Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective

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1. INTRODUCTION

International and European human rights law and policy on disability have developed tremendously since the 1950s and '60s, when a lack of awareness resulted in disability being left unmentioned in, for example, the United Nations Bill of Rights and the International Covenant on Civil and Political Rights.[2] This development in human rights law and policy on disability consists *inter alia* in the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and many recent European judgments and resolutions demonstrating a new understanding of what respect for human rights of persons with disabilities entails.[3] However, since this development in human rights law and policy is relatively recent there is a need to study more carefully what a contemporary disability human rights approach means. A contemporary disability human rights approach is here understood as the founding principles and obligations under present-day international human rights law. The determination hereof will take the CRPD as a starting point because this human rights instrument is both the newest and most comprehensive in the field of international disability human rights law today. In addition, present-day interpretations of human rights instruments, such as the European Social Charter, will also be drawn upon.

The focus of this article is employment in Europe, from which persons with disabilities have traditionally been, and continue to be, excluded. In 2002, the average employment rate of persons with disabilities was 50% and there are no

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2 Committee on Economic, Social and Cultural Rights, General Comment 5 – Persons with Disabilities, (1994), UN Doc. E/95/22, para. 6.

3 On the development in protection of persons with disabilities see M. Liisberg, *Disability and Employment – A contemporary disability human rights approach applied to Danish, Swedish and EU law and policy*, (Intersentia, 2011), 19. See for example the judgment by the European Court of Human Rights: *Glor v. Switzerland*, Application No. 13444/08, judgment of 30 April 2009, para. 53 where reference is made to the CRPD.

indications that this figure is rising.[4] The question which will be examined in this article is whether the laws and policies governing labour markets in Europe are in compliance with the contemporary disability human rights approach.

Rather than examining the different employment laws and policies in different European States, this article will focus on the 'flexicurity labour market model', because this general labour market model is being promoted by EU Member States as a model for employment law and policy.[5] A labour market based on flexicurity will broadly speaking provide a high degree of flexibility for employers to organize work and a high degree of social security for the unemployed. In the present article, Denmark, which is often referred to as a prime example of flexicurity in action, is used as a case study in order to study in more detail how flexicurity (as it is understood in Denmark) influences the labour market participation of persons with disabilities.[6]

Flexicurity in Denmark has three main characteristics: a low level of employment protection leading to high flexibility for employers; a high level of social support to facilitate return to employment; and a high level of social security for persons without employment.[7] Only the first two aspects of flexicurity, which relate more directly to persons in employment (employment protection and support to obtain employment), are examined in the present article in relation to persons with disabilities. In addition, this article also draws on experiences with inclusion of persons with disabilities on the labour market in Sweden, because Sweden has achieved exceptionally high rates of employment for persons with disabilities while at the same time being relatively similar to Denmark as regards *inter alia* a relatively high general employment rate. As will be explained in more detail below, persons with disabilities and reduced working capacity are twice as likely to be in employment in Sweden than in Denmark.

The article is divided into two main sections: Section 2 covers the contemporary disability human rights approach in the context of employment, and Section 3 considers Danish flexicurity in light of the contemporary disability human rights approach.

2. THE CONTEMPORARY DISABILITY HUMAN RIGHTS APPROACH

The aim of defining a contemporary disability human rights approach in the context of employment is to provide a general framework for assessing employment laws and policies from the perspective of human rights law. This approach is based on contemporary human rights sources, with a focus on the CRPD, due to the fact that the Convention constitutes the most recent and comprehensive legally

4 Eurostat, *EU Labour Force Survey – Ad hoc module 2002 on employment of disabled people*, (European Commission, 2002).

5 Guideline 7, Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States, [2010] OJ L308/46.

6 P. Kongshøj Madsen, 'Flexicurity in Danish – A model for Labour Market Reform in Europe?', 43 *Intereconomics* 2 (2008), 74. S. Bekker and T. Wilthagen, 'Flexicurity – a European Approach to Labour Market Policy', 43 *Intereconomics* 2 (2008), 68.

7 P. Kongshøj Madsen, 'Flexicurity in Danish – A model for Labour Market Reform in Europe?', 43 *Intereconomics* 2 (2008), 74.

binding human rights standard on disability. In addition, the Council of Europe conventions and their recent interpretations by the European Court of Human Rights and the European Committee of Social Rights are taken into account, but to a lesser extent.

In order to define the contemporary disability human rights approach in relation to employment, this discussion begins with an examination of the central concepts of equality and disability (Section 2.1) and goes on to analyze the main requirements under Article 27 of the CRPD on Work and Employment. These relate to an open and inclusive labour market (Section 2.2), protection against discrimination (Section 2.3) and employment promotion (Section 2.4). Finally, the CRPD contains strong requirements regarding the involvement of representative organizations of persons with disabilities, which are examined in Section 2.5.

2.1. MODELS OF DISABILITY AND EQUALITY

The CRPD is based on a new model of equality which is known by many names: the 'proactive model', the 'multidimensional disadvantage model', 'equality of results' and the 'substantive diversity equality model'.[8] Substantive equality is a form of equality which is based on the recognition that certain groups are disadvantaged and, as explained by Sandra Fredman, 'it is combined with the key insight that societal discrimination extends well beyond individual acts of prejudice. This makes it clear that substantive equality must include some positive duties'.[9] In addition, the CRPD recognizes that diversity is the new norm or, as stated by Kayess and French, 'if formal equality was about ignoring difference, [the CRPD] is about expecting difference'.[10] In other words, what characterizes and differentiates the substantive diversity equality model from some other equality models is not so much that it recognizes that certain groups are disadvantaged compared to others, but the fact that this model of equality requires States to challenge the norms on which society is built. It follows that it is not sufficient to offer special solutions or even accommodation of relevant differences to individuals in specific situations, and that the main obligation is to create general structures that are inclusive. The adherence of the CRPD to 'substantive diversity equality' can be seen from the fact that the Convention recognizes that disability results from the interaction between social barriers and impairments, cf. Article 1, that it is founded on 'full and effective participation and inclusion' and 'equality of opportunity', cf. Article 3, and most importantly, from the weight accorded to the removal of general barriers for full inclusion of persons with disabilities in social life. For example, Article 24 on education and

8 O. Arnardóttir, 'A Future of Multidimensional Disadvantage Equality?', in O. Arnardóttir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities – European and Scandinavian Perspectives*, (Martinus Nijhoff Publishers, 2009), 41; S. Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation', 12 *Maastricht Journal of European and Comparative Law* 4 (2005), 369.

9 S. Fredman, *Human Rights Transformed – Positive Rights and Positive Duties*, (Oxford University Press, 2008), 178.

10 R. Kayess and P. French, 'Out of Darkness and Into Light? Introducing the Convention on the Rights of Persons with Disabilities', 8 *Human Rights Law Review* 1 (2008), 11.

Article 27 on employment, which will be discussed in more detail below, require, first and foremost, that general structures be inclusive so as to enable persons with disabilities to take part in *ordinary* education and *ordinary* employment on an equal footing with others. As explained by the Special Rapporteur on Education, Vernor Muñoz, the paradigm of inclusive education is 'in direct contrast' with the paradigm of segregated education.[11] The paradigm of segregated education is founded on a 'belief that persons with disabilities are uneducable', which leads to the exclusion of those who do not live up to performance goals which may become increasingly narrow.[12] In addition, for the first time in a UN convention, the CRPD includes an article on the duty to ensure accessibility for persons with disabilities to *inter alia* physical structures, information, goods and services on an equal basis with others, cf. Article 9.

The concept of equality on which the CRPD is founded is closely linked to the understanding of disability which underlies the Convention. According to the CRPD, disability results from the interaction between social barriers and impairments. Thus, as opposed to a 'medical model of disability', the CRPD recognizes that disability is not an inevitable consequence of impairment, but results from an interaction between social barriers outside the individual and the impairments of the individual. Moreover, the remark in Article 3 of the CRPD that 'disability is a part of human diversity and of humanity' indicates that the Convention is based on a 'universality model of disability' according to which disability is a general human condition, rather than a condition characterizing an insular group in society. As explained by Bickenbach:

> [A] disability should not be viewed as a human attribute that demarcates one portion of humanity from another (as gender does and race sometimes does), but rather as an infinitely various but universal feature of the human condition … [A]bility-disability is a continuum and the complete absence of disability, like the complete absence of ability, is a limiting case of theoretical interest only.[13]

Once disability is seen as a general human condition, it becomes clear that the range of 'normality' must be broadened and that general social structures must be amended to reflect this new and broader norm. All sorts of social structures including, for example, rules and practices, physical structures as well as attitudes, must consequently be amended to ensure that disability does not lead to exclusion or disadvantage.

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11 Human Rights Council, Report of the Special Rapporteur on the Right to Education, Vernor Muñoz, The Right to Education of Persons with Disabilities, (2007), UN Doc. A/HRC/4/29, para. 11.

12 Ibid.

13 J. E. Bickenbach, 'Minority Rights or Universal Participation: The Politics of Disablement', in M. Jones and L. A. Basser, *Disability, Divers-ability and Change*, (Martinus Nijhoff Publishers, 1999), 112.

2.2. AN OPEN, INCLUSIVE AND ACCESSIBLE LABOUR MARKET

In accordance with the models of disability and equality outlined above, Article 27 of the CRPD, on Work and Employment, requires that States Parties shall promote 'a labour market and work environment that is open, inclusive and accessible to persons with disabilities'. Unfortunately, Article 27 does not provide many details on what is meant by an 'open, inclusive and accessible' labour market and work environment. The word 'open' is used also in subsection (1)(j), according to which Member States shall 'promote the acquisition by persons with disabilities of work experience in the open labour market'. This indicates that 'open' should be understood as 'ordinary' or as the opposite of a segregated labour market. The word 'open' is also used in this sense in, for example, the proposal of the International Labour Organization (ILO) to amend Article 27, which was made during the Sixth Session of the UN Ad Hoc Committee: 'Provision, on a transitional basis, for alternative forms of work for persons with disabilities who may be unable to work in the open labour market'.[14]

In fact, both the Working Group set up under the Ad Hoc Committee to prepare a first draft text for a CRPD, and the ILO, called for more details on how States should achieve an 'open and inclusive labour market'. Thus, the Working Group stated that '[t]he Ad Hoc Committee may wish to consider whether to spell out the meaning of this provision in practice and the further definition of the term "inclusive" in this context'.[15] Some text was added to the Working Group's proposal during the negotiations which led to the final text of Article 27, but this text mainly dealt with protection against discrimination and not general working conditions. The ILO also called for more detailed provisions to be added to Article 27 in its written proposal for amendments to Article 27 during the Seventh Session of the UN Ad Hoc Committee.[16] However, the specific proposal of the ILO did not contain a definition of an 'inclusive and accessible labour market'. Instead, the main focus in the ILO proposal was on disability-specific measures, such as reasonable accommodation, providing for alternative forms of employment, technical supports, etc.

Several State governments also made proposals for amendments, and it would seem that especially the proposals of Israel, Canada and the EU made a mark on the final text. Israel underlined the need for a distinction between protection against discrimination on the one hand, and, on the other hand, the 'the need to ensure that employment protection laws and standards which are of general application are equally applied to persons with disabilities'.[17] However, Israel did not provide a specific definition of what inclusive laws and standards of general

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14 United Nations Enable, Article 27 – Right to work, Sixth Session, Comments, proposals and amendments submitted electronically, (2006), available at: <www.un.org/esa/socdev/enable/rights/ahcstata27sscomments.htm> (accessed 5 March 2012).

15 United Nations General Assembly, Report of the Working Group to the Ad Hoc Committee, (27 January 2004), UN Doc. A/AC.265/2004/WG/1, paras. 88 and 89.

16 See footnote 14.

17 United Nations Enable, Contribution by Governments, Israel, Israel Position Paper for the 7th Ad Hoc Committee – First week, (2006), available at: <www.un.org/esa/socdev/enable/rights/ahc7israel.htm> (accessed 5 March 2012).

application would entail, other than that they should apply equally to persons with disabilities and others on the labour market. Similarly, while Canada and the EU did not propose a text defining an inclusive labour market, they recommended that the focus of the article should be on the protection against discrimination on the grounds of disability, including the right of persons with disabilities to reasonable accommodation.[18]

According to the Report of the Sixth Session of the Ad Hoc Committee which drafted the CRPD, the Ad Hoc Committee agreed that the Convention 'should take a rights-based approach to this article'.[19] It would seem that the Ad Hoc Committee concluded that Article 27 should underline the duty of States to provide effective protection against discrimination, including reasonable accommodation, and to protect the rights of persons with disabilities. While Article 27(1)(a) underlines the duty to prohibit discrimination, Article 27(1)(b) was intended to explain how legislation of general application should be shaped to ensure inclusion of persons with disabilities. However, subsection (b) is not very different from subsection (a). It merely states that persons with disabilities have a right to protection of their rights on an equal basis with others, especially as regards 'just and favourable working conditions, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment and the redress of grievances'. The use of the concepts of 'equal basis' and 'equality of opportunities' may be a reference to the fact that the CRPD is founded on the concept of 'substantive diversity equality' and a recognition of the fact that protection against discrimination is not sufficient to achieve equality. In other words, the use of the term 'equality of opportunities' may be intended to underline that the general structures of the labour market must be made inclusive and accessible. But again, very little guidance is provided on how these laws should be shaped in order for them to promote equality of opportunities.

Some guidance on the meaning of an 'accessible' labour market and working environment may be taken from Article 9 on the CRPD on accessibility. According to Article 9, accessibility is multi-dimensional and entails accessibility in relation to general structures (laws and policies), attitudes, information, means of communication, goods and services, physical structures, means of transportation and more. Translated to the labour market, this would mean that an accessible labour market has general laws on for example employment protection, work environment, employment promotion, etc., which ensure that persons with disabilities have equal opportunities, attitudes towards persons with disabilities are positive, information on new jobs and information necessary to carry out work on the labour market is accessible to persons with disabilities, means of communications needed to apply for work and to carry out work on the labour market are accessible to persons with disabilities, goods and services which cater to the needs of the self-employed are accessible to persons with disabilities, physical structures such as working places are accessible, and means

[18] See footnote 14.

[19] United Nations General Assembly, Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Sixth session, (17 August 2005), UN Doc. A/60/266, para. 95.

of transportation needed both to get to and from work, and also to carry out work, are accessible.

The concept of inclusiveness is not defined in the CRPD, but is used in relation to Article 24 on inclusive education. According to this provision inclusive education aims at *inter alia* 'the full development of human potential' and 'the strengthening of respect for … human diversity'. It follows from Article 24 that inclusive education is education that ensures that persons with disabilities are not excluded due to their disability, and that they receive 'the support required within the general education system to facilitate their effective education'.[20] As explained by the UN Special Rapporteur on Education in 2007, 'educational systems should no longer view persons with disabilities as problems to be fixed; instead, they should respond positively to pupil diversity and approach individual differences as opportunities to enrich learning for all'.[21] This indicates that an inclusive labour market is a labour market where persons with disabilities are considered to be a resource not a problem, and where the general structures ensure that they are not excluded and receive the necessary support within the ordinary system.

In relation to the labour market, this would mean that legislation on employment protection and legislation on health and safety, which constitute cornerstones of the legal framework of a given labour market, should ensure that persons with disabilities are not excluded from employment due to their disability. At a minimum, employment protection and health and safety legislation should reflect the duty of employers to make reasonable accommodation for employees with disabilities which may in some countries only be found in anti-discrimination legislation. Thus, employment protection legislation should specify that dismissals due to reduced working capacity linked to disability are prohibited unless, for example, placing the employee in another position or job would impose a disproportionate burden on the employer. In addition, health and safety legislation should specify that employers have an obligation to make individual adjustments for employees with disabilities in the form of changes to working tasks, working time, working tools, working place, etc. In addition, health and safety legislation could oblige employers to have a plan for creating a more accessible work place and a policy for providing individual adjustments when needed.[22] Clearly, different countries have different interpretations of when a duty to place a person in a different position would constitute a disproportionate burden, but even a duty to show that reassignment to another position would constitute a disproportionate burden would be an improvement, compared to having no duty to make such an evaluation.

In addition, general employment legislation, such as health and safety legislation, could include more positive duties, such as duties to develop a policy on retaining employees whose working capacity decreases due to disability and duties to make working places accessible to persons with disabilities by a certain date.

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20 Article 24(2)(d), United Nations Convention on the Rights of Persons with Disabilities (2006).

21 United Nations General Assembly, Report of the Special Rapporteur on the right to education, Vernor Muñoz, (19 February 2007), UN Doc. A/HRC/4/29, para. 9.

22 M. Liisberg, *Disability and Employment*, 271.

It is important that the general legislation on the labour market provide for obligations on employers to create general structures that will, to some extent, oblige employers to retain employees who lose working capacity due to disability, because this legislation must be expected to have a greater impact on the behaviour of employers than anti-discrimination legislation. The advantage of general legislation is that it applies to all employees in all situations, as opposed to special anti-discrimination legislation which applies only once it has been shown that a person was placed at a disadvantage compared to others due to disability. Also, employers cannot be expected to have specialized knowledge of anti-discrimination legislation. Since the legitimacy of dismissals due to reduced working capacity is regulated in employment protection law, this legislation should be formulated so that employers may rest assured that they are acting lawfully if they comply with employment protection laws without having to examine their duties under anti-discrimination laws as well. In other words, all positive duties stemming from anti-discrimination laws should, at a minimum, be mainstreamed into general employment legislation.

In sum, the creation of an open, inclusive and accessible labour market requires that general employment legislation, at a minimum, provides for some positive obligations on employers to limit dismissals due to reduced working capacity linked to disability, and establishes a duty on employers to make reasonable accommodations for persons with disabilities in accordance with existing anti-discrimination laws. These protections cannot be 'hidden away' in anti-discrimination legislation which only applies when the employee has proven that a certain treatment was linked to disability and which will, as a rule, be secondary to the general labour market legislation which applies to all.

2.3. ANTI-DISCRIMINATION PROTECTION

As explained above, Article 27 places a strong focus on the duty of States to prohibit discrimination on the basis of disability. Firstly, Article 27(1)(a) specifies that protection against discrimination must cover 'all matters concerning all forms of employment'. Secondly, Article 27(1)(i) underlines that States Parties must 'ensure that reasonable accommodation is provided to persons with disabilities in the workplace'.

An effective protection against discrimination on the grounds of disability will only be in place if a number of requirements relating *inter alia* to the definition of disability, the extent of the duty to provide reasonable accommodation and access to remedies are fulfilled. In relation to the definition of 'disability', it is necessary that the definition be broad enough so as to cover all instances of discrimination on the grounds of disability in the sense of the CRPD. 'Disability' must not only be defined broadly to encompass all forms of longer-lasting impairments which, in interaction with social barriers, may result in disability: it should also be linked to the differential *treatment* in question as opposed to the *person* who is treated differentially. The difference may be illustrated by the *Coleman* case decided by the Court of Justice of the European Union (CJEU) in 2008.[23] In this judgment, the CJEU found that the protection against direct discrimination and harassment in the Employment Equality Directive was not limited to persons who

[23] Case C-303-06 *Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

are themselves disabled, but also encompasses protection against discriminatory treatment based on the disability of an individual's child.[24] Other examples of discrimination, which should, in accordance with the contemporary disability human rights approach, be prohibited, are discrimination on the grounds of disability which is mistakenly perceived to exist (assumed disability) and discrimination on the grounds of a disability which existed in the past or was expected to occur in the future.[25]

In addition, as mentioned above, Article 27(1) underlines that persons with disabilities must have access to reasonable accommodation on the labour market. According to Article 2 of the CRPD, reasonable accommodation 'means 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'. In other words, States must provide for a right to adjustments *in a particular case* as opposed to a right to generally inclusive structures in all situations.[26] The CRPD specifies that 'reasonable accommodation' only applies to modifications and adjustments that do not impose a disproportionate or undue burden. It is also likely that factors such as how ordinary it is for employers to make adjustments for reduced working capacity under general employment legislation will play a role. Whether the right to reasonable accommodation entails, for example, a right to reduced working hours for a person whose impairment prevents him or her from working full-time, would therefore presumably also be influenced by how ordinary it is to work part-time in the labour market in question. Moreover, effective access to reasonable accommodation means that considerations of proportionality must take into account the right of persons with disabilities to be included on the labour market.

In sum, a broad definition of disability and an effective right to reasonable accommodation are instrumental for ensuring effective protection against discrimination on the grounds of disability.

2.4. EMPLOYMENT PROMOTION

Whereas the previous Sections dealt with the duty of the State to create general inclusive structures and ensure protection against discrimination on the grounds of disability, the present Section examines the duty of the State to undertake specific promotional measures for the employment of persons with disabilities.

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24 Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16. Case C-303-06 *Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603, para. 56.

25 J. Gerards, 'Discrimination Grounds', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, (Hart Publishing, 2007), 163 (on discrimination on the grounds of assumptions relating to a discrimination ground).

26 For a discussion of the nature of 'reasonable accommodation' see for example: M. Liisberg, *Disability and Employment*, 112; L. Waddington, 'Reasonable Accommodation', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, (Hart Publishing, 2007), 741.

Article 27 of the CRPD obligates Member States to undertake such measures. The present Section focuses especially on supported and sheltered employment, which are widely used in Europe to promote employment of persons with disabilities and examines the requirement to adopt such employment promotional measures under the contemporary disability human rights approach.[27]

Employment support for persons with disabilities falls into two main categories: *supported employment* on the one hand and *sheltered employment* on the other hand. Supported employment aims at encouraging employment on the open labour market and includes programmes that aim to support employment through wage and cost subvention. *Wage* subvention is economic support which allows employers to employ persons with disabilities at a reduced cost. *Cost* subvention compensates employers for additional costs that occur when employing persons with disability other than their employees' salaries, such as technical aids. In contrast, sheltered employment entails a higher degree of specialized working conditions for persons with disabilities than supported employment. There will be significantly lower requirements regarding the employed person's work output than for a person employed in supported employment. Although there may be some work output to the benefit of the employer, sheltered employment is more likely to focus on therapeutic rehabilitation or work training for the benefit of the employee. Sheltered employment may take place either in segregated workplaces reserved for this type of employment or in special positions on the open labour market. There is no clear-cut line between supported and sheltered employment, since sheltered employment may take place 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. In the present Section, I examine the treatment of supported and sheltered employment under the contemporary disability human rights approach.

The CRPD and the Revised European Social Charter explicitly recommend the use of 'incentives' and 'measures tending to encourage employers', respectively, in order to promote employment of persons with disabilities on the open labour market. According to the Article 27 of the CRPD on Work and Employment, States Parties shall: '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'.[28] '[I]ncentives' and 'measures tending to encourage employers' may include economic incentives in the form of wage and cost subvention (supported employment), as well as many other measures, such as information campaigns and other pecuniary supports.

In the Preparatory Works to the CRPD, the drafters took a clear stand on sheltered employment: 'The balance of views in the Committee on sheltered workshops was that such settings were undesirable because of the potential for

[27] EU Member States spent an average of 0.5% of their GDP on activation measures (including training, rehabilitation and employment support) in 2008. Eurostat, 'Public Expenditure on labour market policies, by type of action, % of GDP, total LMP measures, categories 2–7, 1998–2008' (European Commission, 2008).

[28] Article 27(1)(d) and (h), United Nations Convention on the Rights of Persons with Disabilities (2006).

segregation from the community and their conditions of employment'.[29] The negative opinion of the UN Ad Hoc Committee on sheltered workshops resulted in 'sheltered employment' not being mentioned in Article 27(b) of the CRPD on means to achieve the realization of the right to work. Thus, Article 27(h) provides that States Parties must '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'.[30] Presumably, the drafters of the CRPD wished to underline the new approach to human rights of persons with disabilities that this Convention represents compared to older human rights instruments, such as the UN Standard Rules on Equalization of Opportunities for Persons with Disabilities of 1993, which stated that '[f]or persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative'.[31]

Under the CRPD, the aim of creating an inclusive labour market takes priority. As such, while sheltered employment is not prohibited, it is envisaged to play a small role in promoting employment of persons with disabilities. Also, in the Council of Europe instruments, it is clear that there has been a shift in the approach to sheltered employment. In the European Social Charter of 1961, sheltered employment is mentioned as a preferred means of promoting employment of persons with disabilities. Thus, States Parties should undertake 'adequate measures for the placing of disabled persons in employment, such as specialized placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment'.[32]

In contrast, according to the Revised European Social Charter employment, 'in the ordinary working environment' is the primary goal and sheltered employment shall be used only 'where [employment in the ordinary working environment] is not possible by reason of the disability'.[33] The European Committee of Social Rights has laid down three requirements for sheltered employment under Article 15(2) and Article 1(2) on the right to work: Firstly, sheltered employment must be reserved for persons who due to their disability cannot be integrated into the open labour market. Secondly, the aim of sheltered employment should be to assist participants to enter the open labour market. Thirdly, persons working in sheltered employment facilities must enjoy the usual benefits of labour law, and trade unions should be active in enforcing the labour rights of persons in sheltered employment. This last requirement regarding the usual benefits of labour law applies particularly when production is the main activity.[34] In the context of examinations of periodic State reports, the Committee asks that States provide

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29 United Nations Enable, Article 27 – Right to work, Sixth Session, Ad Hoc Committee, Report by the Chairman, (2006), available at: <www.un.org/esa/socdev/enable/rights/ahcstata27ssrepchair.htm> (accessed 4 July 2012).

30 Article 27(1)(h), CRPD.

31 Rule No. 7, United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities (1993).

32 Article 15(2), European Social Charter (1961).

33 Article 15(2), Revised European Social Charter (1996).

34 See for example Council of Europe, European Committee of Social Rights, *European Social Charter (revised), Conclusions 2007, vol. 1, Estonia*, (2005), 387.

information on sheltered employment and rates of progress of integration from sheltered employment into employment in the ordinary labour market.[35]

These same strict requirements are not applied to supported employment, which is considered necessary and positive as long as it leads to increased employment. However, here, it is argued that supported and sheltered employment only differ marginally and not by nature. Therefore, the requirements set up by the European Committee of Social Rights should also apply to supported employment. This is not to say, however, that supported employment is not necessary – the intention is merely to underline that even though supported employment may have positive consequences for the participation of persons with disabilities on the labour market, it should be kept in mind that supported employment does entail differential treatment of persons with disabilities, because employees in supported employment will often have a lower income than others. This is the case even where those in supported employment receive wage subvention, because wage subvention does not compensate fully for lower productivity or allow for employment on special terms. In addition, persons with disabilities in supported employment are continuously dependent on public authorities' authorization for the wage subvention. Moreover, employment with wage subvention may be a hindrance to access to, and attainment of, an ordinary position, without support, if the employer stands to gain from employment with wage subvention. In sum, although supported employment schemes are a valid form of positive action which may ensure the participation of persons with disabilities on the labour market, their use may in some cases amount to differential treatment of persons with disabilities which excludes them from full inclusion on the labour market.

Both sheltered and supported employment represent means of assisting persons with disabilities in obtaining employment and involve the differential treatment of persons with disabilities. As a consequence, they should be made available to those who need this support in order to obtain or stay in employment. However, they should be limited to those persons without an alternative for employment on the ordinary labour market unless they are supported. 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. Since sheltered employment, which includes segregated employment, entails more differential treatment than supported employment, it follows that the use of sheltered employment should only be a last resort.

2.5. THE INVOLVEMENT OF DISABILITY ORGANIZATIONS

The CRPD requires that persons with disabilities and their representative organizations be 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 CRPD provides that States Parties must promote participation of persons with disabilities in non-governmental organizations in general, and representative organizations of persons with disabilities specifically,

[35] Council of Europe, European Committee of Social Rights, *Conclusions XVIII-2, vol. 2, Slovenia*, (2007), 542.

under Article 29 on participation in political and public life, as well as Article 33 on national implementation and monitoring.

According to Sandra Fredman, the requirement that representative organizations of under-represented groups be involved actively in policy-making is in fact implied by the substantive diversity equality model.[36] Such active involvement is necessary to redress and counteract the under-representation and lack of power of the group in question. The participatory process also increases the chances that any standards eventually adopted will truly promote equality. Thus, Fredman argues that 'substantive diversity equality' implies a participatory role for civil society in relation to both standard-setting and enforcement.[37] Equality implies positive duties and the State must co-operate actively with civil society both in the standard-setting process and in implementation. This active participation may redress some of the weaknesses of the majoritarian process by increasing the opportunities of disadvantaged groups to be heard. A participatory role for civil society increases the chances that the adopted standards and the implementation process promote equality and reduce the need for individual complaints before the courts.

The Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families expressly envisage a role for 'other competent bodies' in the work of their respective treaty bodies which, in the context of these Treaties, has been interpreted to mean non-governmental organizations.[38] However, these treaties do not expressly envisage a role for civil society in the development of standards and their implementation in the way the CRPD does.

In sum, the position argued by Fredman, that a duty for the State to involve civil society in policy-making is inherent in the substantive diversity equality model, is supported by the CRPD. The involvement of civil society in the conduct of state functions is especially relevant in relation to persons with disabilities who are under-represented in positions of power.

2.6. CONCLUSION

In conclusion, the contemporary disability human rights approach entails labour market policies founded on 'substantive diversity equality' and the 'universality concept of disability'. It follows that all general structures of the labour market, including employment legislation, should ensure the creation of an open, inclusive and accessible labour market. There should be effective protection against discrimination. Positive action measures for the promotion of employment of persons with disability should constitute an embedded part of disability employment law and policy, and the use of, for example, supported employment should be limited to those who need it, as it entails differential

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36 S. Fredman, 12 *Maastricht Journal of European and Comparative Law* 4 (2005), 372 and 379–380.

37 Ibid.

38 Article 45(1)(a), United Nations Convention on the Rights of the Child (CRC), on the role of the Committee on the Rights of the Child. Article 22(2), CRC also obligates States to co-operate with NGOs in relation to refugee children; Article 74(4), United Nations Convention on the Rights of Migrant Workers.

treatment. Finally, representative organizations of persons with disabilities must be included in policy-making in order to ensure full compliance with the contemporary disability human rights approach.

The following Sections examine whether the flexicurity model, as it is exemplified in Denmark, lives up to the contemporary disability human rights approach as outlined above.

3. DANISH FLEXICURITY

In the present Section, Danish flexicurity, which is a model for flexicurity promoted by the EU, is examined in light of the requirements of the contemporary disability human rights approach which were described in Section 2. As mentioned above, under Section 1 (Introduction), flexicurity in Denmark has three main characteristics: a low level of employment protection leading to high flexibility for employers, high levels of social support to return to employment and high levels of social security for persons without employment.[39] Only the first two aspects of flexicurity, which both relate more directly to persons in employment (employment protection and support to obtain employment), are examined in the present article.

This part of the article is divided into four main parts, reflecting the requirements for a contemporary disability human rights approach to disability on the labour market: Section 3.1 considers whether the Danish labour market is open, inclusive and accessible, Section 3.2 reflects on protection against discrimination on the grounds of disability, Section 3.3 covers employment promotion, and finally Section 3.4 deals with the inclusion of representative organizations of persons with disabilities in decision-making and the implementation of policies.

Looking at the general employment rates in Denmark may prove helpful in explaining the aspiration of the Danish flexicurity model. Denmark has one of the highest rates of employment in Europe, with approximately 73% of persons between the ages of 16 and 64 years in employment, compared to the EU-27 average of just under 65% in 2010.[40] However, in spite of the high general employment rate, the employment rate of persons with disabilities remains the same as the EU average, namely 50%.[41] Interestingly, the employment rate of persons with disabilities in Sweden shows that it is possible to achieve a significantly higher rate of employment of persons with disabilities in a labour market system that is relatively similar to the Danish one. In Sweden, the rate of employment of persons with disabilities was 62% in 2008.[42] A comparison of the employment rates of persons with disabilities and reduced working capacity renders this difference even bigger. Thus, while only 25% of persons with disabilities and reduced

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39 P. Kongshøj Madsen, 43 *Intereconomics* 2 (2008), 74.

40 Eurostat, *European Union Labour Force Survey 2010*, (European Commission, 2011).

41 Eurostat, *European Union Labour Force Survey – Ad hoc module 2002 on employment of disabled people*, (European Commission, 2002); B. Larsen and J. Høgelund, *Handicap og Beskæftigelse – Udviklingen mellem 2002 og 2008*, (Danish National Centre for Social Research, SFI 2009), 39.

42 Statistics Sweden, *Labour Market Situation for Disabled Persons – 4th Quarter 2008*, (Statistics Sweden, 2009).

working capacity were in employment in Denmark, 50% were in employment in Sweden in 2008.[43] In the relevant Danish and Swedish employment surveys, persons with disabilities and reduced working capacity are defined as persons who have an enduring impairment or health problem and who define their own working capacity as being reduced.[44] In both Denmark and Sweden, three national surveys were conducted between 2000 and 2008 measuring that 9% or 10% of the population aged between 14 and 64 years were persons with disabilities and reduced working capacity.[45] The ratio of persons with disabilities varied between 16% and 20% in the same surveys across the years.[46]

3.1. AN OPEN, INCLUSIVE AND ACCESSIBLE LABOUR MARKET

As mentioned above, Danish policy is considered a prime example of flexicurity, not least due to the ease with which employers may dismiss employees. The question is, however, whether the state of law and policy this model embraces is in line with the contemporary disability human rights approach. As explained above, it follows from the fact that the CRPD is based on 'substantive diversity equality' and a 'social universality disability concept', as well as the wording of Article 27 on Work and Employment, that the general structures of the labour market must be inclusive and accessible to persons with disabilities. In relation to, for example, employment protection and working conditions, this means that general laws and policies should ensure that persons with disabilities are not dismissed or placed at a disadvantage due to reduced working capacity linked to their disability. Employers should be under clear obligations to organize their undertakings so that employees whose working capacity is limited or diminishes may be accommodated in the workplace and given adjusted working tasks, working places, working hours, etc. unless these adjustments would result in a disproportionate burden on the employers. These obligations should not only follow from anti-discrimination legislation, but should be mainstreamed and apply across general legislation concerning the labour market, such as employment protection laws, health and safety legislation and legislation governing the obligations of employers with employees on sick-leave.

In Denmark, a component that is often considered the cornerstone of the flexicurity model is that employers enjoy extensive freedom to dismiss employees.[47] According to the OECD's indicators of individual employment protection, Denmark has the 7th most lenient protection against dismissals of permanent employees of all OECD countries, following countries such as the

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43 Statistics Sweden, *Labour Market Situation for Disabled Persons – 4th Quarter 2008*, (Statistics Sweden, 2009); Danish statistics: extracts by the Danish National Centre for Social Research for M. Liisberg, *Disability and Employment*, 12.

44 Ibid.

45 Ibid., at 13.

46 See footnotes 41 and 42.

47 J. C. Barbier, F. Colomb and P. Kongshøj Madsen, 'Flexicurity – An Open Method of Coordination at the National Level', *Documents de travail du Centre d'Economie de la Sorbonne (Paris I)*, (2009), No. 09046, 6.

United States and several Commonwealth nations.[48] In contrast, countries such as Sweden, Germany and the Netherlands feature at the top of the list of those with strong individual employment protection. In Denmark, a significant number of persons are not covered by employment protection under law or collective agreements. Danish employment protection legislation is incorporated into three different laws, covering white-collar employees, sailors and public servants.[49] Many persons who are not covered by these legal acts will be covered by collective agreements but, according to a survey from 2001, around 30% of blue-collar workers in the private sector were not covered by a collective agreement either. In addition, employment protection only applies after nine months of employment. In sum, a significant number of employees on the Danish labour market do not enjoy protection against unfair dismissals other than anti-discrimination protection.

Secondly, for those employees who are covered by employment protection under law or collective agreements, the protection afforded is relatively weak. The regulation of the employment market is, to a large extent, based on the assumption that, in the long run, it is in the best interest of both employers and employees that the only limitations on the managerial prerogatives of the employer are a result of free negotiations between employers and employees on a collective and an individual basis.[50] Interference from the State in this balance of interests is seen as detrimental to a stable economy and employment market. As a consequence, contractual principles dominate the practice of limiting the employer's right to dismiss their employees.[51] In order to determine whether a dismissal is fair (in relation to dismissals on the grounds of reduced working capacity), a concrete assessment is made, assessing the burden placed on the employer as a result of continued employment of the individual in question and whether it is reasonable that the employer should suffer this inconvenience. The prevalence of contractual principles implies that the employer may, as a rule, expect from the employee that he or she deliver the initially agreed working targets. Thus, under many collective agreements, such as one which covers the production industry, an employer is permitted to dismiss an employee after 120 days of absence due to reduced working capacity.[52] Moreover, the collective agreement does not mention any duties for the employer to place the employee in another position or provide any other adjustments for his or her reduced working capacity.

This so-called '120-day rule' illustrates an underlying presumption that an employer should not be made to bear the burden of having employees who have restricted working capacity. According to Section 5(2) of the Act on White

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

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

50 L. Nielsen and R. Roseberry, *Dansk Arbejdsret*, (DJØF, 2008), 479.

51 R. Nielsen, *Lærebog i Arbejdsret*, (DJØF, 2005), 17; J. Bruun, *Usaglig Afskedigelse,* (Thomson GadJura, 2003), 32.

52 Section 29 of the Collective Agreement in the production industry (*kollektiv overenskomst på industriens område*).

Collar Employees, an employer and an employee may agree that the employee can be dismissed with a shorter notice of one month, when he has been absent due to sickness for 120 days within a period of 12 months. The 120 days must be calculated as calendar days and not as working days and the dismissal must take place while the employee is still absent from work.[53] The Danish Supreme Court has established that a dismissal which takes place with reference to such an agreement will normally be considered reasonable.[54] The case in question concerned the dismissal of a shop assistant who had been employed for 13 years, and had developed a problem with her back. She was dismissed after being absent from work for four months and the dismissal was found to be reasonable. The Supreme Court stated that dismissals with reference to the 120-day rule 'will ordinarily be deemed reasonable so that compensation for a dismissal on unreasonable grounds will only be relevant under very special circumstances. Such very special circumstances are not in our opinion present in this case'.[55]

According to its wording, the 120-day rule applies when the 120-day absence is due to *sickness* and, until the implementation of the Employment Equality Directive, there was no doubt that also absences related to disability would warrant a dismissal with shortened notice. However, in 2011, questions on compliance of the 120-day rule with the EC Employment Equality Directive were referred to the CJEU by the Danish Maritime and Commercial Court.[56] In my opinion, the fact that this rule still exists in its unmodified form in a Danish legal act, without making specific requirements for employees whose absence is related to disability, shows that the consequences of the duty to provide reasonable accommodation under the Employment Equality Directive were not thought through when the Directive was transposed into Danish law. Today, only the most well-informed employers will know that they have special duties towards employees with reduced working capacity under the Danish Act on Differential Treatment on the Labour Market which implements the Employment Equality Directive in Denmark.[57] Presumably, the general assumption among employers, employees and others is still that employers are entitled to dismiss employees whose working capacity becomes reduced, regardless of whether the reduced capacity is related to a disability or not. As explained under Section 2.2, the duty to provide reasonable accommodation under anti-discrimination legislation should be mirrored by protection against dismissals on the grounds of reduced working capacity under employment protection legislation. This principal approach under Danish employment protection of safeguarding the free choice of the employer

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53 Danish Maritime and Commercial Court judgment, UFR 1951.156 SH. J. Paulsen, *Afskedigelse*, (GadJura, 1997), 598.

54 Danish Supreme Court judgment, UFR 2002.2626 H.

55 Ibid. One judge dissented and stated that 'very special circumstances' did not have to be present in order to find that a dismissal in accordance with the 120-day rule was unreasonable. In his opinion, a simple assessment of all the available facts could well lead to the conclusion that such a dismissal was unreasonable.

56 Joint Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S* and *Jette Ring v. Dansk Almennyttigt Boligselskab DAB*, not yet decided.

57 Legal Act on Differential Treatment on the Labour Market, (*Forskelsbehandlingsloven*), LBK No. 1349 of 16 December 2008.

is also reflected in other general laws regulating the labour market. For example, the Danish Health and Safety Act does not impose any obligation on the employer to make adjustments for the needs of employees with disabilities.[58] Similarly, the Danish Act on Sickness Benefits imposes few obligations on the employer to ensure that the employee returns to work.[59]

In sum, the obligation to create an inclusive and accessible labour market is not fulfilled in Denmark, where the flexicurity model operates to grant employers extensive freedoms to dismiss employees and few obligations to make adjustments for employees with disabilities under general employment legislation.

3.2. ANTI-DISCRIMINATION

As mentioned above under Section 2.3, the contemporary disability human rights approach requires that persons with disabilities enjoy effective protection against discrimination on the grounds of disability. The effectiveness of such protection depends on a number of factors, including the interpretation of key concepts, such as direct and indirect discrimination, the definition of disability, the extent of the duty to provide reasonable accommodation and appropriate enforcement procedures.

In Denmark, the adoption of a prohibition of discrimination on the ground of disability only occurred after Denmark was required to do so under the Employment Equality Directive.[60] On 22 December 2004, the existing Act Prohibiting Differential Treatment on the Labour Market was amended to cover also age and disability.[61] Since 2009, an Equal Treatment Board has considered individual complaints of discrimination on the ground of *inter alia* disability.[62] As mentioned under Subsection 3.1, the Danish flexicurity model is traditionally based upon a consensus between the social partners and the political parties in Parliament, with the main prerogative to regulate the labour market in the hands of the social partners. This explains why Parliament also sought to implement the Employment Equality Directive in Danish law with a view to interfering as little as possible with legislation on the labour market. This proved quite difficult because the prohibition against discrimination on the ground of disability clashes with the long-standing Danish labour market principle, described in the previous subsection, that employers may dismiss an employee due to a significant

58 Legal Act on Health and safety (*Arbejdsmiljøloven)*, LBK No. 1072 of 7 September 2010.

59 Legal Act on Sickness Benefit (*Sygedagpengeloven*), LBK No. 1152 of 12 December 2011.

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

61 Legal Act amending Act Prohibiting Differential Treatment on the Labour Market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), L1417 of 22 December 2004. Latest version of Act Prohibiting Differential Treatment on the Labour Market, LBK 1310 of 16 December 2008.

62 Legal Act on the Equal Treatment Board (*Lov om Ligebehandlingsnævnet*), Lov nr. 387 of 27 May 2008.

reduction in their working capacity, irrespective of whether this is associated with a disability or not.

The interpretation of the concept of 'disability' by the courts is a good illustration of how reticently the legal protection against discrimination on the ground of disability was, at least initially, interpreted in Denmark. The Danish Act on Differential Treatment on the Labour Market does not provide a definition of 'disability', and the Preparatory Works give an unclear picture of the intended scope of the term. The Preparatory Works explain that the concept of disability must be understood as 'physical, psychological or intellectual impairment [which] must be compensated in order for that person to function on an equal footing with other citizens in a similar situation'.[63] However, the meaning of 'compensation' is not provided, although it is stated that 'it is not a requirement for protection against differential treatment on the grounds of disability that there is a specific need for compensation'.[64]

In the first two cases decided by a High court relating to the disability provisions of this Act, the Western High Court found that two women, who had Multiple Sclerosis and Post-Traumatic Stress Syndrome, respectively, were not disabled under the Act on Differential Treatment on the Labour Market.[65] Both women were employed in 'flexjob' positions, which meant that they worked reduced hours and that special consideration had to be given to their reduced working capacity, while the employers received a reimbursement of part of their salary. In one of the cases, the Western High Court explained that:

> it was proven that A's illness, especially on account of the tiredness, sensory disorders and memory problems, had led to an impairment, but the High Court did not find that the impairment, which at the time of the dismissal only required additional compensation in the form of a further reduction of her working time, could be seen as a disability in the sense of the Act on Differential Treatment on the Labour Market.[66]

In later cases, however, the Danish courts seem to have broadened their interpretation of 'disability' under the Danish Act and have considered persons in supported employment to be disabled without requiring that they have an additional need for adjustments.[67] Nevertheless, the question of the definition of

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63 Danish Preparatory Works, Proposal L92 of 11 November 2004, 4.1. 'Handicapkriteriet' and 'Bemærkninger til de enkelte bestemmelser', 'Til no. 2'.

64 Ibid.

65 Danish Western High Court judgment of 11 October 2007, published in UFR2008.306V (Multiple Sclerosis); Danish Western High Court judgment of 11 October 2007, No. B-2722-06, unpublished (Post-Traumatic Stress Syndrome).

66 Danish Western High Court judgment of 11 October 2007, published in UFR2008.306V (Multiple Sclerosis). The reasoning of the Court was almost identical in the Danish Western High Court judgment of 11 October 2007, No. B-2722-06, unpublished (Post-Traumatic Stress Syndrome). For a critical analysis of these two judgments see P. Justesen, 'Handicap og Arbejdsmarkedet' in *Ugeskrift for Retsvæsen* 2008, B 295.

67 See e.g. Danish Eastern High Court judgment of 5 May 2010, 18. Afd., No. B-2215-09 (unpublished).

disability is clearly still unresolved under Danish law and, in 2011, the Danish Maritime and Commercial Court decided to refer a question on the definition of 'disability' under the Employment Equality Directive, as implemented by the Danish Act on Differential Treatment on the Labour Market, to the CJEU.[68] The question referred to the CJEU reads as follows: 'Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means only that the person concerned is not capable of working full-time be regarded as a disability in the sense in which that term is used in Council Directive 2000/78/EC?'.

In my opinion, it is unlikely that the CJEU will state that 'disability', in the sense of the Employment Equality Directive, requires the need for special assistive devices or personal assistance. In the *Chacón Navas* case, which concerned the differentiation between sickness and disability, the CJEU stated: 'The concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[69] Thus, in *Chacón Navas* the CJEU did not require that the limitations resulting from the impairment were of a specific type. In accordance with the social model of disability, the need for compensation is a result of the existence of barriers to participation. In other words, a person with a specific impairment might need an assistive device where working procedures are not inclusive, but might not need an assistive device in an inclusive setting. Consequently, requiring the need for special assistive devices or personal assistance would be to ignore the role of social barriers in relation to disability, and would introduce a problematic arbitrariness in the definition of disability under the Employment Equality Directive. Although the CJEU has been criticized for applying a medical, as opposed to a social, model of disability in the *Chacón Navas* case, the CJEU did take a step in the direction of recognizing the social model of disability in the *Coleman* case.[70] It is therefore unlikely that the CJEU would now apply a medical model of disability, and find that 'disability' in the sense of the Employment Equality Directive presupposes the need for special assistive devices.

In sum, Danish anti-discrimination protection has evolved significantly since it was introduced in 2004, but the definition of disability as it is applied under Danish case law does not live up to the contemporary disability human rights approach. The concept of 'disability' was initially interpreted as encompassing only persons with severe and permanent impairments in need of additional compensation which did not take the form of reduced working hours. It has now been interpreted, however, to cover persons with less severe but permanent impairments in need of compensation, although the form that this compensation should take remains undefined. Presumably, the CJEU will, in the coming prejudicial ruling, find that a Danish requirement that a person must need e.g. special assistive devices to be considered as disabled violates the Employment

68 Joint Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Lone Skouboe Werge v. Pro Display A/S* and *Jette Ring v. Dansk Almennyttigt Boligselskab DAB.*

69 Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, [2006] ECR I-6467, para. 43.

70 Case C-303/06, S. *Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

Equality Directive and thereby require that the Danish legislation be brought more in line with the contemporary disability human rights approach.

3.3. EMPLOYMENT PROMOTION

Whereas the two sections above, on general employment legislation and anti-discrimination protection, dealt with the 'flexibility' element of the three-legged Danish flexicurity model, namely the right of the employer to organize the work flexibly, the present subsection deals with the 'support' element of this model. More specifically, it will address the support offered by the State to promote employment through measures such as rehabilitation and wage subvention. As mentioned in Section 3.1, this article will not deal with the 'security' element of this model, namely the benefits for persons who are unemployed or outside of the labour market. In the present Section, Danish policies aiming at employment promotion are examined in relation to the contemporary disability human rights approach.

As explained above, one of the cornerstones of the flexicurity model is that employees who were unemployed for a short or a longer period of time receive relatively strong support to return to employment. This support also means that relatively generous employment promotion schemes for persons with disabilities have been set up. The main employment promotion scheme in Denmark for persons with disabilities, both in terms of persons concerned and costs of the scheme, is the 'flexjob' scheme.[71] A person employed in a 'flexjob' works approximately one third of a full-time position, but receives the salary of a full-time position. The employer of a person in the 'flexjob' scheme receives a wage subvention, which amounts to two-thirds of the salary usually offered. Approximately 15% of persons with disabilities and reduced working capacity in Denmark are employed in a 'flexjob'. In spite of the fact that the number of persons in 'flexjobs' increased sharply, by 600%, between 2002 and 2008 and that the ratio of persons with disabilities and reduced working capacity who were in supported employment rose from 10% in 2002 to 62% in 2008, the overall employment rate of persons with disabilities and reduced working capacity remained at 26% throughout this period, according to statistics.[72]

The fact that the number of persons in 'flexjobs' rose sharply, without this leading to a rise in the number of persons with disabilities in employment, could indicate that wage subventions might be being used to support persons who may previously have been employed in positions with reduced working hours, without the financial support afforded through the scheme. If so, wage subvention may be suited to compensate persons with disabilities for the loss of income that they would otherwise suffer due to their reduced working capacity, but it is possible that it may not be well suited to significantly increasing the number of persons with disabilities and reduced working capacity in employment.

As explained in Section 2.4, it is a requirement under the contemporary disability human rights approach that supported employment does in fact lead to an increase in the number of persons in employment. In light of the fact that it is

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71 B. Larsen and J. Høgelund, *Handicap og Beskæftigelse – Udviklingen mellem 2002 og 2008*, (Danish National Centre for Social Research, SFI 2009), 51.

72 Ibid., and M. Liisberg, *Disability and Employment*, 299.

questionable whether Danish wage subvention in the form of the 'flexjob' scheme contributes effectively to promoting employment, it would seem that Denmark does not fully live up to its obligation to promote effectively the employment of persons with disabilities.

A reform of the 'flexjob' initiative was announced in February 2012, and although the exact implications of this are as yet unknown, it seems that the main changes will be a ceiling on the amount of wage subvention that one person may receive.[73] At present, wage subvention is based on the minimum wage according to the relevant collective agreement, and there is no ceiling on the amount of subvention that a person receives over time. It is yet to be seen whether the reform will also seek to address the possible problem that the receipt of wage subvention may have become a prerequisite for employment of persons with disabilities and reduced working capacity in Denmark.

In relation to positive action measures, the question also arises whether Denmark has imposed duties on employers to provide preferential treatment to employees with reduced working capacity. This would be in accordance with the contemporary disability human rights approach, which requires positive action to promote employment, but does not prescribe which types of positive action measures should be adopted. In line with the Danish flexicurity model, few obligations are imposed on employers and this is also reflected in the policy regarding positive action measures. Applicants to a job with a public employer have a right to be employed if the local employment service authority acknowledges that they have had difficulties in obtaining employment due to disability and if they are at least equally qualified with other applicants for the position in question.[74] However, in practice, it seems that this right is rarely enforced. In 2006 only 8% of persons with disabilities who were registered as job applicants and had applied for work during the last year had even heard of this right.[75] No obligations to give preferential treatment to persons with disabilities are imposed on private employers.

In conclusion, Denmark has, as part of its flexicurity model, put a strong focus on supporting persons outside of the labour market in returning to employment. However, in spite of the fact that a growing number of persons with disabilities and reduced working capacity are reported to be in 'flexjobs', this has apparently not resulted in a higher rate of employment of persons with disabilities and reduced working capacity. This may be the result of a situation where an increasing number of persons who are currently employed under the 'flexjob' scheme would previously have been employed without wage subvention. In relation to the contemporary disability human rights approach, this may indicate that the Danish 'flexjob' scheme has not served its purpose of promoting the employment of those that it is aimed at, and thus that the Danish flexicurity model does not live up to the contemporary disability human rights approach in this regard. However, it may, of course, still have served the purpose of ensuring a decent standard

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73 Danish Ministry of Employment, Press Release of 28 February 2012 (*Reform af Førtidspension og Flexjob*).

74 Section 3 of Legal Act on Compensation of Persons with Disabilities in Employment (*Lov om Kompensation af Handicappede i Erhverv*), LBK 727 of 7 July 2009.

75 B. Larsen, K. Schademan and J. Høgelund, *Handicap og Beskæftigelse*, (Danish National Centre for Social Research, SFI 2008), 131.

of living for persons with disabilities and reduced working capacity who would otherwise have been in employment, with reduced working hours, where possibly their income might not have been sufficient to ensure a decent standard of living.

3.4. CIVIL SOCIETY

As mentioned above, it follows from the contemporary disability human rights approach that representative organizations of disabled people should be involved in the conduct of State affairs in order to compensate for the lack of representation of persons with disabilities in State bodies.

In Denmark, the dialogue between State and disability organizations is highly formalized. The dialogue with disability organizations regarding employment policy takes the form of including representatives of disability organizations on advisory boards on employment policy at local, regional and state levels, as well as including representatives of disability organizations in key administrative judicial bodies which handle complaints regarding disability employment promotion measures, disability pensions and discrimination claims on the ground of disability.[76] For example, a disability council has been set up at central level to ensure dialogue between disability organizations, other civil society representatives and the State on disability policy and law.[77] In addition, local councils are required to establish local disability councils to ensure a continuous dialogue between local disability organizations and local council authorities in relation to local disability policy.

However, in spite of a formalized dialogue between authorities and disability organizations in Denmark, the Danish labour market is not as inclusive towards persons with disabilities as is the case in Sweden, where the dialogue between State and disability organizations is less formalized.[78] This indicates that a formalized dialogue does not in itself guarantee that opinions and interests are taken into account. In fact, it is possible that the establishment of the formalized dialogue between authorities and disability organizations is a side effect of a strong political consensus in Denmark that the State should play a minimum role in the regulation of the labour market, which should rather be regulated, to the highest extent possible, by the social partners. Formalized dialogues between authorities and social partners have therefore been set up in order to ensure that the social partners are involved in the formulation of all public policies and laws on the labour markets. Disability organizations have then been invited to take part in these formalized dialogues. However, where the interests of social partners and disability organizations differ, it would seem that the opinions and interests of the social partners prevail. In sum, although it is in line with the contemporary

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76 Legal Act on the Coordination of the Active Employment Policy (*Lov om Styringen af den Aktive Arbejdsmarkedsindsats*), LBK nr. 890 af 08/09/09, Chapters 5, 6 and 7 on the Central Employment Council, Regional Employment Councils and Local Employment Councils (*Beskæftigelsesråd*), as well as Chapter 8 Regional Employment Complaint Boards (*Beskæftigelsesankenævn*).

77 Legal Regulation on Rule of Law and Administration in relation to Social law (*Lov om Retssikkerhed og Administration på det Sociale Område*), Chapters 10 and 11 on the Local and Central Disability Councils.

78 M. Liisberg, *Disability and Employment*, 381.

disability human rights approach to include persons with disabilities in policy-making bodies, it is not sufficient merely to include disability organizations in this process. Instead their views, recommendations and suggestions must be taken into account, and thus have an actual influence on policy-making.

4. CONCLUSION

In conclusion, employment law and policy, in line with the contemporary disability human rights approach, is founded on a concept of 'substantive diversity equality' and seeks to ensure equal opportunities for persons with disabilities, firstly, through the creation of inclusive general structures on the labour market. To this end, it is vital that, secondly, anti-discrimination legislation is in place. Thirdly, employment promotion must be effective in promoting the employment of persons with disabilities, and fourthly, disability organizations must be involved in policy-making and implementation. The Danish flexicurity model, which is being promoted as an ideal labour market model in the European Union, does not live up to the contemporary disability human rights approach. The main problem is that the hands-off approach towards the regulation of the labour market adopted by the Danish State means that the general structures of the Danish labour market are not inclusive towards persons with disabilities. This has also led to a weak protection against discrimination on the ground of disability, which also fails to live up to the contemporary disability human rights approach.

Whilst Danish employment promotion measures are among the most extensive within the EU, they have not been efficient in compensating for a lack of inclusiveness of general structures. In contrast, the general structures of the Swedish labour market are inclusive towards persons with disabilities in that clear obligations are imposed on employers in *inter alia* employment protection legislation and health and safety legislation. Swedish legislation clearly sets out that employers must provide employment-related training and adjustments to employees in need hereof, and protects employees against dismissals due to reduced working capacity unless the employee cannot carry out work of value to the employer. Presumably, as a result of more inclusive general structures on the Swedish labour market, twice as many persons with disabilities and reduced working capacity are in employment in Sweden as in Denmark.