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The Implementation of the Rights of Persons with Disabilities to Employment on the Basis of the Convention on the Rights of Persons with Disabilities (CRPD)

Abstract: Poland has made considerable progress in the implementation of Article 27 of the CRPD. Professional activity is one of the most important conditions for full inclusion and participation in society. Upon ratifying the Convention in 2012, Poland confirmed that persons with disabilities have the right to fully and equally enjoy all human rights. The level of legal framework is satisfactory in numerous respects. The difficulty in implementing the right to employment lies primarily in the manner of its practical implementation, absence of horizontal employment policy, other support systems affecting the right to work (social benefits and services, health care services, availability of services and benefits, accessibility of transport and technologies). Most Polish employers do not hire persons with disabilities at all. The analysis of the implementation of the right is also hampered by incomplete statistical data on disability in Poland. This paper presents the implementation of the right to employment in the period between ratification of the CRPD by Poland in 2012 until the drafting of this paper at the end 2018.

Keywords: the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 27 of the CRPD, the implementation of the right to work in Poland

1. Introduction

By October 2018, six years had elapsed since the ratification by Poland of the UN Convention on the Rights of Persons with Disabilities (CRPD).¹ As such, this should formally have marked the second period for Poland to report on the implementation

1 UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding observations on the initial report of Poland, 29 October 2018, CRPD/C/POL/CO/1, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fPOL%2fCO%2f1&Lang=en (accessed 14.12.2018).

of and compliance with the CRPD. However, the process of verifying reports by the Committee on the Rights of Persons with Disabilities (hereinafter the Committee) had taken so long that by September 2018 the Committee was only in the process of considering the initial report of the Polish Government which was submitted two years after the entry into force of the Convention. The next combined report for periods from the second to the fourth reporting period is expected for 2026.²

In particular, the first report is a detailed report which, pursuant to Article 35(1) of the CRPD, should specify the measures taken to give effect to the obligations under the Convention. The Committee has prepared detailed guidelines on the content of reports submitted by States Parties to the Convention.³

In its report the Polish Government therefore referred to the provisions establishing the freedom to choose and practice a profession and the workplace, in respect of which exceptions may only be provided by law, regulations to ensure equal treatment and anti-discrimination legislation, specific solutions to support the employment of persons with disabilities, starting from support in searching for and maintaining employment, through a quota system, to regulations regarding social clauses in public procurement. The reporting period covered mainly the years 2012-2013 and 2014 (in part only).⁴ However, it should be noted in this respect that while the Government's report reflects the existing legislation and positive action during the reporting period, it contains no critical or even thoughtful conclusions about the current regulations and the practice of their application. Such conclusions can be found in the Polish Commissioner of Human Rights report and social reports submitted to the Committee.⁵

2. Most important changes in the right of persons with disabilities to employment

To a large extent, the initial report covered solutions that at that time were a permanent element of State policy for persons with disabilities in the labour market. Those which reflected certain progress in shaping the rights of persons with

2 Ibidem.

3 Ibidem.

4 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2f-C%2fPOL%2f1&Lang=en (accessed 28.12.2018).

5 Realisation of the obligations arising from the UN Convention on the Rights of Persons with Disabilities in Poland – report of the Human Rights Defender 2012-2014, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fIFU%2f-POL%2f30099&Lang=en; Alternative Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, Warsaw 2015; https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fPOL%2f21651&Lang=en (accessed 28.12.2018).

disabilities to employment or, in other words, the adoption of which resulted from the implementation of Article 27 of the CRPD, are particularly worth mentioning. One should undoubtedly mention those of such developments that are conducive to the transition of persons with disabilities to the open labour market. These were primarily the new principles of subsidizing the wages of disabled employees, consisting of placing wage subsidies in the protected and open labour market on an equal footing.⁶ The open labour market better promotes the idea of professional fulfilment and offers a greater diversity of jobs. Exceptions include cases of disability that are serious enough to require institutionalized forms of sheltered employment or are such as to prevent a person from taking up employment in any form.

The wage subsidy mechanism, though rightly made equal for employers from open and protected labour markets, still has certain disadvantages.⁷ For a number of years, it has not clearly induced a general increase in the employment of persons with disabilities in Poland. Only half of those who are economically active are in subsidized employment or have their social security contributions refunded, or who have social security contributions for farmers refunded on account of the economic or agricultural activities which they pursue. The others are not guaranteed similar support. The mechanism is not adapted to the current employment structure in Poland. It neither contributes to an increase in regular employment nor takes into account the high rate of persons remaining outside regular (subsidized) employment, in other words, mainly persons engaged under civil law contracts. The key solutions for the employment of persons with disabilities focus on maintaining the rate of regular employment and absorb a significant part of the budget of the State Fund for Rehabilitation of Disabled Persons (pol. *Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*) (over 60% of its financial resources).⁸ Studies have also shown that, when applying for funds to support the employment of persons with disabilities, high bureaucratic barriers are an obstacle to employing persons with disabilities, with Poland having a very high proportion of persons employed in SMEs (small and

6 Article 3 of the Act of 8 November 2013 amending certain acts in connection with the implementation of the budget act, Journal of Laws of 2013, item 1645. The change regarding the equalization of wage subsidies was adopted as early as in 2009, but its effective date was repeatedly postponed. Initially, there were plans to increase the amounts of wage subsidies received by employers from the protected labour market. Finally, the abovementioned act struck a balance in respect of subsidies. The change took effect in April 2014 (see Article 68gc of the Act on Vocational and Social Rehabilitation and Employment of Disabled People).

7 K. Roszewska, Środki prawne służące aktywności zawodowej osób z niepełnosprawnościami w obecnej strukturze rynku pracy, "Studia Oeconomica Posnaniensia" 2015, No. 10, pp. 32-34.

8 Report on the implementation of the objective and financial plan relating to PFRON activities for 2017, p. 30, <https://bip.pfron.org.pl/pfron/budzet-funduszu/sprawozdanie-z-realizacji-planu-rzeczowo-finansowego-z-dzialalnosci-pfron-za-2017-rok/> (accessed 17.12.2018).

medium-sized enterprises).⁹ The same is true for barriers to setting up businesses.¹⁰ Other barriers include a lack of statutory regulation of supported employment, segmentation of employment of persons with disabilities and related shortage of diversified job offers, poor preparation of public employment services, low awareness of the entitlements, training opportunities or more flexible forms of employment (e.g. telework). In Poland, the level of education and professional qualifications of persons with disabilities is inadequate to the needs of the labour market. Employers are concerned about high sanctions for improper spending of public funds while facing complex legislation and a number of obligations (including the obligation to provide health care services). Persons with disabilities themselves at times address the issue of “too favourable treatment” in employment, in particular in the context of shortened working hours (so-called discrimination by favour). However, this view is not taken by the community as a whole. An attempt to amend the provisions on shortened working hours of persons with disabilities has not been approved by the Constitutional Tribunal.¹¹ The weakness of social economic entities, which should prepare persons, especially those with intellectual disabilities, for an open labour market has also been criticized.¹² For years now persons with disabilities who are willing to take up employment have faced the issue of a benefits trap. Proposals to

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- 9 “Legal, administrative and organizational barriers to the implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at overcoming these barriers” – a synthetic report. Chapter 2 Identified barriers in the areas of implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at their elimination, developed as part of the project entitled “Implementation of the UN Convention on the Rights of Persons with Disabilities – a common cause” (pol. *Wdrażanie Konwencji o Prawach Osób Niepełnosprawnych – Wspólna sprawa*), Warsaw, February 2017, p. 294. These barriers are also confirmed by previous studies which estimated that 44% of employers employing persons with disabilities refrain from applying for wage subsidies due to bureaucratic procedures, see: B. Gąciarz, B. Giermanowska, *Zatrudniając niepełnosprawnych. Wiedza, opinie, doświadczenia pracodawców*, Warsaw 2009, p. 56.
- 10 A. Gawska, B. Marcinkowska, A. Waszkielewicz, M. Zima-Parjaszewska, A. Wołowicz-Ruszkowska, M. Żejmis, *Pogłębiona analiza kontekstowa badania jakościowego, opracowana w ramach Projektu “Wdrażanie Konwencji o prawach osób niepełnosprawnych – wspólna sprawa”, Projekt “Wdrażanie Konwencji o prawach osób niepełnosprawnych – wspólna sprawa”, Polish Disability Forum (pol. *Polskie Forum Osób Niepełnosprawnych*)*, Warsaw 2017, p. 120.
- 11 Constitutional Tribunal judgment of 13 June 2013, K 17/11, OTK-A 2013/5/58.
- 12 Legal, administrative and organizational barriers to the implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at overcoming these barriers – a synthetic report. Chapter 2 Identified barriers in the areas of implementation of the Convention on the Rights of Persons with Disabilities and directions for action aimed at their elimination, developed as part of the project entitled “Implementation of the UN Convention on the Rights of Persons with Disabilities – a common cause”, Warsaw, February 2017, pp. 282 et seq.

address this particular issue were submitted during the Third Congress of Persons with Disabilities.¹³

There are also legislative restrictions. The employment of persons with disabilities is regulated by the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities,¹⁴ partly by provisions related to supported employment and provisions of the Act on Employment Promotion and Labour Market Institutions.¹⁵ The provisions of the Labour Code do not apply other than in issues that are not regulated by special provisions. Such a normative solution is applied to separate professional groups (such as teachers, judges, public administration employees). However, excluding persons with disabilities from the application of the Labour Code because of their disability is conducive to their segregation. Employers from the open labour market have negligible knowledge of special regulations compared to that of the Labour Code. Therefore, there are suggestions in the literature to incorporate provisions on employment of persons with disabilities, similar to those relating to the employment of young people or protection of parenthood, in the Labour Code.¹⁶

There have also been significant changes in access to public services. In this case, as early as in the preparatory period following signature and before ratification of the Convention, it was noticed that the obligations of public authorities towards persons with disabilities had not been duly complied with, primarily for failing to provide those persons with adequate access to public services on the terms set out in Article 60 of the Constitution of the Republic of Poland. A mechanism was therefore put in place to facilitate access of disabled employees to offices in government (civil service and state offices) and local government units. On the terms set out in the provisions on civil service and local government employees,¹⁷ priority has been afforded to candidates with disabilities with respect to employment in those administrative authorities which do not exceed 6% of the statutory employment rate for persons

13 Assumptions underlying bills for the New Support System for persons with disabilities, December 2017, <http://konwencja.org/download/zalozenia-dla-projektow-ustaw-dla-nowego-systemu-wsparcia-osob-z-niepelnosprawnosciami-v3-0-2017-12-11/#> (accessed 28.12.2018).

14 The Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, i.e. Journal of Laws of 2018, item 511.

15 The Social Employment Act of 13 June 2003, Journal of Laws of 2016, item 1828; the Social Cooperatives Act of 27 April 2006, Journal of Laws of 2018, item 1205; the Act on Employment Promotion and Labour Market Institutions of 20 April 2004, Journal of Laws of 2018, item 1265.

16 K. Roszewska, Aksjologiczne podstawy unormowania zatrudnienia pracowniczego osób z niepełnosprawnościami w Kodeksie pracy, "Praca i Zabezpieczenie Społeczne" 2014, No. 12, pp. 8 et seq.

17 See in particular Article 29a(2) of the Civil Service Act of 21 November 2008, Journal of Laws of 2018, item 1559; Article 3b of the Act on Employees of State Offices of 16 September 1982, Journal of Laws of 2018, item 1915, and Article 13a(2) of the Act on Local Government Employees of 21 November 2008, Journal of Laws of 2018, item 1260. The proposed changes did not cover senior positions in the civil service and managerial positions in local government units.

with disabilities, provided that they meet the eligibility requirements to the same extent as other selected candidates. A number of prior employment practices in civil service and local government establishments were discriminatory in nature. One might go a stage further by suggesting that given their exposure to an earlier segregated education system and a poorer educational offer, hitherto persons with disabilities have in fact been discriminated against in respect of employment in these public institutions.¹⁸

Following ratification of the CRPD, the change was subject to partial evaluation.¹⁹ The employment of persons with disabilities increased in controlled ministries. However, the number involved was insignificant and none of the ministries achieved the 6% employment rate required. The implementation of access to the civil services was also critically assessed by the Supreme Audit Office on the basis of an audit conducted in 2012, both within the ministries and in selected central offices.²⁰ Although the rights of persons with disabilities with regard to access to positions in public administration have been strengthened, the percentage of persons with disabilities employed in public administration has virtually remained unchanged. It should be noted, however, that 251 offices have achieved an employment rate exceeding 6%.²¹ Increasing the employment rate in budgetary units should be treated as a priority. It is symbolically important. It shows that the “authority” sets upon itself the same obligations it expects other employers to undertake.²²

For those who are unable to work on the open labour market or who require adequate support, the Rehabilitation Act provides for a multi-stage model of professional activation, which should essentially lead to the transition of as many people as possible from a protected market to an open one. However, it has been observed that this model does not serve its purpose as there are no elements which would encourage entities conducting occupational therapy workshops or vocational rehabilitation facilities operating on the protected market to transition persons with

18 Upon adoption of the CRPD, the employment rate in the civil service stood only at 3.2% see: Chancellery of the Prime Minister, Audit and Supervision Department, Employment of persons with disabilities in the civil service, Warsaw, 6 June 2013, p. 11. In the last two years (2016-2017) it fluctuated at 4.0% and 3.9%, respectively, see: Chancellery of the Prime Minister, The Report of the Head of the Civil Service on the state of the civil service and the implementation of its tasks in 2017, Warsaw, March 2018, p. 24.

19 Details of the results of audit: Chancellery of the Prime Minister, Audit and Supervision Department, Employment of persons with disabilities in the civil service, Warsaw, 6 June 2013.

20 Employment of persons with disabilities in selected ministries, central offices and state organizational units. Details of the audit results. Warsaw, Supreme Audit Office Warsaw, 2013, p. 10.

21 Chancellery of the Prime Minister, Report of the Head of the Civil Service on the state of the civil service and the implementation of its tasks in 2017, Warsaw, March 2018, pp. 10 and 25.

22 Explanatory memorandum to the bill amending the Civil Service Act and the Act on Local Government Employees, print No. 2772, Lower House of Parliament of the 6th term of office, p. 8.

disabilities to the open labour market following a suitable period of rehabilitation.²³ Considerable changes in this respect took place in the spring of 2018.²⁴ It became possible for participants of workshops to pursue work placement with an employer and concurrently attend club classes. Club classes are a form of rehabilitation which aims at supporting persons with disabilities to achieve self-reliance and independence in both social and vocational life. Such clubs also include active forms of supporting a disabled person in taking up and maintaining employment. Finally, the guarantee of being able to return to a workshop for a person who loses their job, constitutes a significant and welcome change.

3. Changes in the right of persons with disabilities to employment under the impact of EU law according to the CRPD

Some legal solutions should be triggered by special needs of persons with disabilities compared to other groups of employees who are disadvantaged and face discrimination. For instance, the opportunity to hire a person responsible for assisting a disabled employee in the workplace came up as early as Poland's accession to the EU.²⁵ The obligation to provide necessary reasonable accommodation was also imposed on employers by virtue of the act implementing certain European Union provisions with regard to equality,²⁶ namely Article 5 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.²⁷ These solutions were rolled out prior to the adoption of the Convention, yet they remain consistent with the approach to disability which the Convention presents as an evolving concept, according to which disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. However, one can hardly notice any improvement during the period which followed ratification of the CRPD, which should have prompted a wider use of the two institutions. In 2017, applications were filed for reimbursement of the costs of adapting the premises of the workplace to the needs of a disabled person, in particular the costs incurred in connection with the adaptation of new or existing

23 K. Roszewska, Środki prawne..., *op. cit.*, p. 34.

24 Article 3 of the Act of 15 December 2017 amending the Social Cooperatives Act and certain other acts, Journal of Laws of 2017, item 2494, and Article 1(2), (6) to (7) of the Act of 10 May 2018 amending the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities and certain other acts, Journal of Laws of 2018, item 1076.

25 Act of 20 April 2004 amending and repealing certain acts in connection with the Republic of Poland becoming a Member State of the European Union, Journal of Laws No. 96, item 959.

26 Act of 3 December 2010 implementing certain European Union regulations in respect of equal treatment, Journal of Laws of 2016, item 1219.

27 OJ EU 2000, No. L 303, p. 16.

workplaces, adaptation or purchase of devices facilitating work or functioning in the workplace, purchase and authorization of software to be used by such an employee and technologies supporting or adapted to the needs resulting from disability and the costs of identification of these needs by occupational health advisory services for a total of three workplaces only, with one of the applications being filed by the public finance sector. The number of processed applications for reimbursement of employment costs of 209 employees assisting disabled employees was higher, yet still insignificant in the context of needs. The majority of applications concerned reimbursement of the costs of equipping workstations for employees who are unemployed or who are looking for work and who are not in employment (1033), as well as reimbursement of expenditure on labour market instruments and services for persons with disabilities who are looking for work and who are not in employment (1413).²⁸

4. Conclusions

Summing up, while the Polish employment regulations guarantee persons with disabilities basic employment rights, the adoption of the CRPD was an incentive for further positive changes. However, it should be borne in mind that the solutions which formally meet international standards are not adjusted to the current situation in the Polish labour market; in certain aspects they do not have the adequate (effective) mechanism for their implementation (e.g. lack of a job coach) or simply are not implemented in practice. Although formally legal solutions ensure equal access to employment and prohibit discrimination at all employment stages, cases of disability discrimination are not in principle reported to control and judicial authorities.²⁹ With an insignificant proportion of discrimination complaints filed with the National Labour Inspectorate, not one single complaint based on alleged disability discrimination has been recorded.³⁰ This is attributable, among other things, to low awareness of the rights and limited access to legal assistance.³¹ Nor are

28 Report on the implementation of the objective and financial plan relating to PFRON activities in 2017, Warsaw, February 2018, pp. 72-74. Its insignificant decline compared to previous years is attributable to the change in labour supply in general in Poland, including a decline in the unemployment rate for persons with disabilities.

29 Exceptions include the case regarding refusal to hire a person in a wheelchair, Supreme Court judgment of 12 April 2012, file number II PK 218/11, OSNP No. 9-10/2013, item 105.

30 They were based on alleged discrimination on grounds of sex, age, trade union membership and nationality. See complaints from persons with disabilities listed in the 2017 PIP report, Warsaw 2018, pp. 61-62, <https://www.pip.gov.pl/pl/f/v/192642/Sprawozdanie%20z%20dzialalnosci%20PIP%20w%202017.pdf> (accessed 28.12.2018).

31 For more details see part of the Government report devoted to the implementation of Article 5 of the CRPD.

the systems of deciding on the degree of incapacity for work and disability conducive to appropriate adjustment of support in employment. The social policy based on intervention, sometimes compensatory, rather than activating strategies, is too often the predominating form of support.³²

The Committee undoubtedly expresses concern about the large proportion of persons with disabilities who are unemployed or in low-income employment; the lack of provision of reasonable accommodation in the workplace; the lack of affirmative action measures to promote employment; the non-enforcement of quota systems both in the public and private sector; and prevailing discrimination in the workplace.³³

In the case of Poland, the Committee prepared a list of issues in relation to the initial report, which is relatively short in terms of employment, but rather cross-cutting in general. It refers to comprehensive data on the employment of persons with disabilities, disaggregated by sex, ethnicity, age, level of qualification, type of employment and level of salary, indicating whether it is public or private sector employment and whether it is in a segregated or an inclusive work environment. The Committee also requested information about specific incentives and measures to facilitate the employment of persons with disabilities in the open labour market. Employment is also addressed in questions regarding the adopted national policy measures to promote the rights of persons with disabilities following the ratification of the Convention. The Committee requested information about the extent to which the Convention had been promoted and mainstreamed across the government and local government units and relevant sectors, including i.a. in employment, and also about the resources allocated to the implementation of these tasks.³⁴ The Polish Government has not yet addressed the Committee's recommendations, nor is there any mechanism which would make it possible to give effect to them. The recommendations should nevertheless be treated as guidelines for action to be taken by public authorities. The European Commission may have an indirect effect on their implementation in the course of agreeing projects financed from European Union funds.

32 Social alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Poland, Warsaw 2015, p. 50, http://fundacjasksk.pl/dopoczytania/spoleczny_raport_alternatywny.pdf (accessed 28.12.2018).

33 Report of the Committee on the Rights of Persons with Disabilities (from 13th session from 25 March to 17 April 2015 to 16th session from 15 August to 2 September 2016), Supplement No. 55 (A/72/55), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=27 (accessed 28.12.2018).

34 The Committee on the Rights of Persons with Disabilities, List of issues in relation to the initial report of Poland, CRPD/C/POL/Q/1, 25 April 2018 (accessed 22.06.2018).

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