

European Union Article 13 Network of Disability Discrimination Law Experts

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Introduction

The Portuguese State has partially transposed the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, with the adoption of a new Labour Code.

This Code was approved by the Law of the Assembly of the Republic n.º 99/2003 of the 27th of August, and came into force at the 1st of December 2003¹. Article 2 of this Law expressly says that with the approval of the Code the provisions of this Directive are implemented.

I General Provisions of the Labour Code on the Prohibited Grounds of Discrimination

According to article 10 of the Labour Code a contract of employment exists when a person works under the orders of another who controls what she must do and when she must do it, and receives a remuneration for the work done.

Although this workplace law intends to protect mostly those workers who can legally be defined as “employees”, some of its dispositions cover, as well, public employees.

This is what happens with the articles concerning equal treatment and non-discrimination that, according to article 5 of the Law n.º 99/2003 of the 27th of August, protect public employees unless special legislation determines it to be otherwise.

The Labour Code contains several provisions on equal treatment and non-discrimination that implement, as well, the “Framework Employment Directive”.

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It guarantees the right of all workers to integration into the labour market in conditions of equality, since it states in Article 22 (1) that "all workers have the right to equal opportunities and treatment in regard with access to employment, training, job promotion and working conditions". And n.º 2 of the same article determines that "no worker or job seeker shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, namely by reason of ancestry, age, sex, sexual orientation, civil state, family situation, genetic patrimony, reduced working capacity, disability, chronic disease, nationality, ethnic origin, religion, ideological or political beliefs, and membership of a trade union".

Although not giving a definition of direct and indirect discrimination, the next article, Article 23, prohibits all practices of direct and indirect discrimination on the referred grounds by the employer. However, according to the same article, a difference of treatment which is based on a characteristic related to any of the above referred grounds shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

On what concerns to the burden of proof in discrimination cases, Article 23 (3) determines that when a worker considers himself wronged because the principle of equal treatment has not been applied to him, and establishes before a court or other competent authority facts from which it may be presumed that there has been discrimination, it shall be for the employer to prove that the difference on the working conditions is not linked to any of the referred grounds. Thus being, the complainant has to establish the facts from which discrimination may be presumed. Once they have been established the burden of proof will shift, since the employer has the duty to prove that the facts alleged in court are not true. If the employer fails to prove that there has been no discrimination the employee shall win.

Harassment is deemed, by Article 24 of the Code to be a form of discrimination, being given a definition of harassment: "all unwanted conduct related to any of the grounds

¹ As it was foreseen in Article 3 (1) of the Law n.º 99/2003 of the 27th of August. Thus being, Portugal has adopted the laws necessary to comply with this Directive before 2 December 2003, as required by article 18.º of the Directive.

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above referred to, that takes place in the context of the access to employment or in the employment, work or training, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment". It refers, in particular, to one form of harassment: sexual harassment. An unwelcome behaviour in the workplace becomes unlawful sexual harassment when it consists in repeated acts involving touching or not (such as word or gesture) that have the above-referred purpose.

The analysed general prohibition of discrimination shall be – according to Article 25 - without prejudice to the adoption of measures of affirmative action. So, the general prohibition of discrimination is without prejudice to the maintenance or adoption of legal measures that intend to compensate for disadvantages suffered by a group of people, namely linked to sex, reduced working capacity, disability, chronic disease, nationality, ethnic origin, with a view of ensuring full equality in the exercise of the rights recognised by the Labour Code and of correcting a situation of inequality that persists in social life. These measures have to be temporary *i.e.*, have to be intended to last for a limited time.

The payment of compensation for patrimonial and non-patrimonial damages suffered by the victim of discrimination is foreseen in Article 26 of the Code.

II Specific Provisions of the Labour Code Against Discrimination on the Ground of Disability

Articles 73 to 78 of the Labour Code refer to workers who have a disability or suffer of a chronic disease.

With the aim of implementing the principle of equal treatment, Article 73 (1) states that these workers shall enjoy all the same rights and be subject to all the same duties of the other workers, in what regards to access to employment, training, job promotion, and working conditions, except to the extent that their disability renders them unable to exercise them.

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On what concerns the promotion of employment opportunities for a person with a disability, number 2 of the same Article states that the Portuguese State shall make available incentives to facilitate the hiring of people with disabilities or chronic diseases.

According to number 3 of the same Article public authorities shall, as well, adopt policies on acquired disabilities or chronic diseases, this is, when the employee acquires a disability or begins to suffer from one of those diseases. These policies shall incentive employers to include, when developing a strategy for managing disability in the workplace, measures for job retention.

Article 74 of the Code states that the employer shall adopt measures of positive action, appropriate to enable a person with a disability or a chronic disease, to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Nevertheless the burden shall not be considered disproportionate when it is sufficiently remedied by legal measures existing within the framework of the national disability policy.

The competent national authorities shall, as well, advocate the adoption by the employers of these specific measures and make available incentives to their action in this field.

Several rights are recognised to the worker with disability: the right to benefit from flexible working hours (Article 75); the right not to perform extra working hours (Article 76) and the right not to work during the night if that is considered to be dangerous for his health or for the safety in the workplace (Article 77).

The Code also states, on Article 78, that the laws or the collective agreements may introduce provisions that are more favourable to the protection of the worker with disability or chronic disease or of the employer, always having in mind the interests of both of them.

We may also refer that the Labour Code rules teleworking on Articles 233 to 243.

As it is well known, this new modality of work may benefit citizens with a disability, since many of the tasks that were previously accomplished in the factory or in the office can now be done at home or from any place were the worker can accede to the necessary tools.

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According to Article 236 of the Code teleworkers have the same rights and the same duties of the other workers in what concerns to training, job promotion and working conditions.

III Sanctions for the Violation of Disability Anti-discrimination Dispositions

The Labour Code lays down the rules on administrative sanctions applicable to the infringement of the referred provisions. According to Article 617 of the Code these sanctions can be applied both to individuals and legal entities.

Under Article 642 of the Code people found guilty of discriminatory acts that violate Articles 22 (2), 23 (1) and 24 are punished by means of a fine. The amount of money paid depends on the seriousness of the offence and on the value of the annual income of the enterprise. The person may also be liable to an ancillary penalty: the publication of the decision.

Also punished with a fine (as it is said in Article 646) is the violation of Article 73 (1) and of Articles 75 to 77. The amount of money that has to be paid for the violation of Article 23 (1) is greater than the one that has to be paid for the violation of the other articles².

If the person is found guilty of discriminatory acts more than once, she might be liable to ancillary penalties in addition to a fine, which include temporary withdraw of public authorisation to carry out activities in her enterprise, a ban on competing for a public contract and the publication of the decision³.

² See Article 620 of the Labour Code.

³ See Article 627 of the Labour Code.

IV Other Provisions that implement the Framework Employment Directive

The Constitution of the Portuguese Republic⁴ guarantees to all Portuguese citizens' access to law and to courts in order to defend his or her rights and legally protected interests. So everyone has the right, in accordance with the law, to legal advice and information, to legal aid, to be assisted by a lawyer before the authority, as well as to have a cause which affects him determined in a fair trial within reasonable time.

In order to defend personal rights, liberties and guarantees, the Constitution determines that the law shall provide citizens with legal procedures that are characterised by swiftness and priority, so that there is effective and timely protection against threats or violations of these rights.

The Civil Procedure Code recognises as well the right of everyone to accede to Justice in order to defend their rights on Article 2 (2).

Associations of people with disability may engage, in accordance with the criteria laid down by Article 4 of the Law of the Assembly of the Republic n.º 127/99 of the 20th of August, either on behalf or in support of the worker with disability, with his approval, in criminal procedure. In administrative procedure they have the right (according to Article 5 of the same law) to be informed about the enforcement of the obligations that exist under the legal provisions that protect people with disability.

Provisions on the protection of health and safety to work with regard to disabled people, and measures aimed at creating facilities for safeguarding their integration into the working environment were introduced by Law n.º 9/89, of the 2nd of May 1989 (the Basic Law on Prevention, Rehabilitation and Integration of People with Disabilities), and by Decree-Law n.º 441/91, of the 14th of November 1991 (the Basic Law on Safe and Healthy Working Conditions).

⁴ See Article 20 of the Constitution of the Portuguese Republic.

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The National Action Plan for Employment for 2003 - 2006 adopted by Council of Minister's Resolution n.º 185/2003, of the 3rd of December 2003, has measures of affirmative action that aim at improving employability and social-professional integration of people with disabilities and chronic diseases, such as the removal of architectural barriers in order to enable a person with disability to participate in employment or vocational training for disabled people.

V Dispositions of the Directive Not Fully Implemented

The Portuguese State has not yet introduced into its legal system measures necessary to provide legal protection for people who take legal action under disability anti-discrimination law or assist others to do so.

Although Article 11 (“Victimisation”) of the Directive has not yet been fully implemented some of the Articles of the new Labour Code protect the employee against dismissal or other adverse treatment by the employer as a reaction to complaint within the undertaking of any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

On what concerns dismissal the employee is protected against unfair dismissal by article 396 of the Code⁵. According to this Article there are a number of reasons that may make it legal for the employer to fire the employee. The situation above referred is not one of them.

The Code also provides protection against arbitrary termination of employment on Article 429 that states that the dismissal shall be considered wrongful if the reason given by the employer to fire the employee is considered unfair. The remedies for wrongful dismissal are compensation and reinstatement⁶.

On what concerns to other adverse treatment by the employer we may refer to article 374 (1) of the Code. According to this Article a disciplinary sanction is considered to be

⁵ The right of workers to security of employment is also guaranteed by Article 53 of the Constitution of the Portuguese Republic that forbids dismissals without just cause or for political or ideological reasons.

⁶ See Article 436 of the Labour Code.

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abusive if the fact upon which the employer relied to establish it consisted in the exercise by the worker of a legally recognised right.

Unlawful instructions to discriminate on the ground of disability are not specifically deemed to be discrimination under the Portuguese Law.

Thus being, it is doubtful that Article 2 (4) of the Directive has been implemented.

Nevertheless we may refer that according to Article 32 of the Labour Code new regulations pursuant to the Articles 22 to 31 of the Code are to be promulgated, and that may solve the problem. These regulations (Bill n.º 109/IX/2 of the 14th of January 2004) should have come into force (according to its article 3) at the 15th of April 2004. This has not happened since they are still being discussed at the Assembly of the Republic. If they are approved in this Assembly, and later come into force, the Council Directive 200/78/EC of 27 November 2000 shall be fully transposed by the Portuguese State.

We may also refer that a new Basic Law of Prevention, Habilitation, Rehabilitation and Participation of People with Disabilities (Draft Law n.º 407/IX/2 of the 2nd of January 2044) is being discussed in the Assembly of the Republic.