabled persons as a fundamental principle of public policy. Therefore, the aim of the public authority is to guarantee the conditions enabling disabled persons to earn a livelihood and participate in social life.

All the Constitutions of the countries examined in this research provide anti-discrimination protection, but only in some of them, such as the **German** (art. 3(3)2) and the **Swedish** Constitutions (chapter 1, § 2, section 2 and 5), is that protection expressly referred to disability.

Taking into consideration the *ordinary legislation*, it can be observed that in most of the countries surveyed different definitions or variants of disability can be found with reference to the aims and the scope of the legal provisions which they are provided for, such as those on vocational training, job placement or income support.

The medical model of disability is still predominant in the **British** regulations (Equality Act of 2010), also in **Sweden**, notwithstanding the adoption of the idea of

disability as a social construct, the existing legislation demonstrates a reluctance to finally abandon the medical perspective of disability. The concept of disability is not clearly defined under **Danish** law and varies according to the purpose of the specific regulations. The Danish courts adopted a narrow interpretation of disability, at least initially linked to the medical model, especially relating to legal protection against discrimination. However, the Danish courts can be expected to change their position following the above mentioned *HK Denmark* judgment by the ECJ.

In **Germany** (Code of Social Law, Book IX), in Italy (Law No. 104/1992) and in **Poland** (Act of 27 August 1997) the legislators adopted a comprehensive approach considering both the medical and social aspect of disability. The notion of disability is based on two criteria: a limitation resulting from physical, mental or psychological impairments and the lack of integration and participation in society. The **French** definition is very close, although not identical, to that given by the ECJ in the *HK Denmark* case (Act No. 2005-102 of 11 February 2005 and Article L.114 of the Family and Social Action Code), taking into account the social, material, human and technical environment.

The **Spanish** legislation (Royal Legislative Decree 1/2013), which contains the literal definition closer to the social model of disability, in any case requires a permanent or at least long-lasting impairment and a minimum percentage of reduced functional capacity.

In most of the countries, recognition of disability occurs through specific administrative proceedings brought by the applicant. These proceedings generally foresee the involvement of a medical committee. The medical state and the ability to work remain decisive factors in the competent administrative body's assessment.

To ensure full consistency with the social model of disability, therefore, an evolutionary interpretation of the literal text of the regulations is essential in all the countries surveyed, so as to allow, on the one hand, to overcome the original welfare-ratio, if still present and, on the other, to expand and consolidate the anti-discrimination protection, according to the *substantive equality model*. This equality model not only recognizes that certain groups are disadvantaged compared to others, but it also includes some positive obligations for the States, such as creating general structures that are inclusive⁸.

⁸ S. FREDMAN, "Human Rights Transformed – Positive Rights and Positive Duties", Oxford University Press, 2008.

3. CURRENT TRENDS IN DISABILITY LEGISLATION ON WORK AND EMPLOYMENT

The analysis of national legislations reveals some common lines along which the discipline of the protection of people with disabilities has been developed in Europe, including the origin of the first legislative actions, which occurred frequently near the end of the First and Second World Wars⁹.

Comparative study allows a substantial uniformity to be detected in the tools adopted in different jurisdictions for the protection of the right to work of disabled people, with a predominance of the model of compulsory recruitment (*quota system*) **in western, eastern and southern Europe.**

For persons with disabilities for whom, for reasons of choice and/or suitability, open employment may not be appropriate, alternative forms of employment of a sheltered or supported nature are usually provided. There are numerous variations of these options across countries, given that even the concept of sheltered employment does not have the same meaning for all of them¹⁰.

3.1. Quota system

Quota schemes are probably the best known and most familiar affirmative action measures aimed at promoting the integration of people with disabilities in the labour market.

Affirmative action measures seek to actively promote the principle of equal opportunity for members of disadvantaged and under-represented groups by granting these members some form of preferential treatment and are aimed at overcoming structural disadvantages experienced by those groups.

Under quota schemes, employers of a specific minimum number of workers are obliged to ensure that a certain percentage (*quota*) of their workforce, typically in the range of 2%-7%, is made up of people with disabilities.

Such schemes first emerged in Europe in the aftermath of the First World War, and initially war veterans who were disabled as a result of military action were the only beneficiaries. These schemes usually exempted small employers. In the post Second

⁹*Infra*, par. 3.1.

¹⁰ See the national reports in this issue.

World War period, quota schemes were extended to cover civilians with disabilities, and were adopted in many countries throughout the world. The exemption for small employers was, however, often maintained. More recently, some quota schemes have been expanded expressly to include people with mental health problems.

While all quota systems call for employers to employ a set minimum percentage of disabled persons, not all of them are supported by a levy-grant system, according to which all employers covered by the system who do not meet their obligation are required to pay a compensatory payment. The money raised through such a quota scheme usually goes into a fund to support the employment of people with disabilities. These funds are usually administered by the public authorities, although exceptionally the social partners are involved, as in the case of **France**.

The levy is often regarded, particularly during difficult economic periods, as an additional tax to be paid by the employers and as a more attractive option than hiring.

The quota system is often accompanied by rules concerning modes of exemption or alternative measures, such as in **Italy and Spain**, which allow companies to avoid the obligation to hire people with disabilities. The basic problem of the quota system is the implementation of a delicate balance between freedom of economic initiative and the right to work.

Despite the fact that quota systems can be adapted to fit national economic and political requirements, since they allow law and policy makers to influence the size and nature of both the targeted group of beneficiaries (persons with disabilities) and the group upon whom obligations are imposed (employers), the available data indicates that they are only partially effective as an instrument for furthering open competitive employment for individuals with disabilities. Even when the use of mandatory quotas is accompanied by adequate sanctions, they are only partially filled¹¹.

Transforming Disability into Ability; Policies to promote work and income security for disabled workers, a 2004 study conducted by the Organisation for Economic Co-operation and Development (OECD) in 20 countries found that more than one-third of the countries in the study used mandatory quota systems. The study concluded that, whether the approach is rights-based (anti-discrimination laws), obligations-based (quota) or incentives-based (voluntary action), it is predominantly current employees with a disabling condition who receive protection. A further conclusion was that employees who become disabled and are thus eligible for inclusion in the quota

¹¹ European Commission (2000), *Benchmarking employment policies for people with disabilities*, Brussels, http://ec.europa.eu/employment_social/soc-prot/disable/bench_en.pdf

are more likely to be kept in a job, while quota schemes give little incentive to employ a disabled job applicant¹². [p. 105].

Moreover, the choice to exclude small employers from the quota scheme has a much greater impact in countries where small firms are predominant and provide a high percentage of jobs; the impact of the quota in these countries will be significantly reduced if such employers are excluded from its scope.

Nevertheless, a targeted positive action measure in the form of a quota remains an appropriate tool to promote employment for those people with the most severe disabilities, who might be expected to be less able to profit from the existence of non-discrimination disability legislation, and that even in non-discriminatory environments may not be able to compete for and win jobs on their individual merits.

3.2. Alternative forms of employment:

3.2.1. Sheltered work

In calling for measures to promote employment opportunities for persons with disabilities, ILO Recommendation No. 168/1983 states that such measures should include “appropriate government support for the establishment of various types of sheltered employment for disabled persons for whom access to open employment is not practicable”.

In general, sheltered employment was intended for persons who were unable or unlikely to obtain or retain a job in the open labour market because of the severity of their disability or limited working capacity. The majority of those employed under this system tend to have an intellectual disability.

According to a broad definition, sheltered work should not only have the purpose of making it possible for people with disabilities to carry out worthwhile work and employment options, but also to prepare them, as far as possible, for work in normal employment.

The majority of **Polish** people with a disability work in sheltered jobs. In **Sweden**, the main provider of sheltered employment is the public body of Samhall AB, a company wholly owned by the Government.

¹² http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/transforming-disability-into-ability_9789264158245-en

3.2.2. Supported work

In recent years, other supported employment measures have come more into favour than sheltered work, which is mainly criticised for failing to provide proper working conditions and employment contracts.

In conformity with the UN CRPD aim of creating an inclusive labour market, sheltered employment is not mentioned in Article 27(b) of the Convention on means to guarantee the right to work. While sheltered employment is not prohibited, it is envisaged to play a small role in promoting employment of persons with disabilities, preferably pursued through other measures which may include affirmative action programmes and incentives.

There is no clear-cut line between supported and sheltered employment, since sheltered employment may be performed on the open labour market and may entail some work output for the benefit of the employer. However, the higher the degree of specialized working conditions (segregation, reduced pay, reduced working hours), the more the employment should be characterized as sheltered employment.

Supported employment can be defined as paid work in integrated work settings, with ongoing support services, for persons with severe disabilities. Supported employment aims at encouraging employment on the open labour market and includes programmes that support employment through wage and cost subvention. Moreover, the support should be given with the aim of promoting employment with the least assistance needed, and working conditions should be as similar as possible to those that apply to persons employed on the ordinary labour market.

The UN CRPD 2006 recognizes that for many disabled persons in developing countries, *self-employment or entrepreneurship* may be the first option, and in some cases, the only option (Art. 27, par. 1, f). Self-employment is appropriate for many of these people because it can provide more flexibility than paid employment in terms of workload, work schedule and work location, and permits better management of disability and lifestyle.

States Parties to the UN CRPD are called on to promote such opportunities. In many of them the legislators introduced regulations supporting the self-employment of disabled persons from public funds¹³.

¹³ European Commission, OECD, *Policy Brief on Entrepreneurship for People with Disabilities. Entrepreneurial Activities in Europe*, Luxembourg: Publications Office of the European Union, 2014 <http://ec.europa.eu/social/BlobServlet?docId=11086&clangId=en> is an interesting study that

In **Spain** people with disabilities who undertake self-employment are subsidized by the state and are eligible for reduced contributions¹⁴. In **Poland**, disabled persons registered as unemployed or searching for work at a powiat labour office may receive one-off support from the State Fund for the Rehabilitation of Disabled Persons by undertaking non-agricultural economic activity, agricultural activity or making a contribution to a social cooperative¹⁵.

3.2.3. Social enterprises

Finally, social enterprises should be mentioned as specific strategies to create additional employment opportunities for persons with disabilities. The EU sees the Social Economy as an important part of the European economic model.

In **Italy**, Law No. 381 of 1991 introduced a new model of employment for persons with disabilities based on social cooperation. Law No. 68 of 1999 (Art. 11 ff.) subsequently provided new paths to widen employment opportunities for people with a disability through greater involvement of social enterprises. These social enterprises sign conventions with employers – obliged or not under the quota system - and public employment services with the aim to facilitate the gradual integration in the workplace of people with disabilities.

In **Spain**, it worth mentioning the interesting experience of ONCE (The Spanish Organization of Blind Persons), which established a Foundation (Fundación ONCE) in 1988, involving representatives of different groups of persons with disabilities, whose primary goal is the promotion of full employment integration of disabled people.

4. DISABILITY ANTI-DISCRIMINATION LEGISLATION

A key element of the human rights based approach to disability is the adoption of anti-discrimination laws and policies. In recent years, the most important shift in the area of employment for people with disabilities has been this move to anti-

indicates various areas of action for governments to improve self-employment and entrepreneurship for persons with disabilities.

¹⁴ See J. GORELLI HERNÁNDEZ in this issue.

¹⁵ See M. SZABŁOWSKA-JUCKIEWICZ in this issue.

discrimination legislation. In the **UK**, for example, the quota system was abolished in 1996 when the Disability Discrimination Act of 1995 came into force. In most of the EU countries examined the anti-discrimination protection has received a significant boost from the adoption of international and European standards.

An interesting survey¹⁶, requested by the European Commission, Directorate-General Justice and co-ordinated by Directorate-General for Communication, published in 2012, proves that disability is one of the three most widely perceived grounds of discrimination. The survey also shows that, for all grounds, discrimination is seen as more prevalent in employment than in other areas of life. As a consequence, measures to foster diversity in the workplace are strongly supported. Finally, the research results highlight that the economic crisis is contributing to more discrimination in the labour market and is impacting negatively on policies promoting equality and respecting diversity.

According to the non-discrimination approach, people with disabilities are inherently equal human beings and thus entitled to equal treatment and equal opportunities, particularly with respect to employment. The criticisms of the quota system are mainly based on the argument that people with disabilities can be equally productive workers as non-disabled individuals, provided the workplace is adapted to ensure that they have the proper accommodations, and that more can be achieved through incentives to employers, such as financing the necessary accommodations, than through sanctions.

The promotion of equal employment opportunities for people with disabilities not only entails the prohibition of discrimination on grounds of disability, but it also requires States to take affirmative action to ensure that people with disabilities have access to employment opportunities in the labour market. This proactive approach includes requirements that the workplace environment be adapted to make it accessible to all people with disabilities who are able to work, with appropriate technical aids or supports, if necessary.

The core of the protection of disability from the perspective of human rights is based on the obligation imposed on the employers to provide a *reasonable accommodation*.

This legal concept can be found in the Employment Equality Directive, No. 2000/78/EC (Art. 5) and in the UN CRPD (Art. 2 and Art. 27, sec. 1, i).

¹⁶ *Discrimination in the EU 2012*, Special Eurobarometer 393/Wave EB77.4 – TNS Opinion & Social, November 2012, http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf.

Furthermore this concept is now adopted by many countries' disability laws. The **Italian** legislation was recently amended in this regard (Article 3 *bis* of Legislative Decree No. 216 of 2003) following the ECJ ruling, according to which the national regulations could not be considered to respect fully the Employment Equality Directive because of the absence of any provisions of specific obligations for employers¹⁷.

In accordance with the second paragraph of Article 2 of the UN Convention, "reasonable accommodation" is "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

The preamble to the Employment Equality Directive states that appropriate measures should be provided to adapt the workplace to the disability, "for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources" (Recital 20).

With reference to these international and supranational rules, reasonable accommodation can be defined as modification or adaptation of a job, employment practice, or work environment, that makes it possible for a qualified person with a disability to apply for a job, perform an essential function of the job, or access a benefit of employment.

The provision of a reasonable accommodation is an individualized measure required to meet the needs of a particular worker that should be distinguished from an affirmative action measure, such as quotas, aimed at the favourable treatment of specific groups.

It may include, but is not limited to making existing facilities used by employees readily accessible to and usable by persons with a disability; job restructuring, modifying work schedules, or reassignment to a vacant position; acquiring or modifying equipment or assistive devices, adjusting or modifying tests, training materials or policies; providing sign language interpreters or readers for individuals who are blind or have poor vision.

¹⁷ ECJ, 4 July 2013, C-312/11, *European Commission v. Italian Republic*. See P. DIGENNARO in this issue.

Reasonable accommodation does not need to be temporary in nature, in fact it could be provided for an individual for the duration of his or her employment. Moreover, it could need adjustments and implementation over time.

Indeed, rather than a focus only on impairments or health conditions, an open and supportive workplace that accommodates a wide range of needs – including not just those of disabled people - would help individuals perform better. Most disabled people do not want to be singled out and treated differently, they want to be part of the mainstream and given a fair chance. The open and supportive workplace requires an understanding by managers and co-workers of their responsibility to subscribe to those values and behave accordingly¹⁸.

The national regulations should provide a definition for what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

In **France**, the High Authority against Discrimination and for Equality (Halde) developed a genuine guidance for employers in the private sector on how to implement the notion of reasonable accommodation¹⁹. In **Britain**, the 2010 legislation makes new and detailed provisions for reasonable adjustments to be made in the case of disabled persons in employment (Equality Act 2010 Schedule 8 paras. 4 & 5). Moreover, the Code of Practice 2011, sec. 6.32 to 6.35, treats “Reasonable adjustments in practice” and gives some excellent practical advice on this issue²⁰.

This obligation to accommodate is not unlimited, but it is subject to the requirement that the accommodation does not result in a *disproportionate burden*²¹. Therefore, an employer could be exempted from providing a reasonable accommodation.

To determine whether the measures to adapt the workplace to the disability give rise to a disproportionate burden the preamble of the Employment Equality Directive states that “account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance” (Recital 21).

¹⁸ These are some of the conclusions reached by Equality and Human Rights Commission, *Working Better. The perfect partnership-workplace solution for disabled people and business*, May 2012, www.equalityhumanrights.com/perfectpartnership.

¹⁹ See S. LAULOM in this issue.

²⁰ See J. CARBY-HALL in this issue.

²¹ Art. 2, UN CRPD 2006; Article 5, Directive 2000/78/EC.

In other words, a disproportionate burden could be considered an action involving significant difficulty or expense when viewed in the light of factors such as the size of the company, its financial resources and the nature and structure of the operation.

In its judgment of 11 April 2013, *HK Denmark*, the ECJ stated that Article 5 of Directive 2000/78/EC must be interpreted as meaning that a reduction in working hours may constitute one of the adjustments an employer might make to enable someone to return to work, provided that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to the Directive is not exhaustive. The EU Court also stated that it is for the national courts to assess whether a reduction in working hours would represent a disproportionate burden on the employer in the particular circumstances.

However, the defence or justification for not accommodating a disabled person needs to be drafted carefully, otherwise unscrupulous employers would have recourse to this in order to avoid any obligation. In practice, the question as to what constitutes a disproportionate burden very much depends on the context of the case concerned, and is not merely dependent on the financial costs of an accommodation or on financial compensation schemes.

The failure to provide a reasonable accommodation to workers and job applicants, who face obstacles in the labour market, is not merely a bad employment practice, but is increasingly perceived as an unacceptable form of employment discrimination.

The Employment Equality Directive does not explicitly define a *denial of an accommodation as a form of discrimination*, while the UN CRPD states a failure to make a reasonable accommodation as a form of discrimination²².

For the **British** legislation (Equality Act 2010, Sch. 8, s. 21 (1) (2) (3)) should the employer not comply with the duty to make reasonable adjustments he would be liable for unlawful discrimination. In **France**, for an employer to refuse to take appropriate measures is deemed to be a form of discrimination.

²² Article 2 of the UN CRPD defines “discrimination on the basis of disability” very broadly to mean: “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*”.

In *HK Denmark*, the judges of Luxembourg ruled that a national legislation, like Danish law in this case, that allows an employer to reduce an employee's notice period after a prolonged period of absence, where that absence was caused by "the employer's failure to take the appropriate measures", constitutes discrimination on the grounds of disability.

In this case the ECJ has defined the scope of reasonable accommodation under the Employment Equality Directive by reference to the UN CRPD, recognising that the UN Convention defines it more broadly. Moreover, with this ruling the EU Court has defined a typical case of indirect discrimination. This interpretation may impact on national tribunals when they apply the relevant provision of the Directive²³. What is certain is that the principle of reasonable accommodation has broken the dogma of the intangibility of the employer's business organization.

Persons with disabilities face many obstacles in their struggle for equality. Very often they are victims of *multiple discrimination*, which means that there is more than one reason for the discrimination, such as in the case of disability in combination with age, race, etc. For example, although both men and women with disabilities are subject to discrimination, women with disabilities are doubly disadvantaged by discrimination based on gender and their disabled status.

The UN CRPD 2006 recognizes the particular situation of women with disabilities. States Parties to the Convention undertake to recognise that "women and girls with disabilities are subject to multiple discrimination, and in this regard [the countries] shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms" (Art. 6).

The new concept of combined discrimination of two relevant protected characteristics has been introduced in **Britain** by the Equality Act of 2010 (s. 14(1))²⁴.

In *Odar v Baxter Deutschland GmbH*²⁵, the ECJ ruled on a case of multiple discrimination on grounds of age and disability. Dr. Odar, a severely disabled Baxter's marketing director, was made redundant on operational grounds and was entitled under the social plan to the reduced amount of compensation provided in the case of workers older than 54 years of age and based on the assumption of earliest possible beginning of pension for severely disabled persons under the German retirement pension scheme. Dr. Odar contended that the calculation formula of the

²³ See the January 2014 decision of the Danish Maritime and Commercial Court cited by M. VENTEGODT LIISBERG in this issue.

²⁴ See J. CARBY-HALL in this issue.

²⁵ ECJ, 6 December 2012, C-152/11.

compensation adopted by the social plan was directly discriminatory against him with regard to age and gave rise to indirect discrimination on grounds of disability. The evaluation technique of discrimination adopted by the Court in this case was to divide the trial into two parts: first assessing the existence and the possible justification of age discrimination and, then, checking for disability discrimination and possible causes of justification, with reference to the workers of the same age. In the present case, the ECJ ruled out age discrimination, because the national provision was considered justified by the aim of protecting younger workers and facilitating their reintegration into employment. On the contrary, the Court stated that there was discrimination based on disability, given that paying a severely disabled worker compensation on termination on operational grounds which is lower than the amount paid to a non-disabled worker has an excessive adverse effect on the legitimate interests of severely disabled workers. They generally face greater difficulties in finding new employment and those risks tend to become exacerbated as they approach retirement age.

More difficult to address is *intersectional discrimination*, that can be explained as a unique mixture of grounds in a given context. Intersectional discrimination is certainly a reality, especially among people with disabilities, but from a legal point of view it is very difficult to conceptualise and combat²⁶. Good examples to illustrate “intersectionality” are cases such as those of an elderly patient with severe impairments requiring expensive health care; a gay mentally disabled man employed in an orthodox catholic school or a mentally disabled single woman who seeks assistance to become a mother.

According to some interpreters a case of intersectional discrimination was recently judged by the European Court of Justice (18th March 2014, C-363/12), without being recognised as such under the EU law²⁷.

A female worker (Ms. Z), a post-primary school teacher in Ireland, unable to bear a child, because of a rare physical condition (lack of uterus), had a baby through a surrogacy arrangement. The baby was a genetic child of Ms. Z and her husband. They

²⁶ See J. BROCKMANN, M. BANAFSCHE in this issue.

²⁷ A. HENDRIKS, “Intersectionality and discrimination”, paper presented at the conference on “Equal Rights and Accessible Environments: the UN CRPD and EU Disability Law and Policy, Maastricht University”, 3-4, April, 2014, http://www.maastrichtuniversity.nl/web/Faculties/FL/programme_EqualRightsAndAccessibleEnvironmentsTheUNCRPDAndEUDisabilityLawAndPolicy_conference_law.htm .

have taken care of the baby since birth. The Government Department stated that Ms. Z. could not qualify either for maternity leave, because she had not been pregnant and given birth, or for adoptive leave, given that she and her husband were considered the baby's parents, also according to the child's birth certificate.

The ECJ ruled that: a) there was no sex discrimination (Directive 2006/54/EC), because the commissioning male father stood in the same position as Ms Z., not being entitled to paid leave equivalent to maternity leave either; b) there was no disability discrimination (Directive 2000/78/EC), because Ms. Z could not be considered a disabled person according to the definition of disability adopted in *HK Denmark* (see above, par. 2), in fact, despite her impairment, she could carry out work and participate in professional life on an equal basis with other workers; c) it was not necessary to examine the validity of the Directive No. 2000/78/EC in the light of UN CRPD 2006, because the provisions of that Convention are not, as regards their content, unconditional and sufficiently precise and therefore they do not have direct effect in European Union law, "*but, that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention*".

This ECJ judgment appears very far from a contextualised approach to discrimination, which has been developing in recent human rights claims. Indeed, the EU anti-discrimination law still adopts a singular grounds based approach that, coupled with the prescribed comparator-based model upon which the concepts of discrimination in the Directives depend (both direct and indirect discrimination require a comparator or comparator group to be identified), makes addressing intersectional discrimination somewhat more problematic and proving it very difficult²⁸.

Discrimination can occur in recruitment of workers - for employment opportunities that are outside the quota system – and during the employment relationship, but even more, perhaps, at the termination of the employment contract. In this regard, according to the **Italian** law, for example, in the event of redundancies, disabled workers can be dismissed only without prejudice to observance of the percentage of employment as required by the quota system. For the individual dismissal, however, such as in **France**, there is no discrimination if the disabled worker cannot be employed otherwise. This obligation to attempt to relocate the employee,

²⁸ K. MONAGHAN, "Multiple and intersectional discrimination in EU law", *European Antidiscrimination Law Review*, Issue No. 13/2011, p. 20, http://www.migpolgroup.com/public/docs/200.European_Anti-discrimination_Law_Review_13_19.01.2012_EN.pdf.

which means that the employer must review all possible job opportunities in all the companies and offices of its group, is strictly controlled by judges. The **German** legislation explicitly mentions severe disability among the social criteria the employer has to consider in selecting a person who has to be dismissed for economic reasons (§ 1 (3) 1 KSchG).

5. SOCIAL POLICY MEASURES TO PROMOTE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES

The participation rate of persons with disabilities in the open labour force tends to be considerably lower than that of other workers, while the unemployment rate tends to be higher. Unemployment rates vary between types of disability, being highest among those with mental illness.

According to the latest data provided by the Labour Force Survey *ad hoc* module on employment of disabled people in 2011²⁹, while in the majority of the Member States the employment rate for people without disabilities aged between 20 and 64 was higher than 70%, the employment rate of people with disabilities was lower than 50%.

National situations vary considerably. Countries with similar employment rates for people without disabilities present large differences in the employment rates for people with disabilities³⁰. This suggests that national interventions and policies can make a difference.

Reasons for this high rate of inactivity vary between countries. Benefit traps and risks of losing benefits on starting work are major disincentives. Another possible reason may be the reluctance of employers to recruit disabled workers for fear of having to make expensive workplace adjustments or because of the difficulty of “letting someone go” once appointed.

The effectiveness of legislation and policy that aims to promote equal employment opportunities for persons with disabilities depends on the measures introduced to implement these in practice.

²⁹ http://ec.europa.eu/eurostat/statistics-explained/index.php/Disability_statistics_-_labour_market_access .

³⁰ See the national reports in this issue.

According to Article 27 of the UN CRPD on Work and Employment, it is the role of States Parties to: “Promote the employment of persons with disabilities in the private sector through appropriate policies and measures which may include affirmative action programmes, incentives and other measures”³¹.

At present, passive measures (income transfers) consume a considerably greater proportion of public resources than active labour market measures. The 2010 OECD study on sickness and disability policies confirm this tendency³². This report shows how the recent recession resulting from the global economic crises has raised the possibility that many of the long-term unemployed may end up on sickness and disability benefits. In OECD countries there is an increasing number of workers leaving the labour market permanently due to health problems or disability and too few people with impairments reducing their work capacity who manage to apply for or remain in employment. Even if there are changing policies in this field³³, much needs to be done to reverse this trend.

Most Member States still spend many times more on cash transfers than on services promoting labour market integration. These should include a range of technical advisory and support services and measures for employers and for disabled job seekers and workers, such as financial incentives as well as specific employment support measures.

Public authorities can provide financial subsidies to employers to compensate them for extra costs or shortfalls in productivity associated with an employee with a disability.

The financial incentives provided for by national legislations are mainly of three types: bonus grants for workplace modifications or special equipment (e.g. costs associated with making a reasonable accommodation); tax credits or reduction in social security charges in respect of each new disabled worker; wage subsidies.

The most practiced solution is the second, but the first, which is used for instance in **France** and in **Sweden**, allows the company to achieve a greater degree of responsibility for adapting its organization to the residual working abilities of the disabled person.

³¹Article 27(1)(d) and (h), UN CRPD 2006.

³² OECD (2010), *Sickness, Disability and Work: Breaking the Barriers: A Synthesis of Findings across OECD Countries*, OECD Publishing, http://www.oecd-ilibrary.org/social-issues-migration-health/sickness-disability-and-work-breaking-the-barriers_9789264088856-en .

³³ See, for instance, the recent change in Swedish sickness benefit legislation reported by A. INGHAMMAR in this issue.

One example of employment promotion schemes providing for wage subsidies for persons with disabilities is the **Danish** 'flexjob'. According to a recent reform of this scheme, persons who are employed in a new flexjob position will receive pay from the employer for the working hours that they perform. In addition they will be entitled to support up to the level of unemployment benefit (and no longer up to the level of ordinary full-time pay as was the case before the reform)³⁴.

A singular and interesting experience in **Britain** is the "Two Ticks' Symbol" campaign, which has the merit of instilling good business practice in employers. The symbol is conferred by Job Centre Plus to employers for their commitment in employing disabled people. This policy aims to convince employers that having disabled employees would provide a good image for the firm. The British policies since the 1990s have focused on the best business practices, with less emphasis on financial support or statutory constraints. The aim is to encourage employers to employ disabled people voluntarily, on the basis that there is an unquestionable value for the business to employ them³⁵.

A combination of financial incentives and employment related support services is useful for disability legislation to be effective, provided that these incentives and services are organised and regulated in a coordinated and coherent way.

Empirical research tends to suggest that anti-discrimination legislation has no employment effect and there is mixed evidence on the merits of quota systems. On the contrary, active labour market programmes, if adequately designed, can greatly contribute to social inclusion and improved and sustainable employment opportunities.

Public employment services (PES) can play an important role in implementing these policies, providing for programmes, such as for example vocational rehabilitation, that are tailored to the specific needs of people with disabilities³⁶.

The target group of disability policies is not easy to identify. Disabled people are a highly differentiated group, varying not only in terms of impairment characteristics

³⁴ See M. VENTEGODT LIISBERG in this issue.

³⁵ See K. GROMEK-BROC in this issue.

³⁶ European Commission (2013), Analytical Paper: *PES approaches for sustainable activation of people with disabilities*, Brussels, Author: Ágota Scharle, Budapest Institute, in collaboration with ICF GHK,

file:///C:/Documents%20and%20Settings/pc%20carla/Documents/Downloads/20130911%20P2P%20Analytical%20Paper_EN.pdf.

(type, severity, stability, duration and time of onset), but also in terms of other personal and household characteristics (i.e. gender, ethnicity, age, education, family structure) and socioeconomic circumstances that influence labour market participation rates (e.g. educational attainment).

The growing awareness that *women* are more likely than men to be confronted with disadvantage, exclusion and discrimination holds true for individuals with disabilities as well. Women with disabilities are more likely than their male counterparts to be poor or destitute, illiterate or without vocational skills, and most of them are unemployed. Therefore, the gender dimension of disability should be taken much more into account at national level both in the legal framework and in the employment policies³⁷.

The same consideration should be devoted to *young people* with health problem and disabilities, who are especially vulnerable in the labour market. They are currently being missed by relevant disability policies, such as those concerned with employment, discrimination and active inclusion. There is a need to shift the focus towards them and to develop new policy tools to reach this target group. Measures to create labour demand for this group are needed³⁸.

The EU Council Recommendation of 22 April 2013 on establishing a “youth guarantee” (2013/C 120/01)³⁹ - whereby young people aged 15-24 who are not in employment, education or training (NEET) are assured a quality offer of employment, further education or training within four months of becoming unemployed or leaving formal education⁴⁰ - contains outreach strategies to ensure that young people with disabilities are included in the scheme and are registered with employment services.

³⁷ European Disability Forum (2011), *2nd Manifesto on the Rights of Women and Girls with Disabilities in the European Union. A toolkit for activists and policy makers*, ch. 12, <http://www.edf-feph.org>

³⁸ Eurofound (2012), *Active inclusion of young people with disabilities or health problems*, Luxembourg: Publications Office of the European Union, http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2012/26/en/1/EF1226EN.pdf

³⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2013:120:FULL&from=EN>

⁴⁰ On this programme see EU Commission (2014), *Employment policy beyond the crisis. Social Europe guide vol. 8*, ch. 3, Luxembourg: Publications Office of the European Union, <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7721> .

6. THE ROLE OF UNIVERSITIES IN THE PROCESS OF TRANSITION OF DISABLED GRADUATES FROM STUDIES TO LABOUR MARKET

Education and lifelong learning are a crucial domain for young people, especially for those with disabilities. Focusing on transition from school-based to employment-based systems is an important and productive way of addressing their problems.

Within this framework the Universities can help to provide their disabled students with training and work-orientation activities, in order to facilitate their employment.

In recent times, more attention has been directed towards these students with disabilities, given that the percentage of the disabled gaining higher education has increased over the years. All Universities should ensure appropriate conditions for the full participation in the process of learning by students with disabilities. In addition to accessibility, these students should benefit from human and material assistance.

In **France** and in **Italy**, for example, a specific reception and support service should be created in each university to assist and support disabled students during their university career.

Organisational facilities are to be provided not only for disabled students, but also for candidates with disabilities in the case of admission tests, entrance requirements and procedures.

The Universities in **Denmark** and **Sweden** do not traditionally provide a great deal of career counselling or job-placement services for their students even in general. Most Swedish Universities, however, have job-coaching offices, but these are not particularly engaged, on a regular basis, in job placement for disabled students. In Denmark, unemployed graduates may receive help from the ordinary job-placement services who will in some cases have special programmes for them.

In **British**, **Polish** and **Spanish** Universities a significant role in promoting fluent transition from studies to labour market is played by the student career offices, which very often assure specific interventions for disabled graduates.

Under Article 6 of Legislative Decree No. 276/2003 the public and private universities in **Italy** are authorized subjects of intermediation in the labour market.

The Universities, therefore, act with their *job placement* services as integrated entities in the network of employment services. However, only a few of them offer specific assistance to graduates with disabilities.

In **Germany**, the Universities engaged in job placement cooperate with the public placement services of local governments and/or student organizations. In **France**, the disability service can also work jointly with the university traineeship service and with non-profit-making organisations to help disabled students find internships and jobs.

The strategies adopted by Universities substantially converge on the establishment of career guidance services, providing graduates with *information* about the labour market and opportunities for improving occupational qualifications; gathering, classifying and making available job offers, training and internships; keeping a *database* of students and graduates interested in finding a job; *assisting* them in active job seeking. They develop *vocational assessment and career counselling* services to assist in understanding the specific skills, traits and abilities a graduate with a disability has that can be matched to specific jobs⁴¹.

These measures have proved much more effective when complemented by actions - like training and workshops on disability - to raise awareness and sensitivity among the actors of the labour market involved (business owners, managers and co-workers).

Better results in terms of accessing the labour market have been gained through conventions signed between Universities and companies, law firms or other employers interested in offering graduate students with disabilities internships, training and job opportunities. British and Spanish⁴² Universities have proved to be particularly active in this field. This practice should be increased and made more widespread so as to enhance the proactive role that Universities can play towards their graduates with disabilities entering the labour market.

⁴¹ See the national reports in this issue.

⁴² See J. GORELLI in this issue.

7. CONCLUDING REMARKS

A *legal framework* for action to eliminate discrimination on the basis of disability and to break down barriers so as to positively promote the inclusion of disabled persons in all aspects of society is now provided by international and national provisions, but it is not enough to reach these goals.

It is still necessary to make a *cultural change* in the way disability issues are considered and to progress further along the pathway towards the dignity of decent work in an inclusive labour market.

In this perspective, it is essential to underline first of all the importance of *information campaigns* about the rights and duties of people with disabilities, employers and other key stakeholders under the law, and the policy provisions that have been introduced at national and international level.

Moreover, the involvement of *organizations representing people with disabilities* is of crucial relevance. By consulting them policy makers will be able to profit from the expertise that exists in these communities and this will help to ensure the effectiveness of any law and policy that is eventually adopted.

The UN CRPD requires that persons with disabilities and their representative organizations are involved in policy-making and the implementation of the Convention. Thus, according to Article 4, “States Parties shall closely consult with and actively involve persons with disabilities through their representative organizations”. In addition, the UN Convention stipulates that States Parties must promote participation of persons with disabilities in non-governmental organizations in general, and representative organizations of persons with disabilities specifically, under Article 29, on participation in political and public life as well as Article 33, on national implementation and monitoring.

In recent years, several countries have gone beyond merely consulting with disabled people’s organizations regarding the drafting of legislation, to directly involve them in the business of representing the concerns of people with disabilities through participatory processes. “Such active involvement is necessary to redress and counteract the under-representation and lack of power of the group in question”⁴³.

⁴³ M. VENTEGODT LIISBERG, “Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective”, in L. WADDINGTON, G. QUINN, E. FLYNN (eds.), *European Yearbook of Disability Law*, vol. 4, Intersentia, 2014.

Notwithstanding the fact that a similar role could be played by *trade unions* in the workplace, their action is not really so significant. Collective bargaining could be an appropriate mechanism to promote equal opportunities, as the social partners are close to social reality and this proximity should facilitate reaching these aims. However, collective bargaining usually either does not regulate the recruitment of disabled person at all or it does it in a very marginal way. Collective agreements more often address topics that are only partly related to disability issues, such as health and safety at work, sick leave and rehabilitation of employees returning to work after sick leave, work-life balance measures for the disabled or their caregivers. The social partners are much more interested in dealing with these issues than in bargaining for measures to promote the access of the disabled to the labour market. Even in France, where the 2005 Act established an obligation to negotiate measures relating to the employability and job retention of workers with disabilities (Article L.2242-3 of the Labour Code), notwithstanding the incentive effect of the law on the signing of collective agreements, it is not easy to find information about the qualitative content of these agreements⁴⁴.

Organizations representing people with disabilities can also make valuable contributions by investigating the strengths and weaknesses of equal employment opportunity policies and law. The task of *monitoring* compliance can be partly carried out by these bodies. They lack, however, the authority – and often the resources – to investigate complaints and measure compliance by individual employers, as a result of which the task of monitoring cannot be solely left to these bodies.

Indeed, the effectiveness of an equal employment law and regulations to implement these laws also depends on the availability and accessibility of *judicial and/or administrative procedures* to individuals. Individuals, and those who represent their interests, must be enabled to enforce the principle of non-discrimination or to claim appropriate compensation through individual cases or group actions taken before the courts.

In most countries, Human Rights Commissions, Equal Opportunity Commissions and Disabilities Commissions have been established to promote and protect human rights, equal treatment law and the rights of people with disabilities.

People with disabilities have the right to work, but they must be given the means to enable them to exercise that right.

Education is one of the key determinant factors in the struggle against inequalities, social exclusion and poverty. There is a need to promote inclusion in education for persons with disabilities in order to mitigate the clear disadvantage they

⁴⁴ See S. LAULOM in this issue.

suffer in this field, which in turn hinders their subsequent inclusion in the labour market. Education systems, at all level, should develop flexible curricula in order to ensure the possibility of individual educational paths for all students with disabilities. Such educational paths should include non-academic and vocational activities.

For persons with a disability, *professional training* – under qualified instructors, and leading if possible to some form of recognized certification – is an essential passport to gaining employment. This is why a national policy on *vocational rehabilitation* and employment of disabled persons, as called for in ILO Convention No. 159 of 1983, is so essential.

Priority in vocational training policy and provisions, particularly in times of high unemployment, needs to be given to the most vulnerable if they are not to become further disadvantaged in the labour market. This is the aim of the above mentioned EU Youth Guarantee, for instance, that requires Member States to tailor services to the needs of beneficiaries, taking into consideration “their diverse backgrounds (due in particular to poverty, *disability*, ...)”. It would be interesting to develop a further analysis on the implementation of this scheme expected at national, regional and local level.

Many women and men with disabilities are still unable to find decent jobs, however, even when they have completed training, and frustration and a decline in aspirations can set in. Discouraged by discriminatory barriers and mistaken assumptions about their capacity to work, many withdraw from an active search for jobs, and rely either on disability benefits where these exist, or accept low value-added work in the informal economy, with support provided by their families and community.

To overcome these situations and modify these behaviours, equal employment opportunities policies for people with disabilities should concentrate not only on access to work but also promote career patterns. The practice of *disability management* in the workplace, undertaken in a coordinated effort by workers’ representatives and management, constitutes a fundamental tool for this purpose.

As this research has shown, all legal instruments and policies adopted at national level – the quota system which prevails in continental Europe, anti-discrimination legislation highly developed in Britain and active labour market measures mainly provided for in northern Europe – have their pros and cons. To achieve greater effectiveness all these tools must be used together, because only with a synergic approach can the different forms of disability be properly addressed.

Carla Spinelli

As explained in the OECD (2010), *Sickness, Disability and Work: Breaking the Barriers*, “helping people to work is potentially a win-win policy: it helps people to avoid exclusion and to have higher incomes while raising the prospect of more effective labour supply and higher economic output in the long term”. In other words, countries around the world are recognizing that people with disability represent a potential, that they can offer a valuable contribution to the national economy and, at the same time, that their employment reduces the cost of disability benefit. Therefore, the issue of social and economic participation of people with disabilities will become an increasingly important policy issue in years to come.

Carla Spinelli
Assistant Professor of Labour Law
University of Bari Aldo Moro, Italy
carla.spinelli@uniba.it