Conference: "Social rights in today's Europe: the role of domestic and European Courts" – Nicosia, 24 February 2017

Statement: "Rights of persons with disabilities: the appropriation by the French judge of the concept of reasonable accommodation" - Fabienne JEGU, Expert Adviser on Disability to the Defender of Rights

Summary: Discrimination on the ground of disability covers all forms of discrimination including the refusal to make reasonable accommodation. How has the requirement for employers to make such accommodation been reflected in the employment of persons with disabilities in France? What role have the national courts played in the implementation of this new concept? What prospects are there for change in other areas under the combined influence of the United Nations Convention on the Rights of Persons with Disabilities and the case-law of European courts?

1) The Defender of Rights

The Defender of Rights is an independent administrative authority enshrined in the Constitution (Article 71-1 of the Constitution of 4 October 1958). It was founded in 2011 and was the outcome of the merger of four other independent authorities: the National Ombudsman (*Médiateur de la République*), the Children's Ombudsman (*Défenseur des enfants*), the High Authority against Discrimination and for Equality (*HALDE*) and the National Commission on Professional Ethics in the Security Services.

The Defender of Rights' task is to protect the rights and freedoms of the public during their dealings with public services, to protect and promote the best interests and the rights of children, to combat discrimination and promote equality, to ensure that the security forces comply with professional ethics and to secure the rights and freedoms of whistle-blowers and direct them to the relevant authorities (Law No. 2016-1690 of 9 December 2016).

France also ratified the International Convention on the Rights of Persons with Disabilities in 2010. The Defender of Rights was designated by the Government as the independent body responsible for supervising the application of the Convention (Article 33-2). In this connection, he or she works

within a national supervisory framework to protect, promote and follow up on the application of the Convention.

In the area of anti-discrimination measures, disability in the strictest sense is the second most common ground on which complaints are made to the Defender of Rights (19% of complaints), to which we should add complaints based on state of health (11.6%) and those motivated by a loss of autonomy (4.6%).

Through his or her actions, the Defender of Rights plays a decisive role in the acceptance of international and European human rights standards by public and private bodies dealing with disabilities, legal professionals (such as lawyers and legal specialists) and national courts.

2) Prohibition of discrimination on the ground of disability in employment

In France, the question of the employment of persons with disabilities is generally dealt with from the angle of the obligation to employ persons with disabilities (OETH), which is a positive action measure that was introduced by Law No. 87-517 of 10 July 1987, resulting in a requirement for employers with 20 or more employees to take on a quota of 6% of persons with disabilities.

However, 30 years after the establishment of this requirement, the 6% target has still not been reached and persons with disabilities are now twice as affected by unemployment as the rest of the population.

While the employment obligation has made it possible to "put a foot in the door" where it comes to the occupational integration of persons with disabilities, it has not been enough in itself to guarantee equal treatment of persons with disabilities in employment.

Employment is the main area in which discrimination on the ground of disability is found (43% of the complaints filed with the Defender). This discrimination generally relates to career development and continued employment. Although they are beneficiaries of the OETH, many complainants consider that they are discriminated against in their work on the sole ground of their disability. Many employers believe that simply complying with the requirement to employ persons with disabilities is enough for them not to be discriminating.

The prohibition of all discrimination on the ground of disability in employment and, by correlation, the requirement for employers to make reasonable accommodation to guarantee equal treatment with regard to persons with disabilities provided for by Directive 2000/78/EC of 27 November 2000,

has been partly transposed[1] into French legislation by Law No. 2005-102 of 11 February 2005 (Articles 24 and 31).

Since 2005, the HALDE and then the Defender of Rights have been highly involved in raising awareness of this requirement and ensuring that it is complied with, particularly by making submissions in courts.

What role have the national courts played in the implementation of this new concept? How has this "new" requirement in the field of employment for persons with disabilities been reflected in practice? Our findings differ according to the type of court concerned.

In the administrative courts the concept of reasonable accommodation has been truly taken up both by the first instance courts and by the higher administrative courts. Their case-law has made a major contribution to the process of establishing the parameters of what is meant by reasonable accommodation with regard to public "employers". Examples:

- Prerequisites for eligibility for competitions and access to certain public posts (Conseil d'Etat, 14 November 2008, No. 311312): the Conseil d'Etat has pointed out that the reasonable accommodation obligation requires the administrative authority concerned both to introduce specific regulations and take appropriate measures, on a case-by-case basis, to give everyone with a disability access to the job for which they are applying provided that the disability has not been declared incompatible with the job in question or that the measures in question would place a disproportionate burden on the service.

- Relying on the Conseil d'Etat's decision and the submissions of the Defender of Rights, the Rouen Administrative Court (9 July 2009, No. 0700940,0802423) found, in a case relating to a disabled person with a hearing impairment, that in this case the administrative authority had not sought appropriate measures to compensate for the complainant's disability because "it has been established by the investigation that appropriate measures to compensate for disability – supposing that they are necessary as it is not disputed that a public swimming pool lifeguard is also present during swimming lessons or that it is possible for the quota of hours to be exchanged with another teacher, as occurs where necessary for tenured staff – do not constitute a disproportionate burden for a department in which swimming lessons form only a very small part of its tasks". Consequently, the court considered that the complainant was justified in

[1] It covers only private sector employers subject to the Labour Code (Article L. 5213-6 of the Labour Code) and public employers in the three types of civil service (Article 6 sexies of Law No. 83-634 of 13 July 1983), meaning that non-salaried disabled workers and persons with disabilities practising a liberal profession are not covered by the requirement.

arguing that the refusal to employ him constituted a fault capable of incurring the administrative authority's liability.

- Responsibility of the state towards a disabled lawyer whose work was made difficult by the arrangements for access to court buildings (CE, 22 October 2010, No. 338892): the Conseil d'Etat considered that the effect of the Directive of 27 November 2000 was "to place the state under obligations towards lawyers although it was not their employer" because, in their capacity as persons assisting in the administration of justice, lawyers "make a regular and essential contribution to the public judicial service and perform a large part of their professional activities in buildings given over to this public service". In this connection, the state is required to take appropriate measures to enable lawyers with disabilities to carry out their work. These measures "must, in principle, include making court premises accessible, including the parts of these premises which are not open to the public but to which lawyers must have access in order to perform their functions …".

- Conditions for the payment of the adjustable bonus to a judge following a change in his duties to take account of his disability (CE, 11 July 2012, No. 347703): In this case, the complainant, who was deaf, did not complain that the authorities had not made reasonable accommodation (which had taken the form of a dispensation from his work in connection with hearings and standby services in exchange for additional judicial and administrative duties). He complained that the implementation of these adjustments had been accompanied by a significant reduction in the rate of his adjustable bonus. In the Conseil d'Etat's view, the criteria used to set the amount of the bonus related to duties from which the complainant had been exempted as a result of the reasonable accommodation made for his disability and this had inevitably been to the complainant's disadvantage. The assessment of the disabled judge's contribution to the proper functioning of the court had to take account of the new duties assigned to him in keeping with his capacities in view of his disability.

In the ordinary courts, acceptance has been slower. The problem has been equating the reasonable accommodation requirement, which applies only to employees with disabilities, with the general obligation to redeploy employees, which applies to employers with regard to any employee found to be unfit for their current work; this existed before the reasonable accommodation requirement and has been the subject of numerous court judgments with regard to private employers, which moreover have been particularly restrictive.

However, under the legislation on the obligation to redeploy employees declared unfit, a refusal by the employer to make the arrangements recommended by the occupational physician does not necessarily amount to discrimination rendering the employer's decision void. [2]

It has to be said that the Court of Cassation has not yet examined and clarified the parameters of the obligation to redeploy employees in the light of the reasonable accommodation requirement and thus either confirmed or contradicted some trial courts' findings of discrimination.[3]

How should we interpret this hesitancy on the part of the ordinary courts? Besides the difficulty of fully grasping the outlines of this concept, either for litigants and their lawyers or for judges themselves, should it also be interpreted as a reluctance by the courts to impose an additional requirement on employers – the scope of which remains to be clarified – in a highly strained employment context?

In its 2016 Conclusions, the European Committee of Social Rights, referring to its previous conclusions,[4] notes that the report by France provides no clarification as to whether the reasonable accommodation requirement extends to all persons with disabilities or just to those covered by the quota obligation.

3) The prospects of extension beyond the employment sphere alone

The International Convention on the Rights of Persons with Disabilities enshrines reasonable accommodation as an integral part of the general principle of non-discrimination. According to Article 2 of the Convention "discrimination on the basis of disability … includes all forms of discrimination, including denial of reasonable accommodation".

The principle of reasonable accommodation is therefore intended to apply across the board, in the same way as that of non-discrimination, to all the rights established by the Convention, therefore extending beyond the sphere of employment alone.

This is moreover what was recently acknowledged by the European Court of Human Rights (ECHR, 23 February 2016, Çam v. Turkey, No. 51500/08) in a case in which a music academy refused to enrol a blind person on the ground that her disability was not compatible with the education provided there. The Court found that Article 14 of the ECHR should be read in the light of the requirements of the UN Convention on the Rights of Persons with Disabilities with regard to reasonable accommodation,

[2] Having dismissed the other grounds for dismissal, the Court acknowledged that "the restrictions imposed by the occupational physician were the real ground for dismissal, leading it to infer that this amounted to discrimination on the ground of the employee's state of health" (Court of Cassation, Social Affairs Division, 26 October 2016, No. 14-26300)

[3] Bordeaux Administrate Court, Social Affairs Division, No. 10/03585, 20 Oct. 2011

[4] 2008 and 2012

which were understood to be the "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case", which persons with disabilities are entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms … Such reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination…".

This interpretation by the European Court was intended to produce knock-on effects in the domestic legal system and be binding on the courts in cases brought to them, including those not relating to employment, if there were no valid provisions in national legislation.

In 2016, the French parliament rejected a motion for an amendment to the bill on equality and citizenship, which was intended to incorporate the obligation to make reasonable accommodation for persons with disabilities into the definition of discrimination in Article 1 of Law No. 2008-496 of 27 May 2008 in order to give it a general scope in keeping with the International Convention on the Rights of Persons with Disabilities.

This measure is crucial in order to secure genuine equality vis-à-vis persons with disabilities and the effectiveness of the rights enshrined in international human rights texts.