

Disability Discrimination in the Legal System – Case of Macedonia

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Abstract:

Disability discrimination is a globally spread phenomenon. The Macedonian society is no exception from this trend. In the last several years, the country has established an anti-discrimination legal framework, which seems to lay solid foundations upon which case law can be developed in the future.

The paper elaborates the existing national legislation for prevention and protection against discrimination, specifically disability discrimination. Specifically, the paper analyzes the definition of disability in the national legislation and its critique due to its foundation on the medical model of seeing the disability, which is outdated in the contemporary international law. Furthermore, the paper presents the current situation as to all forms of discrimination on ground of disability, including direct and indirect discrimination and harassment, prescribing the need for reasonable accommodation, and prohibiting the instruction to discriminate by natural and legal persons, in the public and in the private sectors. Finally, the paper identifies the key challenges and recommends actions for overcoming them. The text uses results from research and surveys that have been conducted in the country and related discrimination as an illustration of trends and patterns.

Key words: *discrimination, disability, social model*

Introduction

The principle of equality is a fundamental principle of human rights, which is based on the equal worth and dignity of all human beings. This principle is articulated in all international and regional human rights instruments. Conceptually, equality and prohibition of discrimination can be seen as positive and negative formulation of the same principle (Bayefsky, 1990, pp.1-2). Although legal instruments are formulated in a way that says what is prohibited, i.e. discrimination, the prohibition itself serves to provide the ideal of equality, which is the purpose of this prohibition. For example, the Explanatory Report of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms states that: "...the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists" (paragraph 15). This clearly concludes that the principles of equality and prohibition of discrimination does not require equal treatment only against similar situations, but different treatment towards different situations, while stressing the purpose of anti-discrimination legislation, and it's not just equality of opportunity but equality of the result (ECtHR, *Thlimmenos v. Greece case*, para.44).

In contemporary living, discrimination is a concept that has no fixed and immutable boundaries and as such should be analyzed. Discrimination on grounds of disability is even more, because the protected grounds - "disability" is an evolving concept in its very nature and manifestations of this kind of discrimination is changing. However, should be stated that disability discrimination is a globally spread phenomenon. The Macedonian society is no exception from this trend. Surveys show that the disability discrimination perception is rather high, i.e. 45% of the surveyed persons consider that disability discrimination is widely spread in the society. The situation becomes even more concerning if one takes into consideration the opinion of half of the surveyed citizens who consider that discrimination on multiple grounds occurs very often (Research Report: Barometer of Equal Opportunities, 2009, pp.46-47). Another survey has produced similar results. Namely, the perception of disability discrimination is rather high, i.e. 48.8% and 49.5% of surveyed persons consider that mental disability discrimination and physical disability discrimination, respectively often occur in the society (Research Project: How Inclusive is the Macedonian Society, 2008, pp.137-160). Even though these surveys are based on the perception of citizens and cannot be substantiated with facts, yet, they serve as a significant indicator of the current situation of disabled persons in the country.

Mirroring these perceptions with the case work of the Commission for Protection against Discrimination and the Ombudsman as responsible protective mechanisms one can conclude that the practice distorts the

perception. Namely, according to the statistics from the cases handled by the Commission it can be observed that discrimination on ground of disability is not common. Namely, in 2011, the Commission for the Protection against Discrimination received a total of 63 complaints, of which only six were submitted on the ground of disability or 9,52% from all cases, and in 2012 from all cases, 10,53% were on ground of disability. The most common area of discrimination is work and labour relations with 47,62% from all cases in 2011 and 36,84% from all registered cases in 2012 (Annual Report of the Commission for the Protection against Discrimination, 2011 and 2012). The same situation is replicated in the complaints initiated in front of the Ombudsman. As illustration, in 2011, out of the total number of applications filed with the Ombudsman's Office, only 0,99% were cases of alleged discrimination, with none submitted on ground of disability (Ombudsman 2011 Annual Report, 2012).

The small number of cases reduces the relevance of the assessment and prevents making conclusions of more general nature. However, the absence of such cases should not lead to the conclusion that there is no disability discrimination, but the answer should be sought in informing citizens about this type of discrimination and available protective mechanisms (Ananiev, Poposka, 2013, pp.6-7).

1. Anti-Discrimination Legislation in Macedonia

As regards the legislation, in the last several years, the country has established an anti-discrimination legal framework, which seems to lay solid foundations upon which case law can be developed in the future.

The Constitution of the Republic of Macedonia guarantees the equality of citizens and prohibits the limitation of freedoms and rights on several grounds. However for the issue assessed in this paper Article 9 of the Constitution is the most relevant one due to the fact that has a blanket clause on equality, envisaging that “[c]itizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law.” This constitutional provision, although constituting a sufficient legal basis for adopting additional, more detailed anti-discrimination legislation, has several shortcomings. It is evident that this clause lacks disability as discriminatory ground and furthermore contains an exhaustive list of grounds. It has also been criticized for the fact that it uses the word “*citizens*”, which leaves the impression that this clause does not protect against discrimination of foreign nationals or stateless persons. Finally, in view of the fact that Article 9 relates to individual human rights and freedoms, i.e. rights and freedoms of natural persons, it does not envisage protection against discrimination of legal entities (Poposka, 2012, p.291).

To worsen the situation, for years, the Constitutional Court has been interpreting this clause rather restrictively, which is clearly demonstrated by the fact that the Court has proclaimed itself as not competent to decide in almost all cases of alleged discrimination, refusing to consider cases on their merits. Namely, according to Article 110, paragraph 3 of the Constitution, the Constitutional Court protects the constitutionality and legality of legal acts, while citizens may file application to the Constitutional Court in order *to protect their human rights and freedoms* relating to *inter alia* prohibition of discrimination. This provision is made operative under the Rules of Procedure of the Constitutional Court, i.e. under its Article 51 which envisages that “[c]itizens who believe that an individual document or action has violated their rights or freedoms established under Article 110, paragraph 3 of the Constitution of the Republic of Macedonia, may request protection before the Constitutional Court within two months of the day a final legally valid individual document has been adopted.”

However if we talk in numbers, we will see that in 2012, out of the total number of 205 new cases before the Constitutional Court, 25 cases were related to protection of freedoms and rights guaranteed under Article 110, of which the Court settled 27 cases, from which 15 were related to protection from discrimination. In six cases the Court dismissed the claim, in 11 cases the Court decided to dismiss the claim mostly since the Court considered itself as not competent to decide in the case, in eight cases because of lack of procedural preconditions for adopting a ruling, and in two cases because of the statute of limitations (Review of the Work of the Constitutional Court of the Republic of Macedonia, 2013, pp.32-35).

However, the national legislation has started to explicitly prohibit discrimination in general and specifically disability discrimination following the adoption of several laws such as the laws that regulate education, social protection and protection of children, health¹ and especially labour laws. This trend culminated in 2010 with the adoption of the Law on Prevention and Protection against Discrimination (hereinafter: the LPPD). These laws explicitly prohibit all forms of discrimination,

¹ In Article 20 of the Law on Social Protection disability is explicitly mentioned as a protected ground, referring to it as “impairment”. The same goes for the Law on Protection of Children (Article 12) which explicitly envisages disability as a protected ground, referring to it as “impairment”. In addition the Law on Primary Education in its Article 2, and the Law on Secondary Education in its Article 3 does not explicitly provides for disability as a protected ground. The Law on Equal Opportunities of Women and Men and the Law on Volunteering (Article 9) explicitly mentions disability as a protected ground. From another side, the Law on Health Protection, as well as the Law on Protection of Patients’ Rights in its Article 5 do not make an explicit reference to disability as a protected ground.

including direct and indirect discrimination and harassment², prescribing the need for reasonable accommodation³, and prohibiting the instruction to discriminate⁴ by natural and legal persons in the public and in the private sectors. Discrimination can occur in the areas of employment and labour relations, education, access to goods and services, housing, health care, social protection, administration, justice system, science, sports, membership of and activity in trade unions, political parties and civil society organizations and in other relevant areas. The author is of the opinion that protection against disability discrimination seems to be taking its proper place in the Macedonian society, though still not to the full extent that would be needed in the society. Regrettably the lack of sufficient judicial and quasi-judicial case law sets a significant obstacle to the further advancement in the application of the legal institutes stipulated under the anti-discrimination legislation.

2. Definition of Disability in Macedonian Legislation

The scope of anti-discrimination legislation is determined by two elements: defining the discriminatory ground “disability” and its protection for that individual ground i.e. the level of protection depends on the justification and exceptions allowed by the legislation for each of the grounds (Schiek, Waddington, Bell, 2007). Practice has shown that states find it difficult to define the discriminatory grounds (e.g. difference between disability and chronic illnesses) and may even consider that they are self-explanatory. Hence, courts will have to explain the meaning of each of the discriminatory grounds. In terms of definitions, national courts are guided by the case law of international courts (Poposka, 2012, pp.20-21). Therefore, the Court of Justice of the EU has stated that all six grounds covered by the anti-discrimination directives, one of them being disability, need to be viewed as EU legal concepts that require an autonomous and uniform interpretation, having regard to the context of the provision and the

² Article 9 and Article 9-a of the Law on Labour Relations make a difference between generally defined harassment, sexual harassment and mobbing (psychological harassment in the working environment) as harassment forms that amount to discrimination. On the other hand, the Law on Social Protection does not make reference to harassment.

³ Despite the fact that reasonable accommodation is very important for persons with disabilities, yet this legal institute is not explicitly mentioned in the Law on Labour Relations, which is criticized as one of the Law’s greatest shortcomings.

⁴ Instruction to discriminate as a legal institute is not covered by the Law on Labour Relations.

objective pursued by the legislation in question (CJEU, Chacón Navas case, 2006, paragraph 40).

In the Macedonian context, the issue of disability definition is especially important because in the case of disability, the establishment of conditions for equal exercise of rights and freedoms by persons with disabilities is often confused with social protection (Analysis and survey: Let us ask ourselves, 2005). The LPPD does not define disability, nor does it define the protected group - persons with disabilities. Such a definition is contained in several other laws, such as the Law on Social Protection, the Law on Employment of Invalid Persons, the Law on Invalid Persons' Organizations, and the Law on the Protection of Children⁵, while the deaf and persons with hearing impairments are defined as a protected group under the Law on the Use of Sign Language.⁶

Namely, Article 17 of the Law on Social Protection does not define disability, but the protected group as follows: “[a]n invalid person within

⁵ It is interesting to mention that the Law makes two references as to which children are defined as disabled children - first in provisions relating to special supplement, in which the Law refers to them as “*children with development impairments*” (Article 25) and second, when elaborating upon the activities of kindergartens where children are referred to as “*children with mental development impediments and children with physical impairments*” (Article 48). Namely, Article 25 stipulates that the following are considered as children with development impairments: children with serious, grievous and most severe impediments in their physical development; children with moderate, serious and most severe mental impairment; children with most serious chronic forms of a disease; most severe impairment of sight, hearing and speech (a blind person and practically blind persons, practically deaf and totally deaf persons, persons without any ability to speak, persons with serious speech impairment owing to child paralysis, autistic children, persons with damaged or lost speech abilities) and children with combined development impediments. Furthermore, Article 48, paragraph 2 stipulates that children with mental development impediments or with physical impairments are the following: the blind and children with sight impairment, deaf and children with hearing impairment, children with impaired speech, children with physical impairments, children with difficulties in their conducts and personal development (it is interesting that mentally disabled children are not referred to here). Both definitions of the protected groups are founded on the medically based approach to disability.

⁶ Article 3 of this Law envisages that “[a] deaf person is a person who has a damaged hearing of more than 80 decibels and who cannot perceive verbal speech even when using a hearing aid. A person with hearing impairment is a person who has damaged hearing of 25 to 80 decibels of the better hearing ear, and who has completely or partially developed speech.” This definition of the protected group is also based on the medical approach to disability.

the meaning of this Law shall be a person having mental or physical impairment." This is a medically based definition and as such is rather restrictive, covering persons with only a certain type of disability, while excluding other persons with disability (especially persons suffering from multiple disabilities). The definition contained in the Law on the Employment of Invalid Persons goes a step further stating that: "[a]n invalid person within the meaning of this Law shall be a person with sight, hearing, voice, speech or language impairment, a physically invalid person, a person with intellectual development impediments, and a person with combined impediments, who owing to the degree of invalidism has specific job requirements ..., and an unemployed person having occupational invalidism, having certain or reduced work capacity" (Article 2, paragraphs 1 and 2). The deficiency ascribed to this Article, i.e. to paragraph 3 of this Article, is related to the provision according to which "[u]pon an application filed by an invalid person, his/her parent or legal guardian, invalidism is established by a committee established at the Pension and Disability Fund of Macedonia assessing the degree of work capacity, unless the invalidism of the person has not been established under another relevant law" (Article 2, paragraph 3). This definition is much more comprehensive as regards the protected group, yet it is also a medically based definition requiring proof of and establishing disability, which runs contrary to the anti-discrimination goal.

In conclusion, let us briefly refer to the definition of the protected group, according to Article 5 of the Law on Invalid Persons' Organizations. Namely, this Article states that "[a]n invalid person is an individual who, owing to his/her congenital injuries or injuries and impairments acquired in or caused by the person's physical or natural environment, cannot partially or completely satisfy his/her personal, family and existential needs in his/her community" (Article 5, paragraph 2). The previous definitions show an evident inconsistency owing to the different terminology used for the protected group and its definition. Yet, this last definition reflects to a certain extent the social model. It should be underlined that in contrast to the definitions of the protected group under the Law on Social Protection and the Law on Employment of Invalid Persons, this definition of persons with disabilities is of much wider scope in the national law. This definition is even wider than the definition given by the Court of Justice of the European Union in the case of *Chacón Navas*, which in principle correlates with the medical model. Namely, on one hand this definition does not make a clear distinction between disability and illness (the injury can also be acquired through illness), and on the other hand this definition does not explicitly include time limitations for the criterion of "permanent and long term disability" as provided in the case of *Chacón Navas*. Consequently, this definition ensures wider coverage of personal scope of protection, i.e. it enables every person having any type of disability to demand protection in accordance with the law.

Furthermore, when it comes to the personal scope of protection, disability discrimination by association has not been explicitly prohibited under the national legislation, including even the LPPD, which means the Macedonian legislation is not in harmonize with the judgment of the Court of Justice of the European Union in the case of *Coleman v Attridge Law*. In this case the Court considered that Directive 2000/78/EC prohibiting discrimination and harassment applies not to a particular category of persons, but, by reference to the grounds of discrimination, it applies also to persons connected or related to disabled persons. In addition, the Macedonian legislation has other shortcoming such as that does not entail protection against discrimination on grounds of a presumed disability.

It can be concluded that the existing definitions, with exception of the Law on Invalid Persons' Organizations, are completely founded on the medical model of defining disability and do not follow the spirit of anti-discrimination legislation, because they narrowly define the protected group. Thus, it is necessary to define persons with disabilities in line with the United Nations Convention on the Rights of Persons with Disabilities and contemporary anti-discrimination legislations, based on the social model.

3. Disability discrimination in Macedonia

3.1 Direct discrimination

Direct discrimination on grounds of disability (called intellectual and physical disability) is prohibited by Article 6, paragraph 1 of the LPPD⁷. Direct discrimination is any unpleasant act, difference, exclusion or limitation which has or will have the consequence of suspension, violation or limitation of the equal recognition or enjoyment of human rights and fundamental freedoms, compared to the treatment which other persons in same or similar conditions have or will have, only because the person suffers from a certain mental or physical disability. In addition to the protected ground of disability, the legislation has stipulated protection against discrimination on grounds of health status (Article 3). The definition is not fully compliant with Directive 2000/78/EC because it states that "*there is or there could be*" less favourable treatment and not that "*there has been*" less favourable treatment. Furthermore, the definition refers to types of less favourable treatment, which brings the risk of excluding certain type of treatment, which has not been referred to, if courts apply the relevant provisions narrowly and restrictively. The definition

⁷ Prohibition of direct discrimination is set forth under Article 7, paragraph 2 of the Law on Labour Relations, then under Article 21, paragraph 1 of the Law on Social Protection, as well as under Article 9-b, paragraph 1 of the Law on Protection of Children, etc.

should be improved in order to reflect all constitutive elements of direct discrimination.

In addition, the LPPD and the Law on Labour Relations do not explicitly prohibit job announcements or statements discriminating on grounds of disability, which can be counted as direct discrimination. This should be changed in the future and relevant provisions need to be harmonized with anti-discrimination standards. Just as a note, the Article 24, paragraph 1 of the Law on Labour Relations explicitly prohibits job vacancy announcements or statements that discriminate, but only on the grounds of gender. This should be applied to disability as discriminatory ground.

Regards the general justification of direct discrimination, it should be underlined that it is not set forth under the LPPD. On the other hand, the anti-discrimination legislation contains a large number of general exceptions. Those applying to persons with disabilities are stipulated below.

1. No action shall be considered as discrimination if it is a measure set forth under a law with view to stimulate employment (Article 15, paragraph 2, item 2 of the LPPD).

Such as for example, measures to encourage employment of disabled persons, both in the public and in the private sector, set forth under the Law on Employment of Invalid Persons. However, defining this exception in this manner, without envisaging that at the same time the test of necessity i.e. proportionality must be satisfied, makes this provision a problematic one. Namely, as it is defined, the exemption implies that any measure for stimulating employment is not discriminatory, which runs contrary to international standards, especially to the case *Werner Mangold* and case *Kalanke* of the Court of Justice of the EU. The Court stipulated that automatic preference of any group is not in line with the anti-discrimination norms.

2. No action shall be considered as discrimination if it is a measure setting forth a genuine and determining occupational requirement (Article 14, paragraph 1, item 2 of the LPPD).

The LPPD stipulates the possibility of making a difference, *inter alia* on grounds of disability required due to the “nature of the profession or activity or due to the conditions in which a certain job is performed.” In this case, courts and quasi-judicial mechanisms need to assess whether the specific criterion is a *genuine and determining condition*, necessary for the performance of the tasks, i.e. specific job. If not, this criterion becomes discriminatory. In addition, this condition is set forth under Article 8, paragraph 1 of the Law on Labour Relations.

3. In cases of affirmative measures (Article 13 of the LPPD).

An essential feature of the affirmative measures is that their application is limited with the fulfilment of legally prescribed conditions, i.e. they are applicable provided that they are necessary and fulfil the goal for which they have been envisaged. An application that goes in the wrong direction or an application that does not contribute to fulfilling the intended goal amounts to making a discriminatory difference and this must be the subject of a judicial review. The courts must assess in a specific case whether the affirmative measures are tailored to reach a declared legitimate aim or are counter-productive and do not produce the expected results, becoming thus discriminatory. The 2010-2016 National Strategy on Equalization of Rights of Persons with Disabilities adopted by the Ministry of Labour and Social Policy makes a brief review of the preferential treatment of disabled persons.

4. In case of different treatment of disabled persons in training and education with a view to satisfying their specific educational needs and to equalizing their opportunities (Article 15, paragraph 1, item 3 of the LPPD).
5. In providing special protection envisaged by law for *inter alia* persons with disabilities (Article 15, paragraph 1, item 7 of the LPPD).

For example: measures for special protection of disabled persons set forth in line with *Part XIII- Special Protection* (Articles 161-162, 164 and 169) of the Law on Labour Relations. Despite the fact that these measures amount to different treatment, they are not considered discriminatory, since their goal is protection of the health of this group of people.

6. Exemption relating to freedom of speech, public address, opinion and public information (Article 14, paragraph 1, item 7 of the LPPD).

This exception as stipulated in the Law is not conditioned by the necessity and proportionality tests. Namely, as it is worded, this exception is problematic in the context of international standards, because freedom of expression is not absolute, instead it may be restricted. One of the reasons for the restriction is to protect freedoms and rights of others, including the right to equality and non-discrimination. Freedom of expression defined in absolute terms becomes especially problematic in the context of possible instruction to discriminate and in the context of inciting discrimination, which is prohibited under the LPPD as well the Criminal Code.

3.2 Indirect discrimination

Indirect discrimination on grounds of disability (called intellectual and physical disability) is prohibited by Article 6, paragraph 2 of the LPPD⁸. Indirect discrimination occurs when an apparently neutral provision, criterion or practice places *inter alia* person with disabilities or a group of persons with disabilities in a less favourable position compared with other persons, unless such a provision, criterion or practice is justified by a legitimate aim and the means to reach that aim are appropriate and necessary. The definition is not fully compliant with Directive 2000/78/EC, because it envisages only that the provision “*places persons with disabilities in an especially less favourable position*”, and not that it “*places them or can place them in an especially less favourable position*”.

The Law envisages the possibility for a blanket justification of indirect discrimination in light of a legitimate aim and of the proportionality test. It is interesting to note that courts should play a key role in solving the dilemma about the extent to which persons belonging to a group have been affected by indirect discrimination, i.e. the effect of the apparently neutral provision, criteria or practice. In this respect, there is no explicit prohibition on the use of statistics in providing evidence in cases of indirect discrimination and the author considers that statistics could be admitted as evidence in court proceedings, of course, according to the margin of appreciation of the court.

3.3 Harassment and instruction to discriminate

Disability based harassment is prohibited under Article 7 of the LPPD, defining harassment as a specific form of discrimination. Harassment and humiliating treatment are a violation of the dignity of a person or group of persons on the ground of their disability, which has the aim of or results in violation of the dignity of the persons with disabilities or in creating a threatening, hostile, derogatory or environment of fear, attitude or practice. Harassment is widely defined to cover violation of the dignity, not only of individuals (in this case individuals with disabilities), but also of groups of persons with disabilities. However, there is no reference to undesired conduct, i.e. that there could be no victim of harassment if the individual desired or approved such a conduct. Despite the fact that the Law is not clear on the issue who could be the perpetrator of harassment, this question is partially answered in the Law on Labour

⁸ Prohibition of indirect discrimination is set forth under Article 7, paragraph 3 of the Law on Labour Relations, then under Article 21, paragraph 2 of the Law on Social Protection, under Article 9-b, paragraph 2 of the Law on Protection of Children, etc.

Relations, which stipulates that the perpetrator of psychological harassment on the job (mobbing) could be one or more persons in their capacity of employers, as natural persons, authorised persons or co-workers (Article 9-a, paragraph 4).

In conclusion, it should be mentioned that in the case of harassment, the Macedonian legislation does not give a clear answer to the question about the responsibility of the authorised person (employer or service provider) for the harassment perpetrated by third parties. However, it is considered that the responsibility of the employer for the conduct of third parties, including for harassment, will depend largely on the nature of their relationship, and on the future case law on this issue (Developing Anti-Discrimination Law in Europe, 2010, p.43).

At the end, instruction to discriminate (which is worded as invoking and stimulating discrimination) is prohibited under Article 9 of the LPPD, as a specific form of discrimination. The relevant provisions cover both direct and indirect incitement, encouraging, giving instructions and encouraging another person to perpetrate discrimination.

3.4 Reasonable accommodation

Provisions envisaging reasonable accommodation for persons with disabilities are contained in the LPPD (Article 5, paragraph 1, item 12 and Article 8, paragraph 2) and in the Law on Employment of Invalid Persons (Article 7, paragraph 2). Namely, the LPPD stipulates that “[a]djustment of the infrastructure and of the services means adopting appropriate measures required in some particular case, in order to provide to the person with intellectual and physical disability, the access, the participation and advancing in the labour process, unless these measures impose disproportionate burden to the employers”. Based on this provision, it can be concluded that the Law sets limits, because it refers only to adjustment of infrastructure and services. Furthermore, the Law does not define the term “*appropriate measures*” for persons with disabilities, except that it explains that such measures are taken on individual basis, i.e. as necessary in a given case. The Law also does not make a difference between major related tasks, and marginal functions, which is a serious deficiency of this provision.

As regards, the issue of the *disproportionate burden*, unreasonable encumbrance according to the Macedonian legislation, should be noted that the legislation of the Republic of Macedonia does not analyse nor does it condition the disproportionate burden, as in the other legislations, with the size and status of the legal entity (state owned or private), or by the financial costs, the volume and sources of finances of the employer, and it does not refer to the possibility of getting public funds or any other subsidies. The author considers that this explanation must be explicitly incorporated in the amendments to this Law and to serve as a guiding principle, orientation in measuring the disproportionate burden.

It can be concluded that the issue of reasonable accommodation is evidently covered by the national anti-discrimination legislation and according to Article 8, paragraph 2 of the LPPD. Unjustified lack of reasonable accommodation is considered as a form of discrimination. This is a rather progressive provision fully compliant with the Convention on the Rights of Persons with Disabilities.

In addition, Article 7, paragraph 2 of the Law on Employment of Invalid Persons stipulates reasonable accommodation stating that “[u]pon employment of an invalid person, the employer shall have the duty of creating appropriate conditions for work and of adjusting the workplace, in line with the type of work, type and degree of education and type and degree of impairment of the person employed.” The legislation does not explain in detail this norm, i.e. it does not state what conditions are to be created by the employer (e.g. whether the creation of such conditions would encompass adjusting the job interview process, or adjusting the working hours and practices, or ensuring vocational training). Leaving this provision without detailed explanation, the legislator has left room to set the boundaries of this legal institute through case law.

Furthermore, the legislator has not explained in detail what type of adjustment of the workplace is to be made. However, more detailed provisions in this context are prescribed under the Rulebook on the criteria and manner of awarding grants under the special fund for improvement of the conditions for employment and work of invalid persons. Namely, Article 7, paragraph 2 of the Rulebook envisages that adjustment encompasses adjustment both of the work and of auxiliary facilities, of the equipment, tools, devices and other technical means for work. It is good that in addition to the obligation for reasonable accommodation, the legislation has also envisaged financial means to be provided under a special fund for the improvement of the conditions for employment and work of persons with disabilities (Article 8 and Article 20). The legislation has restricted the groups of persons that can be covered by the protection provided under this institute. Namely, in order that a person could request reasonable accommodation, the person must be employed in the private sector and the person’s disability must have been recognized, i.e. established in accordance with the law.

It can be concluded that the institute of reasonable accommodation is a rather new concept in the Macedonian legal system and that it is necessary to precisely define the norms governing this concept, both in the labour area and in the anti-discrimination legislation. Furthermore, it would be beneficial to create a case law regarding the application of these provisions in order to show where the limits of this legal institute are.

3.5 Procedural aspects

As regards the transfer of the burden of proof, this has been explicitly envisaged in the LPPD (Article 38), in the Law on Labour Relations (Article 11, paragraph 1 and paragraph 2) and in the Law on Social Protection (Article 23). The relevant laws do not contain any provisions about the transfer of the burden of proof in cases of reasonable accommodation. However, according to Article 8, paragraph 2 of the LPPD unjustifiable lack of reasonable accommodation is considered a form of discrimination, while Article 38 of the same Law envisages transfer of the burden of proof in cases of discrimination. Thus these provisions will apply also in cases of lack of reasonable accommodation and the burden of proof will be transferred upon the establishment of a *prima facie* case of discrimination. When the difference is made based on a certain legal provisions, for example Article 4-a, paragraph 5 of the Law on Employment of Invalid Persons, which requires findings and professional opinion about the capabilities of the person with disability for performance of managerial duties and if this provision is disputed before courts, the applicant (person with disability) can establish a *prima facie* case of discrimination by the mere reference to this provision. Further on, the respondent has the burden of proving that this provision does not discriminate against the person with disability.

The national system envisages three types of procedures that may be instituted against alleged discrimination: administrative procedure (before the Commission for the Protection against Discrimination, national equality body, in pursuance with Articles 25-28 of the LPPD and before the Ombudsman, in line with Articles 13-27 of the Law on the Ombudsman), civil law procedure (in pursuance with Articles 34-41 of the LPPD) and misdemeanour procedure (in line with Articles 42-45 of the LPPD). The Law on Labour Relations envisages that in cases of discrimination the employment candidate or the worker have the right to claim damages (Article 10). It is positive that there is no legal limit set on the amount that may be awarded by the court, i.e. the worker has the right to damage compensation in an amount as determined by courts, which is in line with the judgment of the Court of Justice of the European Union in the case of *Marshall No. 2*. Namely, setting limits on the amount that courts may award the worker as damage compensation runs contrary to Article 15 of Directive 2000/78/EC.

4. Conclusions

Surveys show that disability discrimination in the Republic of Macedonia is a widely spread phenomenon. The country has established an anti-discrimination legal framework, which seems to lay solid foundations upon which case law can be developed in the future. Regretfully the lack of sufficient judicial and quasi-judicial case law sets a significant obstacle to

the further advancement in the application of the legal institutes stipulated under the anti-discrimination legislation.

Furthermore, challenges still remains in the legislation and its practice such as improving effectiveness of the protection of the human rights and freedoms relating to prohibition of discrimination among citizens by the Constitutional Court in accordance with the Article 9 of the Constitution, defining the disability and the protected group – persons with disabilities in line with the United Nations Convention on the Rights of Persons with Disabilities and contemporary anti-discrimination legislations based on the social model, prescribing disability discrimination by association in the LPPD, integrating and harmonising the definitions of direct and indirect discrimination in the anti-discrimination legislation with the Directive 2000/78/EC, narrowing down the large number of specific exceptions contained in the anti-discrimination legislation and making them a subject of judicial review, introducing the provision of protection from harassment in the Law on Social Protection, explicitly mentioning the provision of providing for reasonable accommodation in the Law on Labour Relations as well as introducing the provision of prohibiting any instruction to discriminate as a legal institute, explicitly prohibiting vacancy announcements or statements discriminating on grounds of disability in the LPPD and the Law on Labour Relations, and precisely defining the norms governing the concept of reasonable accommodation, both in the labour area and in the anti-discrimination legislation.

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