



European
Commission

European network of legal experts in
gender equality and non-discrimination

Country report

Non-discrimination

Denmark

2022

including summary



Justice
and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Denmark

Pia Justesen

Reporting period 1 January 2021 – 31 December 2021

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2022

© European Union, 2022

PDF ISBN 978-92-76-49056-2

ISSN 2599-9176

doi:10.2838/50433

DS-BB-22-006-EN-N



Universiteit Utrecht

CONTENTS

EXECUTIVE SUMMARY	5
INTRODUCTION	12
1 GENERAL LEGAL FRAMEWORK	15
2 THE DEFINITION OF DISCRIMINATION	16
2.1 Grounds of unlawful discrimination explicitly covered	16
2.1.1 Definition of the grounds of unlawful discrimination within the directives	16
2.1.2 Multiple discrimination	26
2.1.3 Assumed and associated discrimination	27
2.2 Direct discrimination (Article 2(2)(a))	28
2.3 Indirect discrimination (Article 2(2)(b))	29
2.3.1 Statistical evidence	32
2.4 Harassment (Article 2(3))	34
2.5 Instructions to discriminate (Article 2(4))	36
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	38
3 PERSONAL AND MATERIAL SCOPE	45
3.1 Personal scope	45
3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2), Directive 2000/43 and Recital 12 and Article 3(2), Directive 2000/78)	45
3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)	45
3.1.3 Private and public sector including public bodies (Article 3(1))	46
3.2 Material scope	46
3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))	46
3.2.2 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	48
3.2.3 Access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))	48
3.2.4 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))	49
3.2.5 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	49
3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)	51
3.2.7 Education (Article 3(1)(g) Directive 2000/43)	52
3.2.8 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)	54
3.2.9 Housing (Article 3(1)(h) Directive 2000/43)	58
4 EXCEPTIONS	62
4.1 Genuine and determining occupational requirements (Article 4)	62
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	62
4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)	63
4.4 Nationality discrimination (Article 3(2))	64
4.5 Health and safety (Article 7(2) Directive 2000/78)	65
4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	65
4.6.1 Direct discrimination	65
4.6.2 Special conditions for younger or older workers	66

4.6.3	Minimum and maximum age requirements	67
4.6.4	Retirement.....	67
4.6.5	Redundancy	71
4.7	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)	71
4.8	Any other exceptions.....	71
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	72
6	REMEDIES AND ENFORCEMENT	75
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	75
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78).....	78
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)..	81
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78).....	82
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78).....	82
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43).....	86
8	IMPLEMENTATION ISSUES.....	96
8.1	Dissemination of information, dialogue with NGOs and between social partners	96
8.2	Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78).....	97
9	COORDINATION AT NATIONAL LEVEL.....	98
10	CURRENT BEST PRACTICES.....	99
11	SENSITIVE OR CONTROVERSIAL ISSUES	100
11.1	Potential breaches of the directives at the national level	100
11.2	Other issues of concern	101
12	LATEST DEVELOPMENTS IN 2021.....	105
12.1	Legislative amendments	105
12.2	Case law.....	105
ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION		112
ANNEX 2: INTERNATIONAL INSTRUMENTS.....		114

EXECUTIVE SUMMARY

1. Introduction

In the 1960s and 1970s, the Danish Parliament debated whether legislation on discrimination in the labour market due to race, religion and other grounds should be enacted. The social partners, i.e. employers' organisations and employees' organisations in the labour market rejected the proposal, arguing that Denmark had a tradition of collective agreements rather than legislation in the labour market. As no such collective agreements on anti-discrimination were concluded, victims of discrimination on grounds of race, ethnicity, sexual orientation and religion were not protected until 1996, when anti-discrimination legislation was finally enacted. A prohibition of discrimination based on age and disability was adopted in 2004.

Up until the 1960s and 1970s the Danish population was relatively homogeneous, and the majority were members of the Evangelical Lutheran Church by conviction, tradition and/or culture. With new groups of migrant workers and the arrival of different groups of refugees, this picture has changed. During the last 50 years, Denmark has become a much more multicultural and multi-ethnic country.

The domestic debate on whether and to what extent international human rights obligations should be followed can be quite fierce. Many politicians are sceptical about the limitations that international obligations impose on their legislative power.

In particular, there has been a growing emphasis on encouraging immigrants and descendants from third countries to explicitly sign up to 'basic Danish values'. In Denmark, the requirement to adapt and assimilate as understood by officials and the general public is stronger than in some of its neighbouring countries.

The Faroe Islands and Greenland are closely tied to Denmark as parts of the Danish Realm but are not members of the European Union. In general, the various anti-discrimination acts include provisions stating that they do not apply to the Faroe Islands and Greenland.

2. Main legislation

Anti-discrimination legislation in Denmark does not consist of one single piece of legislation. It is rather a combination of many acts, which have been introduced or amended when public debate or when international and EU obligations have focused on a specific field of application or a specific vulnerable group. Hence, protection against discrimination is ensured by a web of civil and criminal legislation, ranging from the Constitution to specific acts covering areas outside and inside the labour market, making it a challenge to explain and for the public to understand.

The Danish Constitution provides that no Danish subject shall be deprived of his or her liberty because of his or her political or religious convictions or because of his or her descent. Moreover, no person shall be denied the right to full enjoyment of civil and political rights by reason of their creed or descent, nor shall they for such reasons evade any common civil duty. Furthermore, the Constitution provides that no one shall be liable to make personal contributions to any denomination other than the one to which he adheres. Finally, the Constitution provides that citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.

The Act on the Prohibition of Discrimination due to Race etc. makes it a criminal offence to refuse, in connection with a commercial or non-profit business, to serve or allow entrance to a person on the basis of race, colour, national or ethnic origin, religious belief or sexual

orientation.¹ In December 2021, the Act was amended to include the discrimination grounds of 'gender identity, gender expression or gender characteristics'.² The amended Section 1 entered into force on 1 January 2022.

The Act on Ethnic Equal Treatment aims to ensure protection against discrimination based on race or ethnic origin and to implement the non-employment aspects of the EU Racial Equality Directive.³ The Act on Ethnic Equal Treatment includes a prohibition of discrimination on the grounds of racial and ethnic origin as regards access to social protection, including social security and healthcare, social benefits, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry on a particular profession. The Act also includes a prohibition of harassment on the grounds of race and ethnic origin.

The Act on the Prohibition of Discrimination in the Labour Market etc. prohibits direct and indirect discrimination in the labour market based on race, skin colour, religion or faith, political conviction, sexual orientation, age, disability and national, social or ethnic origin.⁴ In December 2021, the Act was amended to include the discrimination grounds of 'gender identity, gender expression or gender characteristics'.⁵ The amended Section 1 entered into force on 1 January 2022. The Act prohibits discrimination in connection with recruitment, dismissal, transfer and promotion as well as discrimination with regard to pay and working conditions and also provides protection against harassment. Similarly, employers are not allowed to discriminate among employees as regards access to vocational education and training, continuing training and retraining. The same prohibition applies to people providing guidance and training as well as to those involved in work placement activities and in making rules and decisions about the right to perform professional activities and about membership of workers' and employers' organisations.

The Act on the Prohibition of Discrimination due to Disability is a civil law, which prohibits direct and indirect discrimination on the ground of disability.⁶ The Act applies to all public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. The Act was adopted on 8 June 2018 and entered into force on 1 July 2018. In December 2020, the Act was amended to include a legal duty to provide reasonable accommodation for young people and children with disabilities in public and private day-care institutions and schools.⁷ This provision in Section 9(a) entered into force on 1 January 2021.

The discrimination grounds of age, and religion or belief do not currently enjoy protection outside the labour market in Danish civil law. On 1 January 2022 an amended Act on Equality between Men and Women entered into force, adding the prohibition of

¹ Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race etc.*), Consolidated Act No. 626 of 29 September 1987 with later amendments.

² Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022. Descriptions of the term sexual orientation and gender identity etc. follow from the preparatory works of this amendment (Bill No. 18 2021/1) (translation by the author):

'In relation to the protection of LGBTI people against discrimination, the working group has looked at protection in relation to 1) Sexual orientation, which includes a person's persistent sexual attraction pattern based on which gender one falls in love with and is sexually attracted to. 2) Gender identity that refers to a person's inner and individual experience of his or her gender. 3) Gender expressions that refer to the way a person expresses their gender, e.g. choice of clothes, hairstyle, makeup, behaviour, movements and speech. 4) Gender characteristics that cover the bodily characteristics that characterise and differentiate gender, e.g. the number of X and Y chromosomes, the type of internal and external genitalia, endocrine conditions, beard growth and breast development.'

³ Act on Ethnic Equal Treatment (*Lov om etnisk ligestilling*), Consolidated Act No. 438 of 16 May 2012 with later amendments.

⁴ Act on the Prohibition of Discrimination in the Labour Market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), Consolidated Act No. 1001 of 24 August 2017 with later amendments.

⁵ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

⁶ Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*), Act No. 688 of 8 June 2018 with later amendments.

⁷ Act No. 2218 of 29 December 2020.

discrimination based on 'sexual orientation, gender identity, gender expression or gender characteristics' to the existing discrimination ground of gender.⁸ The Act on Equality between Men and Women covers areas outside the labour market.

Criminal law prohibits direct differential treatment with regard to access to public places and services on the grounds of race, colour, national or ethnic origin, religious belief, sexual orientation, gender identity, gender expression or gender characteristics outside the labour market, but not age or disability. Moreover, criminal law does not cover indirect discrimination, harassment or victimisation.

Denmark has signed and ratified all major human rights conventions except the UN Convention on Migrant Workers and Protocol 12 to the European Convention on Human Rights (ECHR). Denmark has signed but not yet ratified the COE Revised European Social Charter.⁹

3. Main principles and definitions

Direct discrimination is defined as a situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of, for example, racial or ethnic origin.¹⁰

Indirect discrimination is deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin, for example, at a disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹¹

Harassment, instruction to discriminate and victimisation are also prohibited.¹²

Two main exceptions to the prohibition of discrimination apply in the labour market:¹³

1. Employers whose establishments have the aim of promoting a certain political or religious ethos are exempted from the Act's prohibition of discrimination in situations where a certain political or religious requirement is of importance to the particular job in question.
2. If it is of crucial significance that a person has a particular race, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin, has a particular skin colour, age or disability or is of a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the concrete work in question, the employer can apply for a dispensation from the relevant Government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition of differential treatment.

Regarding reasonable accommodation for persons with disabilities, employers are obliged to adapt the workplace in order to accommodate persons with disabilities, unless this will

⁸ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

⁹ Denmark has not accepted the collective complaints protocol to the European Social Charter.

¹⁰ See Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market, Section 3(2) of the Act on Ethnic Equal Treatment and Section 5(2) of the Act on the Prohibition of Discrimination due to Disability.

¹¹ See Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(3) of the Act on Ethnic Equal Treatment and Section 5(3) of the Act on the Prohibition of Discrimination due to Disability.

¹² See Sections 1(4), 1(5) and 7(2) of the Act on the Prohibition of Discrimination in the Labour Market etc.; Sections 3(4), 3(5) and 8 of the Act on Ethnic Equal Treatment; and Sections 5(4), 5(5) and 9 of the Act on the Prohibition of Discrimination due to Disability.

¹³ See Section 6 of the Act on the Prohibition of Discrimination in the Labour Market etc.

place a disproportionate burden on the employer.¹⁴ The Danish Supreme Court has stated that if an employee needs reduced working hours because of a disability, the employer must show a willingness to look into possible accommodations like flexible jobs, part-time jobs, etc. If the employer refuses such accommodations, the courts might conclude that the obligation to provide reasonable accommodation has been violated.¹⁵ Outside the labour market, the Act on the Prohibition of Discrimination due to Disability establishes an obligation to provide reasonable accommodation within public and private day-care institutions and schools.

The Danish acts on discrimination distinguish between natural persons and legal persons, and state that only natural persons are protected against direct or indirect discrimination.

Discrimination based on association with an individual is explicitly covered by the Act on Ethnic Equal Treatment and the new Act on the Prohibition of Discrimination due to Disability. Discrimination based on association is not mentioned in the wording of the Act on the Prohibition of Discrimination in the Labour Market etc., but it is covered in case law. Discrimination based on a perception or assumption of a person's characteristics is not directly prohibited in Danish law.

Multiple discrimination is not directly covered by legislation. In cases of multiple discrimination, the different discrimination grounds are dealt with individually. In recent cases, discrimination on more than one ground has involved higher amounts of financial compensation.

4. Material scope

In the public and private labour market, discrimination is prohibited on the grounds of race, colour of skin, religion or faith, political conviction, sexual orientation, gender identity, gender expression or gender characteristics, age, disability and national, social or ethnic origin according to the Act on the Prohibition of Discrimination in the Labour Market etc. In civil law covering areas outside the labour market, discrimination on the grounds of race and ethnic origin as well as disability is prohibited according to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination due to Disability. Since 1 January 2022, discrimination on the grounds of sexual orientation, gender identity, gender expression or gender characteristics is prohibited outside the labour market according to the Act on Equal Treatment of Men and Women in Society prohibiting discrimination based on gender.¹⁶

5. Enforcing the law

If the alleged case of discrimination is a criminal matter, the victim should report it to the police.

If the case is a civil matter, the victim can choose to go to:

- 1) Board of Equal Treatment;
- 2) civil courts;
- 3) trade union if it is a case within the labour market;
- 4) a citizens advice service, which exists in some municipalities (advice/assistance);
- 5) the Danish Institute for Human Rights (advice/assistance);
- 6) NGOs (advice/assistance).

¹⁴ See Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

¹⁵ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

¹⁶ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

Most victims of alleged discrimination file complaints with the Board of Equal Treatment.¹⁷ The act establishing the Board was amended in 2021 to include the discrimination grounds of gender identity, gender expression and gender characteristics.¹⁸ Thus, the Board of Equal Treatment covers all protected grounds, (gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin). The Board of Equal Treatment is competent to hear individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression, gender characteristics, age, disability or national, social or ethnic origin. Outside the area of employment, the Board deals with complaints related to discrimination based on disability, race, ethnic origin, gender, gender identity, gender expression and gender characteristics. Victims of discrimination can be awarded compensation for non-pecuniary damages directly by the Board. The Board is entitled to take the case to court if the discriminating party is not willing to pay.

A. Non-governmental organisations

Trade unions and other membership organisations can represent their members in civil court cases dealing with pay and employment conditions. No particular legislation exists regarding the possibility of NGOs representing victims of discrimination in civil court proceedings. In comparison with trade unions on questions of pay and employment conditions, NGOs do not have the same general legal standing before domestic courts of law in relation to cases of discrimination. Only certified lawyers who have obtained a mandate from the individual victim of discrimination can litigate a case for the civil courts. This means that the NGO can help to examine the case but when it comes to representing and promoting the case before the civil courts, the individual victim of discrimination must get legal representation from a certified lawyer.

B. Shared burden of proof

The Act on Ethnic Equal Treatment, the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on the Prohibition of Discrimination due to Disability include provisions on the shared burden of proof, ensuring that the principle of equal treatment is applied effectively. The shared burden of proof implies that when there is a prima facie case of discrimination, the burden of proof shifts back to the respondent.

C. Level of sanctions and monitoring the number of complaints

Statistics on the number of complaints made to the Board of Equal Treatment can be found in the Board's annual report.

The level of compensation for discrimination in the labour market seems effective, proportionate and dissuasive. Outside the labour market, sanctions are so mild that it could be questioned whether they are sufficiently effective, proportionate and dissuasive.

D. Statistical evidence used in practice

Statistical evidence has been used in some cases on age and gender discrimination. In a 2015 ruling from the Supreme Court, the Court concluded that statistical information – if authentic and sufficiently significant – can by itself establish an assumption of discrimination because of age.¹⁹

¹⁷ Act on the Board of Equal Treatment (*Bekendtgørelse af lov om Ligebehandlingsnævnet*), Consolidated Act No. 1230 of 2 October 2016 with later amendments.

¹⁸ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

¹⁹ Supreme Court judgment No. 28/2015 of 14 December 2015.

6. Equality bodies

*The Danish Institute for Human Rights – the national human rights institution of Denmark*²⁰

Legal basis

The Danish Institute for Human Rights (DIHR) has been designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive since 2003. The act establishing the DIHR clarified the role of the institute as a separate and independent institution. The act also specifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute under the EU directives as a specialised equality body on race and ethnic origin as well as on gender. The act establishing the DIHR was amended in 2021 to include the discrimination grounds of sexual orientation, gender identity, gender expression and gender characteristics.²¹ Since 1 January 2022, the DIHR has had the formal competence of a specialised equality body in respect of not only race, ethnic origin and gender but also sexual orientation, gender identity, gender expression and gender characteristics. Furthermore, according to Parliament Decision B15 of 17 December 2010, the DIHR is also responsible for monitoring the Danish implementation of the UN Convention on the Rights of Persons with Disabilities and thus deals with issues of disability. In practice the DIHR takes a horizontal approach and works on other discrimination grounds as well.

Mandate and competences

The DIHR has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination. Also, the DIHR issues a yearly report to the Parliament on the human rights situation in Denmark, which includes the situation of ethnic minorities and persons with disabilities. Finally, the DIHR has the authority to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest.

7. Key issues

The key issues in this section represent the views of the author of this report.

A number of legislative initiatives targeting foreigners have been introduced since 2018. The initiatives deal with the following:

- discrimination and access to healthcare
- legislation to abolish parallel societies by 2030;
- adoption of a burqa ban in public spaces;
- handshake as a requirement for Danish citizenship;
- initiatives against homeless unregistered migrants causing serious issues of discrimination because of ethnic origin.

As described and elaborated upon in section 11.2, it is a widely held view of experts and civil society organisations that the initiatives pose challenges to the protection against discrimination because of ethnic origin and/or religion.

As in previous years, there was a profound lack of recognition that discrimination takes place in Danish society. The Government, the ministries and other public authorities did not seem to prioritise efforts and initiatives for equality and non-discrimination.

²⁰ Consolidated Act No. 553 of 18 June 2012 with later amendments.

²¹ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

There was a serious lack of statistics and general research on discrimination. The monitoring of case law in Danish courts was severely hindered due to a lack of free public access to case law.

There was no obligation and very limited access to the establishment of positive action measures by employers. Legal barriers made it very difficult in practice for employers to initiate genuine positive action measures.²²

Although there has been a general rise in the number of complaints to the Board since the Board was established in 2009, the visibility of the Board among possible victims of discrimination was still relatively low. This was especially the case for ethnic minority groups and persons with disabilities.

The DIHR served as a specialised equality body.²³ However, the obligation set out by the EU directive and Danish legislation to provide assistance to victims of discrimination did not seem to be a priority. The low number of discrimination inquiries illustrated that, for possible victims of discrimination, the DIHR either appeared invisible or there was no general confidence that approaching it would help in concrete terms. The situation may improve in the coming years as the DIHR has made the work of the advice unit a priority of the Equal Treatment Department.²⁴

²² Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc.

²³ Section 2(2) of the Act on the Institute for Human Rights – the National Human Rights Institution of Denmark.

²⁴ Information provided by the DIHR Equal Treatment Department in an email, 10 March 2022.

INTRODUCTION

The national legal system

The basic law of Denmark is the current Constitution, which was adopted by referendum in 1953. This is the latest successor to the 1849 Constitution. The Constitution sets out the essential rules governing the most important institutions of the state, the Government, the Parliament and the judiciary, as well as the relationship between these institutions.

National legislative authority rests jointly with the Government and the Parliament.

The legal system is a continental system following primarily German traditions. Fundamental legal principles are laid down by the Constitution in very general terms. Constitutional rules are expounded in laws, while detailed regulation is provided by administrative orders (delegated/secondary legislation). In contrast to the German legal system, however, Denmark has no Constitutional Court. The Supreme Court has traditionally been very reluctant to use its power to annul laws that may contradict the Constitution.

The legal system is structured into legal fields (criminal law, civil law, labour law, administrative law, etc.), and anti-discrimination laws are represented in all fields.

Public authorities are governed by a general principle of equality applicable under administrative law. The general principle has the force of legislation (and not constitutional law) and means that public authorities must treat equal matters with full equality before the law.

The Danish private and public labour market has traditionally been based on the 'Danish model', as it is known. This means a labour market that is largely regulated by collective agreements between the labour market social partners. A specialised Labour Court exists to resolve conflicts between the social partners regarding breaches of collective agreements. Anti-discrimination is also to some degree covered by collective agreements, for example the question of equal pay.

The Board of Equal Treatment was established on 1 January 2009 to deal with individual complaints of discrimination.

The Danish Institute of Human Rights (DIHR) holds two EU mandates as a specialised equality body on race or ethnic origin as well as on gender. In addition, the DIHR monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with Article 33 of the Convention. On 1 January 2022, the DIHR became competent to act as a specialised equality body on gender identity, gender expression and gender characteristics as well.²⁵

Denmark is a member of the Council of Europe and has acceded to the European Convention on Human Rights and all of its protocols, apart from Protocol 12. The European Convention on Human Rights is the only human rights convention currently incorporated in Danish law.

With regard to unincorporated and ratified human rights conventions, it is generally assumed that they constitute a relevant source of law, which may be invoked and must be applied by national courts and administrative authorities.

²⁵ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

List of main legislation transposing and implementing the directives

The Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race m.v.*) is a penal code. It covers the following grounds of discrimination: race, skin colour, national or ethnic origin, belief, sexual orientation, gender identity, gender expression and gender characteristics.²⁶ The Act contains a prohibition of discrimination in the provision of goods or services, and in access to public places or events. The Act was adopted on 9 June 1971 and entered into force on 1 August 1971. The Act was amended in 1987 to include the discrimination ground of sexual orientation.²⁷ The Act was also amended in 2021 to include the discrimination grounds of gender identity, gender expression and gender characteristics.²⁸

The Act on the Prohibition of Discrimination in the Labour Market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*) is a civil law prohibiting direct and indirect discrimination.²⁹ The Act covers the following grounds of discrimination: race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin. The material scope of the Act is the labour market not regulated by collective agreements that include protection against discrimination. The Act was adopted on 24 May 1996 and entered into force on 1 July 1996.

The Act on Ethnic Equal Treatment (*Lov om etnisk ligebehandling*) is a civil law prohibiting direct and indirect discrimination.³⁰ It covers race and ethnic origin only. The material scope of the Act is the following: access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. The Act was adopted on 28 May 2003 and entered into force on 1 July 2003.

The Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*) is a civil law.³¹ It prohibits direct and indirect discrimination on the ground of disability. The Act applies to all public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. The Act was adopted on 8 June 2018 and entered into force on 1 July 2018. The Danish Government aimed to provide the same protection against discrimination due to disability outside the labour market as the existing protection in the labour market.

The Act on The Board of Equal Treatment (*Lov om ligebehandlingsnævnet*) is a civil law.³² Within the labour market, the Board deals with complaints related to discrimination based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability and national, social or ethnic origin. Outside the labour market, the Board deals with complaints related to discrimination based on race, ethnic origin, gender and disability. The Act was adopted on 27 May 2008 and entered into force on 1 January 2009.

The Act on the Institute for Human Rights – the National Human Rights Institution of Denmark (*Lov om Institut for Menneskerettigheder – Danmarks Nationale Menneskerettighedsinstitution*) is a civil law.³³ The institute is an independent public body appointed as the national human rights institution (NHRI) of Denmark and holds two EU

²⁶ Consolidated Act No. 626 of 29 September 1987 with later amendments.

²⁷ Act No. 357 of 3 June 1987.

²⁸ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

²⁹ Consolidated Act No. 1001 of 24 August 2017 with later amendments.

³⁰ Consolidated Act No. 438 of 16 May 2012 with later amendments.

³¹ Act No. 688 of 8 June 2018 with later amendments.

³² Consolidated Act No. 1230 of 2 October 2016 with later amendments.

³³ Act No. 553 of 18 June 2012 with later amendments.

mandates as a specialised equality body on race or ethnic origin as well as on gender.³⁴ In addition, the institute monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with Article 33 of the Convention.³⁵ On 1 January 2022, the DIHR also became competent to act as a specialised equality body on sexual orientation, gender identity, gender expression and gender characteristics.³⁶

The Faroe Islands and Greenland are not members of the EU and the various anti-discrimination acts listed above include provisions stating that they do not apply to the Faroe Islands and Greenland.

³⁴ Section 2(2) of the Act No. 553 of 18 June 2012 with later amendments.

³⁵ Decision B15 on the promotion, protection and monitoring of the implementation of the UN Convention on Rights of Persons with Disabilities. Decision B15 was adopted by the Parliament on 17 December 2010.

³⁶ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Denmark does not contain a general provision prohibiting discrimination or a general equality clause. The Constitution includes four articles dealing with non-discrimination and these provisions do not apply to the material areas covered by the EU directives. The Danish Constitution only covers one discrimination ground listed in the directives, namely religion.

Section 71(1) of the Constitution provides that 'No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent.' As a point of departure, the Section only covers Danish citizens, but the liberty of foreigners is to some extent protected by Section 70: 'No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons.'

Section 68 of the Constitution provides that 'No one shall be liable to make personal contribution to any denomination other than the one to which he adheres.'

Section 67 of the Constitution provides that 'Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done.'

The constitutional anti-discrimination and equality provisions are directly applicable and can be enforced against private individuals (as well as against the state).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the **main legislation** transposing the two EU anti-discrimination directives: race, skin colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin. Since 1 January 2022, discrimination based on gender identity, gender expression or gender characteristics has also been prohibited.³⁷

2.1.1 Definition of the grounds of unlawful discrimination within the directives

In general, the grounds of discrimination are only vaguely defined and described in Danish legislation.

a) Racial or ethnic origin

There is no definition of race in the Act on Ethnic Equal Treatment or in the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive.

The explanatory notes to the above two acts describe race in the following way: 'The term shall be understood in accordance with usual terminology, as specified in national and international law, as well as case law from the Court of Justice of the European Union (CJEU) in relation to the Directive. Race is understood as a general belonging to a group of people being defined on the basis of physical criteria, including colour.'

Anti-discrimination criminal law on hate speech and access to public places was passed in 1971 in order to ratify the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and consequently the definition of 'racial discrimination' in Article 1 of the ICERD is particularly relevant.

On that basis, race must be understood in accordance with international human rights law as a social construct rather than a biological concept.

Like race, ethnic origin is not defined in the laws implementing the Racial Equality Directive. The explanatory notes to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive describe ethnic origin as follows: 'The term is generally understood as the belonging to a group of people, who are defined on the basis of shared history, traditions, culture or cultural background, language, geographical origin, etc.'³⁸

The only legally recognised ethnic minority in Denmark is the German minority in Southern Jutland.³⁹

In 2020, 45 % of immigrants with a non-Western origin and their descendants experienced discrimination based on their ethnic background.⁴⁰ The survey for the national integration barometer is carried out every second year and the percentage has stayed almost the same since the indicator was first measured in 2012.

³⁷ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

³⁸ Ministry of the Interior, Committee on implementation in Danish law of Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Report No. 1455 (2002), p. 264.

³⁹ Regulation No. 24 of 7 June 1955 on the general rights of the German minority (*Bekendtgørelse nr. 24 af 7/6 1955 angående det tyske mindretals almindelige rettigheder*).

⁴⁰ National Integration Barometer (*Det Nationale Integrationsbarometer*): [Equal Treatment](#).

There is limited Danish case law on the meaning of ethnic origin. However, a preliminary ruling by the CJEU, requested by the Western High Court, illustrates that ethnic origin cannot be determined on the basis of a single criterion.⁴¹ On the contrary, ethnic origin is based on a number of objective and subjective factors like common nationality, religious faith, language, cultural and traditional origins and backgrounds. The question for the CJEU was whether credit institutions were allowed to request different documentation from loan applicants depending on whether they were born in an EU/EFTA country or not. The Court determined that the birthplace of a person is only one of several factors determining the ethnic origin of a person. The Court concluded that it was not direct or indirect discrimination because of ethnic origin to request additional identity information from a person who was born outside the EU/EFTA. In 2018, based on the CJEU ruling in *Jyske Finans*, the Board of Equal Treatment reopened a case from 2014.⁴² The case also dealt with a car loan and whether it was legitimate to request additional documentation from a Danish citizen and loan applicant who was born outside the EU/EFTA. Based on the CJEU ruling, the Board repealed its previous decision and concluded that the request for additional identification did not constitute either direct or indirect discrimination due to ethnic origin.⁴³

A decision by the Board of Equal Treatment from 2021 seems to illustrate a gap in the protection against ethnic discrimination.⁴⁴ In the case, the complainant was a man born in Gaza, Palestine, in 1945. He wanted the place of birth in his passport to be indicated as 'Palestine'. The complainant had contacted his local municipality in connection with the renewal of his passport. Denmark does not recognise Palestine as a state and the municipality stated that neither Gaza nor Palestine existed as country codes in the system. He was informed that for his passport, he could choose between 'Israel' or 'The Middle East' as his place of birth. Before the Board of Equal Treatment, the complainant argued that he was a victim of discrimination based on ethnic origin. The Board found that the indication of place of birth in the passport was not encompassed by the material scope of the Act on Ethnic Equal Treatment and emphasised that the passport issuing authority could not be considered to provide social protection, social advantages or education. According to the Board, the passport issuing authorities also could not be considered as supplying goods and services, as the issuing of passports was part of the exercise of public authority. Given that background, the Board could not process the complaint.

In another decision by the Board, the complainant argued that she had been discriminated against based on her national origin when she applied for a service job.⁴⁵ According to the job advertisement, the company was looking for a 'Danish speaking mature girl'. The complainant who has a foreign-sounding name wrote a note to the company. The company thanked her for the inquiry and asked her which country she came from. The woman replied that she is Turkish and also asked if that mattered for the job. The company wrote back: 'Yes, unfortunately.' The company subsequently wrote to the woman that they had many foreign customers who would not come if the company had employed a Turkish lady. The Board found that the complainant had been discriminated against because of her national origin. The complainant had only claimed that discrimination based on her national origin had taken place. The Board, however, mentioned that the content of the advertisement also constituted discrimination based on age and gender. She was awarded discretionary compensation of EUR 3 360 (DKK 25 000).

b) Religion and belief

The term 'religion' is not defined in the laws implementing the Employment Equality Directive. According to the guidelines for the Act on the Prohibition of Discrimination in the

⁴¹ Judgment of 6 April 2017, *Jyske Finans*, C-668/15.

⁴² Board of Equal Treatment, Case No. 2013-6811-61300 of 29 April 2014.

⁴³ Board of Equal Treatment, Decision No. 9559 of 21 June 2018.

⁴⁴ Board of Equal Treatment, Decision No. 9923 of 15 October 2021.

⁴⁵ Board of Equal Treatment, Decision No. 9302 of 7 April 2021.

Labour Market etc. religion is understood as formally approved or recognised religions.⁴⁶ A definition may thus be found indirectly through the Danish authorities' practice of approving religious communities. The Ministry of Church Affairs may approve a group of adult citizens (over 18 years) belonging to a particular religion as a religious community or congregation in accordance with the Marriage Act (*Ægteskabsloven*).⁴⁷

A standing advisory committee on religious communities (*Det Rådgivende Udvalg vedr. Trossamfund*) is appointed to assess whether the conditions for approval as a religious community are fulfilled. The criteria for approval follow from the Act on Religious Communities outside the Danish National Church (*Lov om trossamfund udenfor folkekirken*).⁴⁸ The committee is independent of the ministry and has expertise in religious sociology, religious history, law and theology.

Since religion in the non-discrimination legislation is therefore understood as formally approved or recognised religions, there is a theoretical link between the recognition as a religious community and the possibility to avail oneself of the non-discrimination rules on the ground of religion. In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice.

'Belief' is not defined in the legislation but is generally assumed to protect a wider area than religion.⁴⁹ Thus, belief includes religions that are not formally recognised. In short, belief is considered to be a more defined conviction covering something other than formally recognised religions. Examples of belief are atheism and other philosophical orientations.

Research from the University of Copenhagen using the method of situation testing has found that wearing a hijab has a negative effect on a job applicant's chances of gaining employment.⁵⁰ The research shows that ethnic minority women wearing a hijab have to send 60 % more applications than ethnic Danish women in order to be called for an interview.

In its 2019 annual report, the Board of Equal Treatment states that in cases of discrimination on the grounds of religion or belief, the Board will assess whether there is a sufficiently close and direct connection between a complainant's act or omission and his or her religious beliefs.⁵¹ Referring to case law of the European Court of Human Rights, the Board underlines that such a connection is a condition for the complainant to be encompassed by the protection against discrimination on the grounds of religion or belief.

In 2021, the Board issued a decision stating that it constitutes indirect discrimination based on religion to require that an employee shakes hands with everybody regardless of gender.⁵² The case dealt with a female Muslim student teacher who was attending a welcome meeting at the school where she was starting an internship. At the welcome meeting, the student for religious reasons did not want to shake hands with a male internship supervisor. Instead, she greeted him by placing her right hand on the left side of her chest, at the same time as bending her head. Subsequently, the school stated that it was a condition for continuing the internship that the student teacher override her religious beliefs by giving her hand to all persons regardless of their gender. In connection

⁴⁶ *Vejledning om Lov om Forbud mod Forskelsbehandling på Arbejdsmarkedet m.v.*, (Guidance on the Act on the Prohibition of Discrimination in the Labour Market) (1 February 2019), p. 55.

⁴⁷ Since 28 June 2015 the Ministry of Church Affairs has had the competence to approve religious communities. See <http://www.km.dk/andre-trossamfund/>. For selected information in English, see <http://eng.andretrossamfund.dk/>.

⁴⁸ Act No. 1533 of 19 December 2017 about religious communities outside the Danish National Church (*Lov om trossamfund udenfor folkekirken*).

⁴⁹ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 55.

⁵⁰ Dahl, M. (2019) 'Alike but different: How cultural distinctiveness shapes immigrant-origin minorities' access to the labour market' in *Detecting Discrimination. How Group-based Biases Shape Economic and Political Interactions: Five Empirical Contributions*. PhD dissertation. University of Copenhagen (2019).

⁵¹ Board of Equal Treatment (2020) *Annual Report 2019*, p. 18.

⁵² Board of Equal Treatment, Decision No. 9031 of 15 December 2021.

with this stipulation, the school asked the student to indicate whether she wanted to continue the internship or not. The student teacher stated that she did not want to continue and the internship ended with immediate effect. The Board found that school's requirement was objectively justified for the legitimate purpose of ensuring equal treatment. The Board also found the requirement to be appropriate. However, according to the Board, the school had not lifted the burden of proof that it was necessary to maintain this practice towards the student teacher in order to achieve the purpose of ensuring equal treatment. The student teacher was therefore awarded compensation of DKK 25 000 (EUR 3 360).

An earlier 2015 decision from the Board of Equal Treatment also concluded that it was a violation of the law to require that a male job applicant shake hands.⁵³ The city court of Frederiksberg upheld the ruling in December 2017.⁵⁴ In the case, the employer had argued that one of the reasons for the complainant not getting the job was the fact that he did not want to shake hands with female customers. The Board held that the employer had not established a legitimate purpose of the requirement to shake hands and concluded that indirect discrimination based on religion had taken place.

The first decisions by the Board of Equal Treatment to conclude that dismissals were discriminatory because of religion or belief were issued in 2019. The complainants in both cases were teachers who, due to their religion or belief, were dismissed from their jobs because they declined to comply with instructions from their employers. The first complainant was a Jehovah's Witness and therefore did not celebrate Christmas.⁵⁵ The other complainant was a Seventh Day Adventist and it was a crucial part of his belief not to work on Saturdays.⁵⁶ In both cases, the Board made the assessment that there was a clear correlation between the teachers' religious convictions and their refusal to participate in a Christmas dance and to work on a Saturday respectively. Thus, the circumstances were encompassed by the Act on Prohibition of Discrimination in the Labour Market etc. In both cases, the Board concluded that the employers could not prove that the principle of equal treatment had not been violated and both complainants received compensation due to indirect discrimination because of religion or belief. The concept of reasonable accommodation on the ground of religion was not directly alluded to in these cases. However, when the Board evaluated whether the individual instructions from the employers were necessary under the indirect discrimination assessment, the Board noted that the employers had rejected a number of proposals from the complainants and had refused to engage in dialogue on alternative solutions. This reasoning from the Board is quite similar to the typical reasonable accommodation argumentation. In 2021, the Western High Court reversed the Board decision in the case involving the Seventh Day Adventist.⁵⁷ The court found that it did not constitute indirect discrimination based on religion to require the teacher to work on a Saturday during an open house event. The ruling was appealed to the Supreme Court in August 2021.

c) Disability

Danish legislation implementing the Employment Equality Directive does not contain a definition of 'disability'. The concept of disability is not unambiguous, but its content has been the subject of a growing body of case law from the Danish Board of Equal Treatment, Danish courts and the Court of Justice of the European Union.

Danish courts and the Board of Equal Treatment continue to focus on medical information to establish a disability. The courts and the Board have not seemed to consider the role that environmental factors play in creating a disability. The medical model of disability has dominated in Danish case law, and still does to a large extent, despite the Supreme Court

⁵³ Board of Equal Treatment, Decision No. 149/2015 of 23 September 2015.

⁵⁴ City Court of Frederiksberg, judgment of 14 December 2017 in Case No. BS G-1756/2016.

⁵⁵ Board of Equal Treatment, Decision No. 9193 of 28 February 2019.

⁵⁶ Board of Equal Treatment, Decision No. 9192 of 28 February 2019.

⁵⁷ Western High Court judgment of 23 July 2021, Case No. BS-54115/2019-VLR.

landmark ruling from November 2017, which established that a medical diagnosis is not a requirement to establish a disability covered by discrimination law.⁵⁸ Following the ruling, the impairment must be evaluated based on all circumstances of the case, including information from doctors and other health professionals describing the impairment. Thus, a comprehensive assessment must determine whether an employee has a disability or not.

The Board of Equal Treatment has evaluated several cases on requirements for facemasks due to COVID-19 and possible discrimination outside the labour market due to disability. The Board has adjudicated the complaints in accordance with the Act on the Prohibition of Discrimination due to Disability and dismissed the cases. The cases illustrate that complainants must prove that they have a disability covered by the law for the Board to deal with the substance of their complaints. One of the cases in question dealt with a man who wanted to shop in a kiosk but was denied access as he would not put on a facemask.⁵⁹ The facemask requirement was introduced as a result of the global COVID-19 pandemic, but due to breathing difficulties and choking sensations, the complainant was encompassed by the broad exemption from the facemask requirement set by the Danish Health Authority. Despite several requests from the Board of Equal Treatment, the complainant did not submit documentation of his disability and the case was dismissed by the Board. Another case dealt with a woman who wanted to stay in an indoor playground, but was denied access as she would not put on a facemask.⁶⁰ As in the above case, the complainant was reportedly exempt from the requirement to wear a face mask due to breathing difficulties. Despite several requests from the Board of Equal Treatment, the complainant did not submit documentation of her disability and the case was dismissed by the Board.

In cases regarding dismissals, the employee also has to prove that he or she had a disability at the time of the dismissal.

In the following, the meaning and scope of the concept of disability in Danish anti-discrimination law will be described on the basis of a number of criteria stemming from case law.⁶¹

What is the impairment of the individual?

In situations where the condition of the individual is congenital or caused by an accident (for example, cerebral palsy or paralysis), it is generally not difficult to assess whether the individual has a disability covered by the law. In relation to illness, the assessment is less straightforward. However, as described in the following paragraph, the CJEU and the Danish Supreme Court have made clarifications illustrating that an illness can result in an impairment, which hinders full participation in professional life on an equal basis with others, and thus constitutes a disability.

Whether an illness is diagnosed or by other means sufficiently documented must be based on a comprehensive evaluation of available information from doctors and other health professionals as well as all other circumstances of the case. However, it is not a requirement that the impairment is caused by a medically diagnosed illness. This follows from a landmark Supreme Court ruling of 22 November 2017,⁶² referring to case law from the CJEU.⁶³ The case dealt with a woman who, after having brain surgery, experienced disabling tiredness. She could only work between 12 and 18 hours a week and her fatigue

⁵⁸ Supreme Court judgment of 22 November 2017, Case No. 305/2016. Judgment printed in U2018.853H.

⁵⁹ Board of Equal Treatment, Decision No. 9082 of 3 December 2020.

⁶⁰ Board of Equal Treatment, Decision No. 9121 of 26 January 2021.

⁶¹ Board of Equal Treatment (2018) *Notat om handicapbegrebet og praksis om forskelsbehandling på arbejdsmarkedet på grund af handicap* (December 2018).

⁶² Supreme Court judgment of 22 November 2017, Case No. 305/2016. Judgment printed in U2018.853H.

⁶³ CJEU, judgment of 11 April 2013, *Ring and Skouboe Werge*, C-335/11 and C-337/11, ECLI:EU:C:2013:222; judgment of 11 July 2006, *Chacón Navas*, C-13/05, ECLI:EU:C:2006:456; judgment of 9 March 2017, *Milkova*, C-406/15, ECLI:EU:C:2017:198; judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917.

was not expected to improve. The Supreme Court clarified that to have a disability covered by the discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case, including information from doctors and other health professionals describing the impairment. The ruling also confirmed that the burden of proof rests with the employee. An employee has to prove that he or she has a disability, including that the impairment is of a long-term nature.

In a 2016 ruling, the Eastern High Court dealt with the issue of sequelae/complications stemming from a disorder (in this case diabetes).⁶⁴ The Court found that sequelae must be regarded as individual illnesses that cannot be considered together resulting in one long-lasting limitation. The Court stated that diabetes by itself does not constitute a disability. The Court also argued that, because of the character and the variations of the different complications related to diabetes, the diverse sequelae did not constitute the entire course of an illness, but had to be considered individually. In other words, since the individual consequences and illnesses of diabetes on their own did not amount to a limitation of sufficient impact and duration, no disability was found.

Most judgments and decisions deal with physical disabilities. However, a growing number of cases relate to psychosocial disabilities. Many individuals with psychosocial disabilities experience discrimination. Figures show that 53 % of persons with major psychosocial disabilities have experienced discrimination.⁶⁵

In a 2020 decision, the Board of Equal Treatment concluded that post-traumatic stress disorder constituted a disability.⁶⁶ The case dealt with a social worker who, in 2019, had been dismissed from her position in the Danish Prison and Probation Service where she had worked since 1983. In 1986 she was the victim of a violent client assault during her work. After the assault she worked full time, primarily as a specialist in the community service team. In 2017, the Prison and Probation Service issued a requirement that in the future, all employees should be generalists, working with all kinds of clients, including clients who had been ordered to undergo psychiatric treatment. This requirement by the employer reactivated the social worker's post-traumatic stress disorder and she went on sick leave. According to a statement from a psychiatrist, the social worker would be able to go back to work again full time on the condition that she was spared contact with convicted clients with mental illnesses or with other clients who could be expected to exhibit unpredictable behaviour. After more than two years of sick leave, she was dismissed and the employer argued that the dismissal was based on her sick leave. The Board assessed that the claimant had a disability encompassed by the act based on the fact that her post-traumatic stress disorder was long term, and that the impairment constituted a limitation on her participation in professional life on an equal basis with others. The Board concluded that discrimination because of disability had taken place and the social worker was awarded compensation equal to 12 months' salary.

Is the impairment limiting the individual?

To constitute a disability, the impairment must constitute a limitation on the individual's participation in professional life on an equal basis with others.

In a 2016 ruling, the question for the city court of Kolding was whether obesity could be deemed a disability.⁶⁷ In December 2014, the CJEU had issued a preliminary ruling in the case (C-354/13). On that basis, the city court stated that obesity might constitute a

⁶⁴ Eastern High Court judgment of 6 December 2016, Case No. B-2828-15.

⁶⁵ Danish Institute for Human Rights (2021), *2012-2021: Otte år uden reelle forbedringer i levevilkår for mennesker med handicap*, (2012-2021: Eight Years without Improvements in living conditions for persons with disabilities), December 2021, p. 11.

⁶⁶ Board of Equal Treatment, Decision No. 9538 of 24 June 2020.

⁶⁷ City Court of Kolding judgment of 31 March 2016.

disability. However, in the case in question, the city court found that according to medical information, the claimant's obesity did not constitute a disability because of the fact that the obesity did not entail a physical limitation that hindered the claimant's participation in professional life. The city court did not evaluate whether it was the employer's view about the claimant's obesity that led to the dismissal. The city court's reasoning and judgment was upheld by the Western High Court in 2020.⁶⁸

In a decision by the Board of Equal Treatment of 25 September 2019, a shop assistant filed a complaint about a discriminatory dismissal.⁶⁹ He was dismissed during his probation. The employer wrote in the dismissal that the 'reading and spelling difficulties constituted a larger challenge for the work than expected.' The Board found that the shop assistant's dyslexia constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. The Board concluded that the employer had not lifted the burden of proof that it would have been a disproportionate burden to keep the shop assistant in the position, or that the shop assistant, regardless of accommodations, was not competent, capable and available to perform the most important functions of his position. Consequently, the complainant was awarded a compensation equal to six months' salary.

In a decision by the Board of Equal Treatment of 10 October 2018, the Board concluded that a woman who was diagnosed with multiple sclerosis did not have a disability.⁷⁰ The woman had received her diagnosis a couple of months before she was dismissed from her position as a family counsellor in a local municipality. Apart from progressive problems with her walking, she had not been experiencing symptoms of her sclerosis when she was dismissed. She was working full-time; she had not been in need of accommodations, and had not been absent from work because of her illness. On that basis, the Board found that the woman had not experienced physical limitations constituting a disability because of her illness. The Board did not establish why the woman was dismissed but only evaluated whether the woman had a disability or not at the time of dismissal and thus concluded that the woman did not have a disability. The actual reason for the dismissal is unclear. The decision illustrated that an illness, which in the future will cause limiting impairments, is not covered by the concept of disability in the Danish anti-discrimination legislation.

In a decision by the Board of Equal Treatment of 7 February 2018, the Board concluded that a woman who was diagnosed with anorexia and depression did not have a disability.⁷¹ The childminder was dismissed from her job because of protracted illness. She had had anorexia for many years and had been able to work without accommodations until she went on sick leave owing to depression. The Board did not find that the anorexia caused a limitation on the childminder's ability to work and thus concluded that it did not constitute a disability. With regard to the depression, the Board argued that her depression had caused fatigue and weight loss as well as months of absence from work. However, based on information from doctors and psychologists, the health of the childminder was improving and at the time of the dismissal, she had informed her employer that she was ready to start working again. On that basis, the Board concluded that at the time of the dismissal, the childminder had not experienced such limitations because of her depression that she had a disability covered by the anti-discrimination legislation. As in the case above, the Board did not assess the actual reason for the dismissal but only evaluated whether the woman had a disability or not at the time of the dismissal.

Is the impairment long term?

It follows from case law that the impairment limiting an individual's participation in professional life has to be either permanent or long term to constitute a disability.

⁶⁸ Western High Court judgment of 6 November 2020, Case No. BS-1716/2016-VLR.

⁶⁹ Board of Equal Treatment, Decision No. 9874 of 25 September 2019.

⁷⁰ Board of Equal Treatment, Decision No. 9892 of 10 October 2018.

⁷¹ Board of Equal Treatment, Decision No. 9167 of 7 February 2018.

A 2020 judgment from the Maritime and Commercial Court seems to illustrate that alcoholism is not seen as a disability because it is not long term.⁷² The case dealt with a woman who had been dismissed summarily because of a violation of the company's alcohol policy. She argued that her addiction to alcohol was a disability. The court stated that after the dismissal the woman had started a new position in another company and that she still held that position. The court also stated that according to the woman's own explanation, she did not drink anymore even though she might have a craving for alcohol. On that basis, the court did not find that the woman had proved that she had a disability at the time of the dismissal. The judgment suggests that even though the craving for alcohol continued to be present for the woman, because of the fact that she did not actually drink anymore, her alcoholism could not be seen as a long-term impairment.

Even if, at the time of a dismissal, an illness has not imposed long-term limitations on an individual, it can still constitute a disability if the limitations based on medical information are expected to be lasting or long term. In the *Daouidi* case (C-395/15), the CJEU held that if the duration of an illness is uncertain, it should be regarded as long term. A decision by the Board from 2017 reached a different result.⁷³ In this decision the Board concluded that a social worker did not have a disability because of the fact that at the time of the dismissal, there was no real prognosis for the duration of the social worker's illness and no prognosis for the impairments.

A 2018 ruling by the Eastern High Court dealt with a service engineer working with fire prevention who experienced impairments due to his involvement in a traffic accident.⁷⁴ After a period of sick leave, the service engineer worked reduced hours. He was no longer able to perform certain tasks, and the employer did not find it feasible to ask colleagues to perform these tasks. The service engineer was therefore dismissed. The High Court found that the impairment at the time of the dismissal had not been of a long-term duration. It was therefore necessary for the Court to evaluate the future prognosis to be able to decide whether the service engineer's impairments after the accident constituted a long-term impairment. Based on a comprehensive evaluation of the medical information in the case, the Court found that the prognosis did not support the claim that the service engineer had a long-term impairment. The Court thus concluded that the service engineer did not have a disability.

A 2019 decision by the Board of Equal Treatment dealt with a child and youth worker.⁷⁵ The complainant had been dismissed from her job at the afterschool centre because of the extent of her sickness absence due to a concussion that she had sustained 10 months earlier. The Board found that at the time of dismissal, the impairments did not have a duration that could be described as long term. However, immediately prior to the dismissal, the working hours of the complainant had been reduced to three hours a week to accommodate her concussion, and she was still on a long-term course of treatment. The Board therefore considered that, following the prognosis at the time of dismissal, her impairments should be expected to be long term. The complainant therefore had a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. The dismissal happened a few days after the complainant began her second work placement at the school. According to the Board, the school therefore had not documented that the complainant would not be able to gradually increase the number of working hours per week. On that basis, the Board found that the school had not lifted the burden of proof that the complainant was not competent, capable and available to perform the most important functions of her position. Furthermore, the dismissal happened just a few days after the complainant had started working three hours a week. The Board therefore argued that the school had not sufficiently looked into whether, with this measure and other reasonable accommodation measures, the complainant could be retained in her position.

⁷² Maritime and Commercial Court judgment of 3 December 2020, Case No. BS-45652/2019-SHR.

⁷³ Board of Equal Treatment, Decision No. 9925 of 8 August 2017.

⁷⁴ Eastern High Court judgment of 12 October 2018, Case No. B-2847-16.

⁷⁵ Board of Equal Treatment, Decision No. 9758 of 8 August 2019.

Thus, the school had not fulfilled the obligation to provide reasonable accommodations. The complainant was granted compensation equal to nine months' salary.

It follows from case law that no minimum period of time as to what constitutes 'long term' has been indicated by the courts. According to the Supreme Court whatever constitutes 'long term' has to be based on a specific assessment of the individual case.⁷⁶

d) Age

Age is not defined in the legislation implementing the directives but according to the guidelines for the Act on the Prohibition of Discrimination in the Labour Market etc. everybody is protected against discrimination on account of age.⁷⁷ This applies to young age and old age – all ages are protected discrimination grounds.

In 2021, the Board of Equal Treatment dealt with two test cases regarding job advertisements on Facebook.⁷⁸ The question for the Board was whether it was contrary to the Act on the Prohibition of Discrimination in the Labour Market etc. to target job advertisements on Facebook, so that the advertisements were only displayed on profiles belonging to Facebook users of a certain gender and age. The cases were brought before the Board by the Danish Institute of Human Rights. The DIHR is competent to take cases of principle to the Board of Equal Treatment, including individual cases of discrimination of general public interest. The respondent companies had advertised for labour on Facebook. The companies had not indicated in the actual advertisement that they preferred a person of a certain gender or of a certain age. However, by using Facebook's advertising platform, the companies arranged for the advertisements to appear only on the profiles belonging to certain Facebook users. In other words, the companies had actively indicated in the Facebook settings that the advertisements should be targeting certain age and gender groups.

One case concerned a company's advert for a manager.⁷⁹ The job advertisement was only shown on the profiles that belonged to Facebook users between 20 and 50 years of age. The Board noted that the company had advertised the position broadly via other channels as well, including on LinkedIn and the company webpage, and that the company had encouraged Facebook users to share the job posting. Also, the company ended up hiring an applicant who was older than 50 years of age for the position. On that basis, the Board did not find, that the advertisements on Facebook were in breach of the advertisement prohibition in Section 5 of the Act on the Prohibition of Discrimination in the Labour Market etc. The Board then considered whether the advertisements were in breach of the general prohibition against discrimination on grounds of age under Section 2, cf. Section 1 of the Act. The Board found that advertising specifically to a group delimited by age created a presumption that people outside this age group did not have the same opportunity to be considered for the position. However, the defendant had encouraged Facebook recipients to share the advertisement to anybody, and in the end the defendant hired an applicant who was older than 50 years of age for the position. Under these specific circumstances, the Board found that the advertisements were not in breach of the prohibition against discrimination on the ground of age.

The second case concerned a company's advertising for 'stagehands'.⁸⁰ The job advertisement was only displayed on the profiles belonging to male Facebook users between 20 and 43 years of age. In the overall assessment, the Board took into consideration that the company had also advertised the job on the company's website and on the company's general Facebook page. Furthermore, the company had encouraged

⁷⁶ Supreme Court judgment of 23 June 2015, Case No. 25/2014. Printed in U2015.3301H.

⁷⁷ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 41.

⁷⁸ Board of Equal Treatment, Decision No. 9134 and Decision No. 9135 of 25 February 2021.

⁷⁹ Board of Equal Treatment, Decision No. 9134 of 25 February 2021.

⁸⁰ Board of Equal Treatment, Decision No. 9135 of 25 February 2021.

Facebook users to share the post. The Board found that advertising specifically to a group delimited by age and gender created a presumption that women and individuals outside this age group did not have the same opportunity to be considered for the position. Based on an overall assessment of the available information in the case, the Board concluded that the company had not lifted the burden of proof that the principle of equal treatment had not been violated. On that basis, the Board upheld the complaint from the Danish Institute for Human Rights and decided that the company had violated the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on Equal Treatment of Men and Women as regards access to employment etc.

The Maritime and Commercial Court concluded in a 2020 judgment that work experience could not be compared to age.⁸¹ The case concerned a woman who had entered into an apprenticeship contract with a dentist on 9 April 2019. According to the contract, the woman should start as a clinic assistant apprentice on 1 May 2019. The woman had work experience, equivalent to three years of full-time employment, and was therefore entitled to a monthly supplement according to a collective agreement between the Danish Dental Association and her union. The employer later learned about the supplement. Because of financial challenges, the employer informed the woman on 24 April 2019 that he was not able to pay the supplement and therefore had to cancel the apprenticeship contract. The woman argued that the repeal constituted discrimination due to age. Her reasoning was that the supplement, being based on work experience, was closely linked to age. The court found it undisputed that the reason for terminating the contract was the financial challenges of the employer. The court therefore did not find that direct discrimination due to age had taken place. Furthermore, the court did not find that such a link between the supplement and age had been established and that therefore there was a situation of indirect discrimination.

In 2020, the DIHR reviewed 526 cases regarding age and discrimination.⁸² The cases were decided by the Board of Equal Treatment during the period from June 2009 to March 2018. The majority of cases concern situations of dismissal and recruitment and in 25 % of the cases the complaints of discrimination were upheld. The review notes that it can be difficult to lift the burden of proof and uphold a claim of discrimination based on age.

e) Sexual orientation

Many individuals experience discrimination based on their sexual orientation. A recent study found that 33 % of homosexuals and bisexuals have experienced discrimination because of their sexual orientation within the last year.⁸³ The same study found that 56 % of transgender people have experienced discrimination based on their gender identity in the last year.

Sexual orientation has not been defined in the legislation implementing the directives. The core area for this criterion is the prohibition of discrimination against heterosexuals and homosexuals. According to the guidelines for the Act on the Prohibition of Discrimination in the Labour Market etc., the prohibition protects 'lawful sexuality, and therefore not paedophilia for example'.⁸⁴ There is very limited case law on the issue. In the literature, 'sexual orientation' has been given a broad interpretation and is understood as including not only bisexuality but also the protection of transgender persons.⁸⁵

⁸¹ Maritime and Commercial Court judgment of 3 November 2020, Case No BS-16241/2020-SHR. Judgment appealed to the Supreme Court.

⁸² DIHR (2020), *Recommendation on openness about age* (August 2020). See:

<https://menneskeret.dk/udgivelser/anbefaling-aabenhed-alder-ved-ansoegninger>.

⁸³ Følner, B., Kalmark, LM., Aagesen, K. (2020) *Undersøgelse af udfordringer og stigma i forhold til at have LGBTI-identitet i Danmark*, (Challenges and stigma of having a LGBTI identity in Denmark) Als Research for Ligestillingsafdelingen i Miljø- og Fødevareministeriet.

⁸⁴ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 65.

⁸⁵ Schwarz, F. and Hartmann, J. J. (2011), *Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven*, p. 178.

On 1 January 2022, discrimination based on gender identity, gender expression or gender characteristics was prohibited according to the amended Act on the Prohibition of Discrimination in the Labour Market etc.⁸⁶ Descriptions of the term sexual orientation and gender identity etc. now follow from the preparatory works of this amendment (translation by the author of this report):

‘In relation to the protection of LGBTI people against discrimination, the working group has looked at protection in relation to 1) Sexual orientation, which includes a person’s persistent sexual attraction pattern based on which gender one falls in love with and is sexually attracted to. 2) Gender identity that refers to a person’s inner and individual experience of his or her gender. 3) Gender expressions that refer to the way a person expresses their gender, e.g. choice of clothes, hairstyle, makeup, behavior, movements and speech. 4) Gender characteristics that cover the bodily characteristics that characterise and differentiate gender, e.g. the number of X and Y chromosomes, the type of internal and external genitalia, endocrine conditions, beard growth and breast development.’⁸⁷

2.1.2 Multiple discrimination

In Denmark, multiple discrimination is not prohibited by law.

In Denmark, there are civil court cases and decisions by the Board of Equal Treatment on multiple discrimination. The cases deal primarily with gender in combination with ethnic origin, disability or age.

A ruling by the city court of Randers dealt with a woman who was dismissed from her job as a teacher due to the employer’s need for cost reductions.⁸⁸ The complainant had a flex-job, which is an adapted job for individuals with disabilities. She had reduced working hours in a school providing education for adults. The teacher was a wheelchair user and the employer made the decision to dismiss her while she was on maternity leave. She claimed that she had been discriminated against based on both her gender and her disability. In the decision by the Board of Equal Treatment (Decision No. 9560 of 21 June 2018), the Board assessed the claims of gender discrimination and disability discrimination separately, almost as if they were two different cases. With regard to gender, the Board found that the decision to dismiss was made during the teacher’s maternity leave and the employer had not submitted any proof that the teacher’s absence had not influenced this decision. With regard to disability, the employer had told the teacher that she was considered to be the least flexible with regard to teaching in locations other than the school in that many of these places were inaccessible. The school had not provided information about the need for flexibility and thus had not proved that the dismissal was objective and proportional. The Board thus concluded that the teacher had been indirectly discriminated against because of both her gender and her disability. The teacher was awarded compensation corresponding to 12 months’ salary. The city court of Randers reached the same result based on a similar reasoning.

In dismissal cases, the awarding of 6 to 12 months’ salary in compensation is common in cases of discrimination on account of a single discrimination ground. Recent case law seems to suggest that the Board may award higher damages when several discrimination grounds are at stake.⁸⁹

⁸⁶ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

⁸⁷ Bill No. 18 (2021/1): <https://www.retsinformation.dk/eli/ft/202112L00018>.

⁸⁸ Randers City Court, judgment in Case No. BS-35572/2018-RAN of 24 September 2019.

⁸⁹ Board of Equal Treatment (June 2019) *Annual Report 2018*, p. 25.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Denmark, discrimination based on a perception or assumption of a person's characteristics is not directly prohibited in national law. The following legislation therefore needs judicial interpretation.

The commentary to Section 3 of the Act on Ethnic Equal Treatment states that the prohibition of differential treatment is applicable irrespective of whether the actual race or ethnic origin of the victim is as assumed by the perpetrator or not. Discrimination based on perceptions or assumptions about a person's race or ethnic origin is therefore prohibited.

Such a statement is, however, not included in the commentary to Section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc. or in the commentary to Section 5 of the Act on the Prohibition of Discrimination due to Disability.

The landmark Supreme Court ruling from November 2017 opens the way for discrimination based on perceived disability to be deemed illegal according to Danish non-discrimination law.⁹⁰ In the case, the Supreme Court explicitly clarified that, in order to have a disability covered by the discrimination law, it is not a requirement that the condition in question be caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case, leaving room for discrimination by assumption. In some rulings (for example the obesity ruling),⁹¹ however, where persons with disabilities claim that they were dismissed because of disability, the approach by the courts and the Board of Equal Treatment seems to be an assessment of disability from a purely medical point of view. If, on that basis, the court or the Board finds that the person in question does not have a disability, there is no protection against discrimination, and in these cases, there is no investigation whether the employer regarded the person as a person with a disability and dismissed him or her on that basis.

b) Discrimination by association

In Denmark, discrimination based on association with persons with particular characteristics is prohibited in national law.

It follows from Section 3(1) of the Act on Ethnic Equal Treatment that no person may subject another person to direct or indirect discrimination on grounds of the latter's or a third party's race or ethnic origin.

It follows from Section 6 of the Act on the Prohibition of Discrimination due to Disability that no person may subject another person to discrimination on grounds of the latter's relationship to a person with a disability, provided that the discrimination is based on this person's disability.

A 2020 decision by the Board of Equal Treatment illustrates the specific prohibition of discrimination by association when it comes to disability and access to public places and services, under Section 6 of the Act on the Prohibition of Discrimination due to Disability. The case dealt with a mother and her six-year-old daughter who were rejected at the entrance to a café. The daughter used a stroller with shoulder and headrests and a special belt. Because of her disability, she could not sit by herself. The Board stated that the rejection was not objectively justified and the mother and daughter were each awarded compensation of EUR 670 (DKK 5 000).⁹²

⁹⁰ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

⁹¹ Western High Court judgment of 6 November 2020, Case No. BS-1716/2016-VLR.

⁹² Board of Equal Treatment, Decision No. 9761 of 3 September 2020.

No such article on discrimination by association appears in the Act on the Prohibition of Discrimination in the Labour Market etc. However, discrimination in the labour market based on a third party's disability is prohibited according to case law, which concludes that direct discrimination by association is covered by the Act.

The most recent Supreme Court case on discrimination by association is a ruling from May 2016.⁹³ The case dealt with a woman who claimed that she had been discriminated against due to the disability of her son who had Asperger's syndrome. She was dismissed from her job as a childminder at a time when she had been on leave for around 14 months to care for her son. The Supreme Court concluded that the son 'suffered from Asperger's syndrome to such a degree that he was covered by the concept of disability' in the Act on the Prohibition of Discrimination in the Labour Market etc. The Court, however, argued that the childminder had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability. The Court then assessed whether the childminder had experienced indirect discrimination. The local municipality had to cut the budget because of a declining number of children. According to the Court, it was both objective and proportional that the local municipality did not move children to the childminder whom the children did not know because of the fact that the claimant had been away from her work for a long period of time. On that basis, the Supreme Court concluded that the dismissal of the childminder in question did not constitute indirect discrimination in violation of the Act on the Prohibition of Discrimination in the Labour Market etc.

Based on this Supreme Court ruling as well as CJEU case law,⁹⁴ the Board of Equal Treatment is of the opinion in a 2018 memorandum that the prohibition of indirect discrimination only covers employees who themselves have a disability.⁹⁵ Situations where an employee does not have a disability himself or herself but is affected by an action because of a disability of his or her child or another close relative does not seem to be covered by the protection against disability discrimination according to the Board. In its assessment, the Board of Equal Treatment did not consider the CJEU *Chez* case (C-83/14).

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In Denmark, direct discrimination is prohibited in national law. It is defined.

Direct discrimination is deemed to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of race or ethnic origin, cf. Section 3(2) of the Act on Ethnic Equal Treatment. Section 5(2) of the Act on the Prohibition of Discrimination due to Disability defines discrimination in the same manner. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also defines direct discrimination in this manner referring to the discrimination grounds of race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin.

In a specific case, a person using a wheelchair complained to the Board of Equal Treatment about the difficult means of access to his apartment building.⁹⁶ The Board made reference to the preparatory works of the Act on the Prohibition of Discrimination due to Disability and stated that the act does not entail an obligation to secure accessibility. According to

⁹³ Supreme Court judgment of 27 April 2016, Case No. HR-151/2015.

⁹⁴ Judgment of 17 July 2008, *Coleman*, C-303/06, ECLI:EU:C:2008:415; judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278.

⁹⁵ Board of Equal Treatment (December 2018) *Notat om handicapbegrebet og praksis om forskelsbehandling på arbejdsmarkedet på grund af handicap*, p. 19.

⁹⁶ Board of Equal Treatment, Decision No. 9153 of 20 February 2020.

Danish law, lack of accessibility therefore does not constitute direct or indirect discrimination due to disability. In January 2021, the Board issued decisions in three test cases on accessibility. The cases dealt with complaints from the same complainant who had dyslexia.⁹⁷ He argued that he had been discriminated against because the websites of three different authorities were inaccessible for him due to his dyslexia. The Board argued that according to the preparatory work, the Act on the Prohibition of Discrimination due to Disability does not require further accessibility than what is required by other legislation. Thus, the Board does not adjudicate complaints dealing with website accessibility.

b) Justification for direct discrimination

As a general rule, the law does not permit direct discrimination – not even if it could be argued to be objectively justified and proportionate.

However, Section 7 in the Act on the Prohibition of Discrimination due to Disability regulating areas outside of the labour market does allow for both direct and indirect discrimination based on disability. This is the case if the differential treatment pursues a legitimate aim and is appropriate and necessary to obtain the desired aim. The application of this exception is illustrated by a 2021 decision from the Board.⁹⁸ The complainant in the case was a woman who was diagnosed with post-traumatic stress disorder. She was a member of an association that trains and certifies psychiatric service dogs and she owned a psychiatric service dog that had been trained and certified through the association. The association required her to use a vest for her service dog with the text: 'psych service dog'. The complainant had asked the association to use an alternative vest with the words 'service dog, 'support dog' etc. She claimed that by using a service dog vest with the word 'psych', she would stick out in public and be further stigmatised. The complainant and the association had a long correspondence on the issue and the association finally stated that to be a certified member of the association, she was required to use the service dog vest with the word 'psych', otherwise the certification of the complainant and her dog would be terminated with immediate effect and the vest and her ID card would be revoked.

The complainant argued that the requirement of marking the word 'psych' on the service dog vest constituted discrimination due to disability. The association argued that the requirement for 'psych' on the service dog vest was justified by the association's goal and purpose of creating recognition of mental illness and spreading knowledge about psychiatric service dogs. Based on Section 7 of the Act, the Board started its assessment arguing that the requirement was objectively justified by the goal of the association, including the dissemination of knowledge about mental illness and service dogs. The Board, however, found that the association had not lifted the burden of proof that it was necessary and reasonable to maintain the requirement of using the word 'psych' on the service dog vest in order to achieve the desired purpose. In this assessment, the Board emphasised that it must be possible to spread the knowledge of mental illness without individuals being obliged to display that they have a psychiatric service dog because of a psychosocial disability. Thus, the Board concluded that the complainant had been discriminated against based on her disability in violation of the Act.

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Denmark, indirect discrimination is prohibited in national law.

⁹⁷ Board of Equal Treatment, Decisions Nos. 9039, 9040 and 9041 of 19 January 2021.

⁹⁸ Board of Equal Treatment, Decision No. 9915 of 28 October 2021.

Definition:

Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin, for example, at a disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (cf. Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(3) of the Act on Ethnic Equal Treatment).

Section 5(3) of the Act on the Prohibition of Discrimination due to Disability states that indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons with disabilities at a disadvantage compared to other persons.

In a judgment of 8 July 2015, the Eastern High Court concluded that an employee has to experience an actual disadvantage to claim that he or she has been discriminated against.⁹⁹ The case dealt with a woman who had been dismissed from her job with 18 other employees. All dismissed employees had been granted a term of notice of six months – independent of their length of service. The woman argued that she had been indirectly discriminated against due to her age because she was already entitled to a notice period of six months according to her contract and seniority. This was not the case for some of the other dismissed employees. The Court opined that all dismissed employees had been treated equally regardless of their age and seniority and that no one had been given a shorter notice period than they were entitled to according to their contract and seniority. In conclusion, no one had been treated less favourably than others and discrimination had not taken place.

In a 2021 decision by the Board of Equal Treatment, the Board did not find a language requirement to be discriminatory.¹⁰⁰ The case dealt with a schoolteacher who was born and raised in Poland. She was fired from her position as a schoolteacher, with reference among other things, to her problematic linguistic Danish skills. On that basis, the Board found that the schoolteacher had demonstrated factual circumstances that gave reason to believe that she had been subject to indirect discrimination because of her ethnic origin. However, the Board also argued that the language requirements were justified in the learning considerations of the students. The Board therefore assessed that the language requirement was objectively justified as well as appropriate and necessary. The Board finally argued that it did not find reasons to override the assessment by the school of the teacher's linguistic competencies in relation to the teaching of students.

In a 2020 decision by the Board of Equal Treatment, the Board did not find that a requirement of work experience in Denmark constituted discrimination based on national or ethnic origin.¹⁰¹ The case dealt with a job applicant who had applied for a position as a dental nurse in a newly opened dental clinic. The woman was a Bulgarian citizen. From the applicant's CV, it appeared that she had taken her bachelor's degree in Norway and that she had work experience from Norway. The dental clinic rejected the woman, citing that the clinic did not have the resources to give her the training that she might need, given the fact that she had not worked in Denmark before. In other words, based on resource considerations, the clinic had a criterion that candidates should have work experience from Denmark. The Board noted that the requirement to have work experience from Denmark did not place persons of a certain national and/or ethnic origin at a disadvantage in the sense of the law. On that basis, the Board did not find that this criterion constituted discrimination based on a particular national and/or ethnic origin. The woman was therefore unsuccessful in her complaint.

⁹⁹ Eastern High Court judgment of 8 July 2015, Case No. B-3983-13.

¹⁰⁰ Board of Equal Treatment, Decision No. 9151 of 26 February 2021.

¹⁰¹ Board of Equal Treatment, Decision No. 10038 of 18 November 2020.

b) Justification test for indirect discrimination

According to the justification test, indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular ethnic origin, for example, at a disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Cases of alleged indirect discrimination must be individually assessed. The justification test is compatible with the directives.

The Supreme Court assessed the question of indirect discrimination in a case of a reorganisation in a hospital and the resulting redundancies in a judgment of 12 September 2014 regarding disability.¹⁰² The case dealt with a nursing assistant who had incapacities in her arm and worked in a flex-job at a large public psychiatric hospital. The hospital had dismissed a large number of employees. The Court found that the dismissal criteria of physical strength and flexibility put the nursing assistant in a worse-off situation than other employees. However, the Court concluded that the differential treatment was legitimate because of the actual change in working tasks after the reorganisation. The Court also stated that the dismissal could not have been avoided by establishing reasonable accommodation. The Court concluded that the dismissal did not constitute indirect discrimination because of disability.

In a landmark judgment from 2004, the Supreme Court found that the dismissal of a female employee for having worn a headscarf for religious reasons in opposition to the rules on clothing did not amount to indirect discrimination. The Court recognised that the prohibition of wearing a headscarf would mainly affect Muslim women but found that differential treatment was objectively justified in the performance of the work.¹⁰³ The judgment seems to accept a very wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities. The wish to appear politically and religiously neutral to the customers was accepted by the Supreme Court as a legitimate purpose. It has previously been questioned whether the rather wide interpretation of 'legitimate purpose' in the headscarf case is compatible with the directives. However, since the 2017 headscarf rulings from the CJEU,¹⁰⁴ the Danish practice seems to be in line with EU law.

A 2021 decision by the Board of Equal Treatment dealt with a complainant who is deaf and during his working hours received a telephone call to his private phone from an electricity company.¹⁰⁵ The complainant asked his interpreter to pick up the phone and interpret the conversation. With the assistance of the interpreter, he informed the electricity company that he was deaf, and that the interpreter could only be used for work-related contexts. The complainant asked the electricity company to contact him by email, as he wanted to know more about the special offer on the supply of electricity. The electricity company rejected the request, saying that they only made offers over the telephone. Before the Board, the complainant argued that he had been discriminated against based on his disability. The Board initially stated that the Act on the Prohibition of Discrimination due to Disability does not involve an obligation to provide reasonable accommodation. The Board then assessed that the company's rejection of the request to send a written offer with reference to fixed practices was objectively justified by cost reducing purposes. However, after an overall evaluation of the information in the case, the Board concluded that it was not necessary to reject the request for a written offer to achieve the purpose of reducing the company's costs. The complainant was therefore awarded compensation of EUR 670 (DKK 5 000).

¹⁰² Supreme Court judgment of 12 September 2014, Case No. 163/2013.

¹⁰³ Judgment printed in U2005.1265H.

¹⁰⁴ Judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2017:203; judgment of 14 March 2017, *Micropole*, C-188/15, ECLI:EU:C:2017:204.

¹⁰⁵ Board of Equal Treatment, Decision No. 9313 of 21 April 2021.

A 2020 decision by the Board of Equal Treatment dealt with a woman who was unable to stand up without support for longer periods of time because of her disability.¹⁰⁶ The woman was a member of a concert choir that made a new rule requiring all singers to stand up during concerts and concert rehearsals. As a result, the woman could no longer participate in these events. She could still participate in weekly meets and social arrangements. The Board found that the new requirement, which was neutral, put the woman in a worse situation than the other choir members because of her disability. The Board, however, argued that the discrimination against the woman was objectively justified by the legitimate purpose of ensuring the quality of the choir's singing. The Board also found that the concert choir had lifted the burden of proof that the requirement to stand up was necessary to achieve the singing quality. Finally, the Board concluded, that there was a reasonable relationship between the desired goal of securing the singing quality of the choir, and how intrusive the discrimination was for the woman. On that basis, the Board did not find that indirect discrimination based on disability had taken place. The case dealt with a situation outside the labour market and was adjudicated according to the Act on the Prohibition of Discrimination due to Disability, which does not include a duty to provide reasonable accommodation.

In 2017, the Board of Equal Treatment dealt with a case about indirect discrimination because of religion as a test case.¹⁰⁷ In typical complaints to the Board, the chairperson and two board members decide the case. In test cases, the chairperson and four board members decide the case. In the case in question, the complainant was a Muslim student at a vocational school, and she argued that new school regulations prohibiting the exercise of religious rituals constituted discrimination based on religion. The school argued that, as a consequence of students reciting their prayers at the school, unrest, conflicts and insecurity had arisen. The Board stated that only Muslim students were performing religious rituals at the school when the new regulations were introduced. However, the Board argued that the regulations were objectively justified by a legitimate aim, which was to secure peace as well as a safe learning environment, taking into consideration the diversity of the students and the teachers. It was furthermore the opinion of the Board that the means were appropriate. The final question for the Board was to evaluate whether the means of achieving the safety aim were necessary. The majority of Board members argued that before the new regulations, there had been episodes where the complainant and other Muslim students had recited prayers in classrooms and in the entrance hall of the school in such a way that it had been an inconvenience to the teachers and the other students. The majority also argued that these episodes had given rise to unrest, conflicts and insecurity. On that basis, the majority of Board members concluded that the prohibition had been necessary and thus that indirect discrimination because of religion had not taken place.

2.3.1 Statistical evidence

a) Legal framework

In Denmark, there is legislation regulating the collection of personal data. The Danish Data Protection Act implementing the GDPR defines sensitive data in accordance with the GDPR by referring directly to Article 9 of the GDPR.¹⁰⁸ In general, the Danish Data Protection Act has regulated the treatment of sensitive data in accordance with the GDPR.

In the labour market, Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. contains an even stricter rule than the general Data Protection Act with regard to protecting sensitive data. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits employers from asking for, obtaining, receiving or using information about the race, skin colour, religion or belief, political opinion, sexual

¹⁰⁶ Board of Equal Treatment, Decision No. 9150 of 20 February 2020.

¹⁰⁷ Board of Equal Treatment, Decision No. 9647 of 27 April 2017.

¹⁰⁸ Act No. 502 of 23 May 2018 (Data Protection Act).

orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin of a job applicant or an employee. Neither anonymity nor informed consent or any other exemption will allow an employer to ask about or use such information about ethnic origin, etc. The prohibition applies no matter how the employer gets the information, including if, for example, the employee herself refers to her 'Jewish family'.¹⁰⁹

In Denmark, statistical evidence may be admitted in order to establish indirect discrimination. It is permitted by the general admissibility conditions of such evidence in court according to Chapter 32 of the Administration of Justice Act.¹¹⁰

According to the preparatory work for the Act on Ethnic Equal Treatment, the assessment of whether a criterion will place persons of a certain race or ethnic origin at a particular disadvantage can be made on the basis of statistical material showing that the criteria actually place the group of persons proportionately at a particular disadvantage to other persons. Furthermore, it is stated that if it is not possible to produce statistical material, the assessment can be made in any other way demonstrating that the criteria are likely to have this effect.

The same statement regarding statistical material and indirect discrimination is not found in the preparatory work for the Act on the Prohibition of Discrimination in the Labour Market etc.

b) Practice

In Denmark, statistical evidence is primarily used in order to establish indirect discrimination. Typically, the courts and the Board of Equal Treatment require some other information in addition to the statistical evidence to establish facts of possible indirect discrimination.

In civil court cases, statistics have been used primarily in cases of gender and age discrimination. Statistics have not been used in cases of indirect discrimination on account of the other discrimination grounds, except as an argument that a defendant did hire staff with ethnic minority backgrounds and thus, according to the defendant, did not discriminate against ethnic minorities.¹¹¹

The Supreme Court clarified the legal situation with regard to statistical evidence in a judgment of 14 December 2015.¹¹² The case dealt with A and B who had been dismissed with three other colleagues from their positions in a Government agency because of workforce reduction. The dismissed employees were all over 50 years of age. A and B claimed that they had been discriminated against because of their age. The Board of Equal Treatment had previously issued a decision in the case stating that the percentage of elderly employees who had been dismissed constituted a disproportionately high percentage of the overall number of employees. On that basis, the Board concluded that the complainants had established facts of possible discrimination and that the employer could not prove that no discrimination had taken place.¹¹³ The Government agency declined to follow the decision and the Board brought the case against the Government agency to the civil courts. In a judgment of 23 January 2015, the Eastern High Court ruled in favour of the Government agency and held that the documentation of statistical information was not by itself sufficient to establish facts from which it could be assumed that discrimination had taken place.¹¹⁴ The Eastern High Court ruling was appealed and the Supreme Court stated that statistical information about the age and age distribution of dismissed

¹⁰⁹ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 68.

¹¹⁰ Consolidated Act No. 1835 of 15 September 2021 with later amendments.

¹¹¹ Printed in U.2005.1265H.

¹¹² Supreme Court judgment of 14 December 2015, Case No. 28/2015. Printed in U.2016.1168H.

¹¹³ Board of Equal Treatment, Decision No. 401/2012 and Decision No. 402/2012.

¹¹⁴ Eastern High Court judgment of 23 January 2015, Case No. B-2951-13.

employees can be included when assessing whether an assumption for discrimination has been established. The Supreme Court referred to a case of the CJEU (C-127/92 – *Enderby*) and emphasised that statistical information – if reliable and sufficiently significant – by itself can establish such presumption for discrimination. In the case in question, the Court held that there was an overrepresentation of elderly employees among the dismissed employees and that none of the dismissed employees were younger than 53 years of age. The Court, however, also held that there were a number of employees in the Government agency who were older than A and B, and who did not get dismissed during the workforce reduction. The Court concluded that the information about the ages of A and B as well as the information about the age distribution in the Government agency did not establish facts of possible discrimination. Thus, the Supreme Court acquitted the Government agency.

In cases before the Board of Equal Treatment, statistical evidence is often used in an effort to document age discrimination in situations of large or major lay-offs. One example is a teacher who was born in 1956 and who was among five dismissed schoolteachers.¹¹⁵ The dismissed teachers all belonged to the oldest or second-oldest age group at the school. The employer could not prove that the teacher's age had been insignificant to the dismissal and the Board therefore concluded that discrimination had taken place. The teacher was awarded compensation amounting to nine months' salary. Another example is a civil engineer who was dismissed after 32 years in the same company.¹¹⁶ The dismissal was part of a larger workforce reduction where 131 employees were dismissed. The Board assessed detailed statistical information about the age composition in different departments at the time of the dismissals as well as the age composition of the dismissed employees. On that basis, the Board argued that there was not a significant majority of older employees among the dismissed employees. The Board concluded that the complainant had not established facts that his age had been part of the redundancy decision.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Denmark, harassment is prohibited in national law. It is defined.

In Denmark, harassment explicitly constitutes a form of discrimination, cf. Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability.

Harassment within the labour market is deemed to be discrimination when conduct related to race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age and disability or national, social or ethnic origin, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. The offending acts can be active as well as failures to act.

Harassment outside the labour market is deemed to be discrimination when conduct related to race, ethnic origin or disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability. Outside the labour market refers to the following: access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods

¹¹⁵ Board of Equal Treatment, Decision No. 9168 of 7 February 2018.

¹¹⁶ Board of Equal Treatment, Decision No. 9930 of 15 August 2017.

and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. For the discrimination ground of disability, the material scope is all public and private activity (except for the labour market and strictly private activities), cf. Section 2 of the Act on the Prohibition of Discrimination due to Disability.

Furthermore, according to the Act on Work Environment (*Arbejdsmiljøloven*) employers are obligated to secure a healthy physical and psychological work environment.¹¹⁷ According to this Act, it is the employer's responsibility to work against harassment in general at the individual workplace. It is irrelevant whether the alleged harassment is an expression of thoughtlessness or an outright intention to harass, rather what matters is the person's experience of the offending act.¹¹⁸

There is limited case law on harassment within employment. A 2018 decision by the Board of Equal Treatment clarified the obligation of employers to secure a working environment without harassment because of issues related to ethnic origin, such as an ability to speak and understand Danish.¹¹⁹ The case dealt with a pedagogue of Turkish origin who had worked in the same nursery school for nearly five years. A new child with a hearing impairment was assigned to the room where the pedagogue worked. Shortly after the child started, his parents complained to the manager about the pedagogue's lack of correct Danish. The pedagogue was not informed about the complaints and about the accommodations that the manager initiated to deal with the criticism from the parents. Among other things, the manager had told the parents about the pedagogue's working hours, with the result that the parents picked up their child right before the pedagogue was going to be the only pedagogue in the room. The pedagogue only heard about these things from other colleagues. Half a year after the child had started in the nursery school, the pedagogue went on sick leave. While she was off sick, the manager decided to move her to another room to limit her daily confrontations with the parents. The pedagogue did not agree with the move and ended up being dismissed because of sickness absence. She filed a complaint with the Board of Equal Treatment and argued that her manager had accommodated the wishes of the parents instead of protecting her as an employee. She argued that the constant criticism from the parents and lack of support from her manager had resulted in insecurity, stress and depression. She claimed that she had been harassed because of her ethnic origin. The Board explained that harassment within the labour market is deemed to be discrimination when conduct related to ethnic origin (like complaining that a person does not speak correct Danish) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned. The Board also underlined that the employer or manager is obliged to protect employees against harassment, including harassment committed by other employees or customers. The Board stated that the complainant's sickness, which led to her dismissal, was a result of the conflict with the parents as well as her experience of not being supported by her manager. On that basis, the Board concluded that the manager had not done enough to secure a working environment without harassment for the pedagogue. Thus, the manager could not prove that the principle of equal treatment had not been violated and the complainant received compensation corresponding to nine months' salary due to the discrimination because of ethnic origin.

Outside the area of employment, in 2019 the Board of Equal Treatment dealt with a case about a man from Latvia.¹²⁰ He did not have the required ticket for traveling by public transport in Denmark. He was therefore charged with a fine on the train. The man claimed

¹¹⁷ Consolidated Act No. 2062 of 16 November 2021.

¹¹⁸ *Arbejdstilsynets Vejledning om 'Krænkende handlinger, herunder mobning og seksuel chikane'* (Danish Working Environment Authority's Guidance on 'Offensive acts, including bullying and sexual harassment') (2020), guideline 4.3.1-1, page 2.

¹¹⁹ Board of Equal Treatment, Decision No. 9077 of 11 January 2018.

¹²⁰ Board of Equal Treatment, Decision No. 9619 of 12 June 2019.

that the steward had exposed him to harassment due to ethnic origin because of the fact that the steward had addressed him in Russian. The Board argued that although the complainant perceived the address in Russian to be offensive, the Board did not find that the steward intended to discriminate against the complainant or that the steward should have known that his choice of language could be perceived as offensive. The complainant was therefore unsuccessful in the complaint.

b) Scope of liability for harassment

According to Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability, the prohibition of harassment applies to anybody who performs tasks within the scope of the Act.

Where harassment is perpetrated by an employee, the employer is liable. In some cases, the employee is also liable. The following will deal with harassment in the labour market.

The prohibition of harassment in Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer is the one exercising the harassment.

The guidelines to Section 1(4)¹²¹ state that the employer may also be liable for any harassment or other discriminatory behaviour exercised by employees, as the employer has to take the necessary measures to ensure a harassment-free working environment.

Thus, where harassment is perpetrated by an employee, the main rule is that only the employer is liable.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of the Danish Act (*Danske Lov*), which dates from 1683. According to this principle, employers are responsible not only for their own negligence and faults, but also for faults committed by their employees acting on their behalf. However, as harassment is not part of performing a job, harassment will not be considered as included in, or part of, the employer's responsibility, unless the employer has neglected their duty to instruct or correct their staff as a good employer should do to avoid harassment among employees.

As described above, only employers are obligated by Provision 3-19-2 of the Danish Act and by the Act on the Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for harassment by an employee against another employee, the employee who experienced harassment can claim compensation from his or her colleague according to the general legislation on damage liability, and more precisely Section 26 of the Act on Damage Liability (*Erstatningsansvarsloven*).¹²²

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Denmark, instructions to discriminate are prohibited in national law. Instructions are not defined in detail.

The law just prohibits an instruction to discriminate, cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(5) of the Act on Ethnic Equal Treatment and Section 5(5) of the Act on the Prohibition of Discrimination due to Disability.

¹²¹ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 9.

¹²² Consolidated Act No. 1070 of 24 August 2018 with later amendments.

In Denmark, instructions explicitly constitute a form of discrimination.

In the labour market, an instruction to discriminate against persons on grounds of race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age and disability or national, social or ethnic origin shall be deemed to be discrimination, cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. Outside the labour market, an instruction to discriminate against persons on grounds of race, ethnic origin or disability shall be deemed to be discrimination, cf. Section 3(5) of the Act on Ethnic Equal Treatment and Section 5(5) of the Act on the Prohibition of Discrimination due to Disability.

b) Scope of liability for instructions to discriminate

In Denmark, the instructor is liable for discrimination. The prohibition of instruction in Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer gives an instruction to employees to discriminate, for example in a recruitment situation where the employer tells the personnel manager to avoid hiring employees with an ethnic minority background. An employee who instructs a colleague to discriminate against another colleague is not covered by the prohibition, because none of them has the power of an employer to instruct.

The employer may be liable for discriminatory behaviour, including an instruction to discriminate that is carried out by employees, as the employer has to take the necessary measures to ensure a working environment without discrimination.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of the Danish Act. However, as an employee's instruction to discriminate is not part of performing a job, it will not be part of the employer's responsibility, unless the employer has neglected the duty to avoid discrimination among employees.

As described above, only employers are obligated by Provision 3-19-2 of the Danish Act and by the Act on the Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for an instruction to discriminate by an employee, the employee who experienced discrimination can claim compensation according to Section 26 of the Act on Damage Liability.¹²³ Compensation can be claimed from the person who instructed the discrimination as well as from the person who actually discriminated.

The prohibition of instruction (discrimination on account of race and ethnic origin) in Section 3(5) of the Act on Ethnic Equal Treatment only involves service providers. As in the case of employers, the provision only applies where the person giving the instruction has some authority or right of supervision over the person receiving the instruction. In other words, there must be a certain hierarchical relationship between the instructor and the person receiving the discriminatory instruction. A situation where a customer encourages a shopkeeper to discriminate against third parties will not be covered by the provision.

A 2019 Board of Equal Treatment case dealt with a private person who advertised the sale of her allotment garden.¹²⁴ She refused to consider a man with a foreign-sounding name at the time of the sale, citing his ethnic origin. The man filed a complaint arguing that he had been subjected to discrimination based on his ethnic origin. In the case, the seller argued that she had rejected the complainant following a general instruction from the garden association. The Board found that the seller had not, at the time of the rejection of the complainant, in fact acquired the right of use of the allotment garden in the garden association. Although, the garden association had established guidelines for the maximum

¹²³ Consolidated Act No. 1070 of 24 August 2018 with later amendments.

¹²⁴ Board of Equal Treatment, Decision No. 9995 of 9 October 2019.

number of members with an ethnic minority background, the garden association did not have the authority to instruct the seller. The reason was that she had not acquired the legal right of use of the garden. The complainant was therefore unsuccessful in the complaint against the garden association. The Board, however, concluded that the seller had violated Section 3(5) of the Act on Ethnic Equal Treatment and awarded compensation of EUR 670 (DKK 5 000).

The prohibition of instruction (discrimination on account of disability) in Section 5(5) of the Act on the Prohibition of Discrimination due to Disability applies to all public and private activities in all areas of society, except for the labour market. In practice, it will most often involve service providers in situations where there is a certain hierarchical relationship between the instructor and the person receiving the discriminatory instruction. One example described in the preparatory work is an owner of a nightclub who instructs his employees to reject customers who use a wheelchair.¹²⁵ Another example is an owner of a holiday home who instructs the estate agent not to rent his holiday home to individuals with intellectual disabilities.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) Implementation of the duty to provide reasonable accommodation for persons with disabilities in the area of employment

In Denmark, the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law according to Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Reasonable accommodation is described in the law but not defined in detail. Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the employer shall take reasonable measures in view of the practical needs to provide a person with disabilities access to employment, to pursue employment or advance in employment, or to give a person with disabilities access to vocational training. The obligation to provide accommodations does not apply if a disproportionate burden is thereby imposed upon the employer. It follows from Section 2(a) that the burden will not be considered to be disproportionate if it is sufficiently eased by public measures, including financial assistance from the state.

- b) Case law

Whether an employer has fulfilled his or her duty to provide reasonable accommodation will always depend on a concrete assessment. The growing body of case law in the area gives some indications on the criteria to be used when assessing the extent of this duty.

The employer's knowledge about the employee's disability

It is a precondition of the duty to provide accommodations that the employer knows – or ought to know – about the employee's disability. This is illustrated by two landmark Supreme Court rulings from 2015.

The first case was part of the *Ring* and *Skouboe Werge* case complex. The Danish *Ring* and *Skouboe Werge* CJEU cases (C-335/11 and C-337/11) were the basis for two judgments delivered by the Maritime and Commercial Court on 31 January 2014.¹²⁶ The Danish Court found that the adaptation of the workplace with a height-adjustable desk as well as part-time employment constituted reasonable accommodation. The two women in question

¹²⁵ Bill No. L221 of 18 April 2018 on the Act on the Prohibition of Discrimination due to Disability.

¹²⁶ Maritime and Commercial Court, judgment No. F-13-06 and judgment No. F-19-06 of 31 January 2014. See U.2014.1223S for the printed judgment No. F-19-06.

were each awarded compensation equal to 12 months' salary. The *Skouboe Werge* case was appealed by the employer and the Supreme Court observed that it is a precondition of the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability. The parties in the case had been emailing each other during the sickness absence of the employee, but the note from the specialist doctor with the long-term prognosis was not sent to the employer. On that basis, the Court did not find that the employer knew or ought to have known at the time of the dismissal about the fact that the illness had caused a disability and the employer was acquitted.¹²⁷

The second case dealt with an employee who had told her employer when she got a diagnosis of arthritis.¹²⁸ She had also informed the employer about the need to modify her tasks. On that basis, the Court found that the employer knew about the disability and was obliged to establish reasonable accommodation. The second case is from 2016.

The employee with a disability must be competent, capable and available

Recital 17 of the Employment Equality Directive is not directly reflected in the Danish legislation. It is, however, stated in the preparatory work for the Act on the Prohibition of Discrimination in the Labour Market etc. that an employer should only choose an applicant with a disability if the applicant is as qualified as an applicant without a disability. Thus, the duty of reasonable accommodation only applies when the applicant with a disability has the necessary qualifications to do the job if accommodations are made.

The Eastern High Court issued a judgment on this issue in 2020.¹²⁹ The judgment dealt with a woman who was employed as a medical secretary at a regional hospital in 2006. The secretary had Menières disease caused by problems with pressure regulation in the inner ear. The symptoms included fatigue and hearing loss. It was undisputed during the proceedings that the secretary had a disability. In 2015, her disability worsened and it became difficult for her to perform hearing-demanding tasks and she was dismissed from her position in September 2016. The question for the court was whether, over the summer of 2016, the hospital should have initiated further accommodation for the complainant to be able to keep her position. The Eastern High Court found that the most important functions of a medical secretary required an ability to hear. After the worsening of the complainant's disability in August of 2016, she was therefore no longer competent, suitable and available to perform her job. The court also stated that the hospital could not be required to consolidate non-hearing tasks from other departments for the complainant to handle, or to establish a 'flex-job' for her. Flex-jobs are adapted jobs with reduced working hours for persons with disabilities where employers receive a subsidy from the local municipality. The court therefore concluded that the dismissal did not constitute discrimination based on disability.

When comparing qualifications of job applicants and evaluating whether a person is competent, capable and available, it follows from case law that the person with a disability is to be assessed according to his or her capacity to carry out the essential functions of the position **after** reasonable accommodation is made.

The nature of accommodations

Possible accommodations can be of a material and organisational nature, including adjustment of workplaces and workstations, modification of work patterns or divisions of labour, or reduction of working hours.

¹²⁷ Supreme Court judgment of 23 June 2015, Case No. 25/2014. Printed in U2015.3301H.

¹²⁸ Supreme Court judgment of 11 August 2015, Case No. 104/2014. Printed in U2015.3827H.

¹²⁹ Eastern High Court judgment of 28 February 2020, Case No. BS-14028/2018-OLR.

A 2017 ruling from the Supreme Court illustrates that if an employee needs reduced working hours because of her disability, the employer must show a willingness to look into possible accommodations like flex-jobs, part-time jobs, etc.¹³⁰ The case dealt with a woman who had undergone serious brain surgery. After the surgery, she experienced abnormal tiredness and was on sick leave for about two months. Thereafter she was on partial sick leave for eight months. She wanted to go back to her full-time position in the bank where she had been employed for 18 years. However, the extreme fatigue meant that she could not work for more than 12 to 18 hours a week. The hospital had recommended a 'flex-job' with reduced working hours (for people with a reduced ability to work) but the employer rejected this. After this rejection, the claimant called in sick again. She was dismissed three weeks later and argued that the dismissal was discriminatory because of her disability. The Supreme Court stated that there were no prospects for the woman getting back to a full-time position in the bank as she was suffering from a 'diagnosed disabling fatigue'. The Supreme Court concluded that the impairment at the time of the dismissal constituted a disability and that the bank had been aware of the disability. The Supreme Court also stated that the bank had failed to fulfil its obligation to establish reasonable accommodation. This was based on the reasoning by the High Court that the employer had refused the claimant a 'flex-job' without examining the options more closely. In conclusion, the dismissal constituted discrimination based on disability.

In a 2016 ruling from the Supreme Court, the Court evaluated the extent of an employer's obligation to provide a part-time position as reasonable accommodation.¹³¹ The Court argued that for the employer to provide for a 20-hour/week position, the employer would have to divide a current full-time position into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of three employees would constitute a disproportionate burden to the employer and the employer was acquitted. The case illustrates that an employer is not obliged to divide a full-time position into two part-time positions if there are objective reasons (like the small size of the company/department) for a current position to be full-time. It also illustrates that employers are given a wide discretion when it comes to the expedient organisation of their operations and services.

A 2021 decision from the Board of Equal Treatment dealt with a complicated conflict between the needs of employees having different impairments.¹³² The case concerned a visually impaired employee who was using a guide dog. In connection with a relocation to another office, restrictions were imposed on the employee in the use of her guide dog. The employer introduced the restrictions referring to a colleague who was allergic to dogs. The employee found that the restrictions put her in a worse position than her colleagues. She ultimately chose to resign and complained that she was discriminated against because of disability. The Board found that when relocating the complainant, the employer had not sufficiently investigated whether there was an office without employees allergic to dogs. In that regard, the Board referred to the fact that the employer was a large workplace with a high number of employees having the same kind of educational background as the complainant. Thus, the employer had not established reasonable accommodation and the complainant was awarded a financial compensation equal to six months' full salary.

In 2018, the Board of Equal Treatment dealt with a complaint from a woman who had been dismissed from her job as a kitchen assistant in November 2016.¹³³ Because of surgery and treatment for breast cancer in 2011, she continued to experience severe pain in the left side of her body. It was particularly difficult for the kitchen assistant to lift heavy weights. When she started working in 2012 after the cancer treatment, the local municipality granted her a personal assistant for 12 hours every week. At the time of

¹³⁰ Supreme Court judgment of 22 November 2017, Case No. 305/2016. Appeal of Eastern High Court judgment of 30 June 2016, Case No. B-477-15. Printed in U.2018.853H.

¹³¹ Supreme Court judgment of 13 April 2016, Case No. HR-98/2015.

¹³² Board of Equal Treatment, Decision No. 9226 of 22 March 2021.

¹³³ Board of Equal Treatment, Decision No. 9736 of 30 October 2018.

dismissal, she had a personal assistant for four hours a week. Because of her pain, the complainant continued to sleep badly at night, and it was difficult for her to get to work in the early mornings. For several years, the complainant had performed her job by doing nightshifts. However, in 2016 the employer changed the employees' duty rosters due to a restructuring of the company. This meant that the kitchen assistant would have had to work at different hours during the day, including morning shifts. The complainant could not accept the changes and was dismissed from her position. Based on medical information and the fact that the complainant had been granted a personal assistant, the Board found that she had a disability covered by the anti-discrimination legislation. The Board also found that the employer had not looked into and evaluated the possibility of adjusting the duty roster according to the kitchen assistant's need for night shifts. The Board therefore concluded that the employer had not fulfilled its duty to provide reasonable accommodation. The kitchen assistant was awarded compensation amounting to nine months' salary.

Two 2018 cases for the Board of Equal Treatment dealt with young men who applied for plumbing apprenticeships.¹³⁴ In both cases, the applicants were deaf or hard of hearing and their applications were rejected. In the rejections, the employers referred to issues of communication and safety as well as the capacity of the respective company. In other words, the employers argued that it would be too difficult to have an employee who was deaf or hard of hearing. The Board stated that the employers had to prove that the duty to provide reasonable accommodations was fulfilled. The Board found in both cases that the employers had not looked into whether the young men would have been able to perform their duties as plumbing apprentices with reasonable accommodations, for example in the form of changed work patterns or division of tasks. Nor had the employers looked into the possibilities of obtaining help from public authorities. Thus, the employers had not proven that it would be a disproportionate burden to hire the young men. Both young men were awarded compensation of EUR 1 675 (DKK 12 500).

The accommodation must be reasonable

The obligation to provide accommodations does not apply if a disproportionate burden is thereby imposed upon the employer, meaning that the accommodation is not reasonable. The size of the employer's business is relevant when evaluating the reasonability of an accommodation. This is illustrated in a judgment from the Maritime and Commercial Court, which dealt with a colour-blind seaman.¹³⁵ According to Danish law, the seaman was not allowed to perform essential tasks on the ship he worked on because of his colour blindness and was therefore dismissed. The Court stated that the seaman had a disability and examined whether the employer should have established reasonable accommodation. The Court concluded that the only realistic option would be to hire an extra seaman during the two weeks when the seaman in question was at sea. As a small shipping company with few employees, such a measure would be unreasonable for the employer.

When evaluating whether the burden placed on the employer is disproportionate, consideration is also given to whether public authorities will cover some or all of the expense. There is no obligation on the employer to apply for public funding to cover such expense. But in a concrete discrimination case before the Board or the courts, it can be detrimental to the employer, if otherwise possible funding has not been applied for. This is illustrated in an older landmark ruling from the Maritime and Commercial Court.¹³⁶ The case dealt with an employee who had severe permanent backache. Due to his illness, the employer decided to terminate the training agreement. The employer had refused a proposal from the municipality concerning a personal assistant arrangement paid for by

¹³⁴ Board of Equal Treatment, Decision No. 9894 of 10 October 2018 and Decision No. 9896 of 10 October 2018.

¹³⁵ Maritime and Commercial Court judgment of 22 December 2014, Case No. F-2-13. Printed in U2015.1053S.

¹³⁶ Printed in U.2009.1948SH.

the municipality. The Court concluded that discrimination based on disability had taken place.

It is the employer who has to prove that accommodations impose a disproportionate burden. In concrete terms, the employer must look into and evaluate various possibilities of accommodation. In cases of dismissal, an employer must be able to document that steps have been taken to provide reasonable accommodation with regard to an employee's specific needs before the decision on dismissal was made. A 2017 ruling by the Eastern High Court dealt with a horse rider who was training to become a riding instructor.¹³⁷ Because of a back injury, she could not meet the requirements established by the Danish Riding Confederation. The question for the Court was whether a dispensation from the requirements constituted reasonable accommodation and thus whether the rejection of such dispensation by the Riding Confederation constituted indirect discrimination because of disability. The Court found that the Riding Confederation had proven that the tests and requirements to become an instructor were objectively justified by a legitimate aim, and that the means of achieving that aim were appropriate and necessary. The Court also found that the Confederation had proven that no accommodations could possibly help the rider to pass the relevant tests. In conclusion, discrimination based on disability had not taken place.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming reasonable accommodation is the same as for claiming protection from discrimination in general.

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In Denmark, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination.

If an employer denies or does not provide reasonable accommodation and if this is not justified, it will constitute indirect discrimination, cf. Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., which refers to Section 1(3) of the Act. The reasonable accommodation case is dealt with as a case of indirect discrimination meaning that the burden of proof will be shifted, cf. Section 7(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. The provision does not entail a total shift of burden of proof, but a divided burden of proof.

A victim of indirect discrimination can claim compensation from the employer according to Section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. There is no penalty.

e) Duties to provide reasonable accommodation in areas other than employment for persons with disabilities

In Denmark, there is no general legal duty to provide reasonable accommodation for persons with disabilities outside the area of employment, including vocational training. This is specifically stated in Section 3 of the Act on the Prohibition of Discrimination due to Disability. According to the preparatory work for this law, one of the reasons for not including a duty to provide reasonable accommodation was what was referred to as 'unpredictable socio-economic costs'.¹³⁸ However, a 2021 decision by the Board of Equal Treatment illustrates that the protection against indirect discrimination because of disability provides some protection against neutral requirements putting individuals with disabilities in a worse position than others when it comes to the provision of goods and

¹³⁷ Eastern High Court judgment of 23 August 2017, Case No. B-2441-16.

¹³⁸ Notat af 21. august 2017 fra Børne- og Socialministeriet og Finansministeriet om rimelig tilpasning af offentlige ydelser – Svar på Spørgsmål 1. See <https://www.ft.dk/samling/20171/lovforslag/L221/spm.htm>.

services.¹³⁹ The case is described in section 2.3 above and dealt with a complainant who is deaf and during his working hours received a telephone call to his private phone from an electricity company.

A 2019 case for the Board of Equal Treatment illustrates the possible effects of this lack of duty to provide reasonable accommodation outside the labour market. The case dealt with alleged discrimination in housing.¹⁴⁰ During night epilepsy seizures, a co-owner in a cooperative dwelling created noise to the nuisance of other resident co-owners. The complainant and his spouse received a demand letter from the property management stating that violations of the house rules could lead to expulsion from the association. According to the house rules, residents needed to maintain good peace and order and not carry out noisy behaviour. In the case, the complainant argued that he and his wife had been subject to discrimination because of disability when they received the demand letter. The Board underlined that the Act on the Prohibition of Discrimination due to Disability does not involve an obligation to provide either reasonable accommodation or accessibility. The complainant had severe frontal lobe epilepsy and the Board concluded that the complainant had a disability covered by the Act. The Board then found that the complainant had established facts that he had been put at a disadvantage compared to other residents in the dwelling. The Board, however, stated that the differential treatment because of disability was objectively justified by a legitimate aim to comply with the house rules on noise for the sake of the neighbours. The Board further assessed that it was necessary to make demands like the demand letter in order to achieve the purpose of the house rules on noise. The Board also argued that the means (the demand letter) were appropriate to achieving the desired goal of noise reduction. Therefore, the complaint was unsuccessful and the Act on the Prohibition of Discrimination due to Disability had not been violated.

Another case illustrating that the Act on the Prohibition of Discrimination due to Disability does not include a general reasonable accommodation duty is a decision by the Board of Equal Treatment from January 2021.¹⁴¹ The case dealt with a complainant who was visually impaired. He argued that he had been discriminated against by the Danish Appeals Permission Board when he filed an application to be granted leave to appeal to the Supreme Court. The case illustrates that the Appeals Permission Board was not obligated to go through documents with the complainant or to provide legal aid to the complainant before issuing a decision.

In December 2020, the Act on the Prohibition of Discrimination due to Disability was amended to include a legal duty to provide reasonable accommodation for young people and children with disabilities in public and private day-care institutions and schools.¹⁴² The new provision in Section 9(a) entered into force on 1 January 2021. It follows from Section 9(a) that in assessing what is considered reasonable, special attention must be paid to the effect of removing the barriers as well as to the costs associated with the accommodation, taking into account the resources of the individual day-care institution or school. This wording of the obligation to provide reasonable accommodation is more specific than the wording in the Act on the Prohibition of Discrimination in the Labour Market etc. Here it is stated in Section 2(a) that the obligation to provide accommodation does not apply if thereby it imposes a disproportionate burden on the employer. It is also emphasised in Section 2(a) that if this burden is sufficiently alleviated through public measures, the burden will not be considered disproportionate. Future case law will show whether the obligation to provide reasonable accommodation will be interpreted in new ways when it comes to day-care centres and schools.

¹³⁹ Board of Equal Treatment, Decision No. 9313 of 21 April 2021.

¹⁴⁰ Board of Equal Treatment, Decision No. 9756 of 8 August 2019.

¹⁴¹ Board of Equal Treatment, Decisions No. 9037 of 19 January 2021.

¹⁴² Act No. 2218 of 29 December 2020.

f) Duties to provide reasonable accommodation in respect of other grounds

In Denmark, there is no legal duty to provide reasonable accommodation in respect of other discrimination grounds in the public and private sector.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2), Directive 2000/43 and Recital 12 and Article 3(2), Directive 2000/78)

In Denmark, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. Undocumented migrants and those with irregular status are therefore protected by the Danish anti-discrimination laws.

3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)

a) Protection against discrimination

In Denmark, the personal scope of anti-discrimination law does not cover legal persons for the purpose of protection against discrimination. Only natural persons are protected against direct and indirect discrimination.

In the labour market, it follows from Sections 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc., which specifically mentions employees and job applicants. Outside the labour market, it follows from Section 3 of the Act on Equal Treatment and from Section 5 of the Act on the Prohibition of Discrimination due to Disability that individuals are protected against discrimination on account of their race, ethnic origin and disability.

b) Liability for discrimination

In Denmark, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

There is no distinction in Section 2 of the Act on the Prohibition of Discrimination in the Labour Market etc. between different kinds of employers when it comes to liability for discrimination in the labour market. According to the general Danish labour law concept of employers, both natural and legal persons may be liable for discrimination as employers. The liability covers an even broader group of legal persons than the traditional Danish labour market concept of employers. Thus, Section 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates that the prohibition of discrimination applies to anybody who runs vocational training and assigns employment, who issues decisions on access to self-employment and who issues decisions on membership and benefits provided by trade unions or employers' associations.

A 2019 decision by the Board of Equal Treatment illustrates the obligation to provide reasonable accommodation in access to employment and how that applies to anybody assigning employment.¹⁴³ In the case, the complainant was a job-seeking man who argued that he had experienced discrimination because of disability. The complainant had dyslexia and was therefore unable to use the computers at the local municipality job centre. The available computers did not have a dyslexia IT program installed. The job centre had told the complainant that he could use the computers at the library. There was, however, no agreement between the job centre and the library on the counselling of jobseekers. The Board found that the complainant's dyslexia constituted a disability covered by the Act. The Board argued that individuals with reading difficulties in the municipality in question did not have access to the relevant IT equipment for carrying out job searches. This group of individuals therefore had a disadvantage in comparison with other individuals regarding job seeking. The Board found that by referring the complainant to the library, the local

¹⁴³ Board of Equal Treatment, Decision No. 9872 of 25 September 2019.

municipality had not lifted the burden of proof that it had fulfilled its obligation to provide reasonable accommodation. The Board concluded that discrimination because of disability had taken place and the complainant was awarded compensation of EUR 2 675 (DKK 20 000).

Employers can be penalised for discriminatory job advertisements according to Section 8(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. (provision of penal law). It specifically mentions that legal persons are subject to a fine for such discriminatory job advertisements.

In a 2019 Board of Equal Treatment case, an engineering firm had advertised for an employee who was 'healthy and completely fit – and full of energy'.¹⁴⁴ The complainant was a woman who had been granted a flexible job from her municipality due to a chronic illness and who could work 20 hours a week. She complained to the Board that the advertisement was an expression of discrimination on the grounds of disability. The Board argued that the criteria in the advertisement by themselves would not preclude a person with a disability from being considered for the position. On that basis, the Board concluded that the wording of the advertisement was not sufficient for the advertisement to be deemed discriminatory due to disability. The woman was therefore unsuccessful in her complaint.

According to Section 2 of the Act on Ethnic Equal Treatment and Section 2 of the Act on the Prohibition of Discrimination due to Disability, there is no distinction between natural and legal persons when it comes to liability for discrimination outside the area of employment.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Denmark, the personal scope of national anti-discrimination law does not cover the private and public sector, including public bodies, for the purpose of protection against discrimination. Only natural persons in both the private and public sector are protected against discrimination.

b) Liability for discrimination

In Denmark, the personal scope of anti-discrimination law covers the private and public sector including public bodies for the purpose of liability for discrimination. Sections 2, 3 and 8 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates the liability of employers and anybody who runs vocational training and assigns employment etc. According to Section 2 of the Act on Ethnic Equal Treatment and Section 2 of the Act on the Prohibition of Discrimination due to Disability, there is no distinction between the private and public sector when it comes to liability for discrimination outside the area of employment.

3.2 Material scope

3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Denmark, national legislation prohibits discrimination in relation to conditions for access to employment, self-employment or occupation, including selection criteria, recruitment

¹⁴⁴ Board of Equal Treatment, Decision No. 9054 of 11 December 2019.

conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds and in both the private and public sector, as described in the directives.

Sections 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. cover all aspects of discrimination in relation to access to employment, to self-employment and to occupation, including selection criteria, recruitment conditions and promotion.

A 2019 decision by the Board of Equal Treatment dealt with the deputy chairman of a municipality's Disability Council who had posted a text and a picture on Facebook about the chairman of the Disability Council.¹⁴⁵ The chairman felt threatened by the posts and the organisation that had appointed the deputy chairman to the Council asked her to withdraw. On that basis, the deputy chairman argued that she had been discriminated against and harassed because of her disability and her political views. The Board found that the complaint dealt with an issue outside the labour market as the complainant only received subsistence and mileage allowance for meetings in the Disability Council. The Board therefore evaluated the case according to the Act on the Prohibition of Discrimination due to Disability. The Board concluded that according to its case law it was obvious that the claim by the complainant could not be upheld and the Board therefore dismissed the case.

In a 2018 case, the Board of Equal Treatment considered volunteerism for employment covered by the Act on the Prohibition of Discrimination in the Labour Market etc.¹⁴⁶ The case dealt with an unpaid volunteer who was a lieutenant in the Danish Home Guard. When he turned 65, he lost his rank as lieutenant and he became a soldier of the lowest rank. As a test case, the Board adjudicated the question of whether volunteerism was covered by the anti-discrimination law. The majority of the Board members referred to the circumstances of the case, including the fact that although unpaid, the lieutenant was obliged to perform a number of duties and that he had contributed 800 hours a year to the Danish Home Guard. On that basis, the Board concluded that the complaint was covered by the Act on the Prohibition of Discrimination in the Labour Market etc. In a previous and similar case, the Board had reached the opposite conclusion.¹⁴⁷

No case law has been found in which the Board considered whether volunteerism could fall under the scope of vocational training (see section 3.2.4 below).

A case before the Board of Equal Treatment illustrates that the area of self-employment and occupation is covered by the Act on the Prohibition of Discrimination in the Labour Market etc.¹⁴⁸ The complainant, who was a private lawyer born in 1960, had applied to the Ministry of Justice to be recognised as a Government-funded defence lawyer. He received a rejection and the ministry argued that it had rejected the application based on an individual assessment of a number of factors, including experience and qualifications, gender, geography and age. The complainant stated that he had been discriminated against on account of his age. According to the Board, the ministry could not prove that the prohibition of discrimination had not been violated. On that basis, the complainant received compensation of EUR 3 350 (DKK 25 000).

In general, the anti-discrimination legislation does not differentiate between the public and the private sector. However, according to the Administration of Justice Act, Danish citizenship can be a selection criterion in the public sector for the police, judges, etc. In the private sector, on the other hand, such a requirement may be considered indirect discrimination due to national or ethnic origin.

¹⁴⁵ Board of Equal Treatment, Decision No. 10011 of 28 October 2019.

¹⁴⁶ Board of Equal Treatment, Decision No. 9254 of 7 March 2018.

¹⁴⁷ Board of Equal Treatment, Decision No. 11063 of 12 August 2015.

¹⁴⁸ Board of Equal Treatment, Decision No. 9564 of 27 June 2018.

3.2.2 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In Denmark, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment. Thus, Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits public and private employers from exercising differential treatment in connection with recruitment, dismissal, transferral, promotion and work and pay conditions.¹⁴⁹

3.2.3 Access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In Denmark, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

Access to all types, and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, are covered in Section 3(1) and 3(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. This provision covers any training aiming at paid employment. Paid employment must be understood in a very broad sense.

In 2020, the DIHR published a report on the equal treatment of students with disabilities in vocational education and training schools.¹⁵⁰ Such schools are covered by the prohibition of discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. The report noted that the dropout rates for students with disabilities was far higher than their co-students without disabilities. The report also showed that more students with disabilities ended up with school-based practical training instead of an apprenticeship in a company.

In a 2019 case before the Board of Equal Treatment a man, born in 1968, applied for and was admitted to an educational summer programme.¹⁵¹ Among other things, the programme included a study trip abroad as well as company visits. When the man's age was subsequently noticed by the education programme provider, they refused to allow him to participate, citing an age limit of 30 years. The Board of Equal Treatment stated that the prohibition of discrimination also applies to anyone who carries out counselling and education activities and anyone who assigns employment, including education, training, job training, etc. aimed at employment. The Board argued that according to information from the provider, the programme included, among other things, a number of courses and activities that are relevant to students in their field of telecom studies. The summer programme ended with an exam and the students received diplomas for their participation. The Board therefore concluded that the study programme provider was covered by the prohibition of age discrimination in Section 3(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. The Board agreed that the complainant had been subject to direct discrimination because of age and awarded compensation of EUR 1 670 (DKK 12 500).

Section 2(2) of the Act on Ethnic Equal Treatment and Section 2(2) of the Act on the Prohibition against Discrimination due to Disability state that the Acts shall not apply to areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc.

¹⁴⁹ Art. 2(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states: 'Discrimination shall be deemed to have occurred in relation to payment conditions if an equal salary is not offered for the same job or for jobs which are regarded as having the same value.'

¹⁵⁰ DIHR (2020) *Ligebehandling af elever med handicap på erhvervsskoler*, (Equal treatment of students with disabilities in vocational education and training schools).

¹⁵¹ Board of Equal Treatment, Decision No. 9319 of 13 March 2019.

Education and training outside the labour market – not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. – is covered by Section 2(1) of the Act on Ethnic Equal Treatment and by Section 2(1) of the Act on the Prohibition against Discrimination due to Disability.

In a case of race discrimination at a technical school,¹⁵² it was decided by a city court and confirmed by the Eastern High Court that this situation was not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. but rather by the Act on Ethnic Equal Treatment prohibiting unequal treatment in goods and services, education etc. By considering a technical school as education covered by the Act on Ethnic Equal Treatment, race discrimination was covered. However, an implementation problem exists in relation to the other protected grounds: by making this decision, the High Court excluded students at technical schools from protection against discrimination due to age, religion and belief (as no provisions against discrimination on these grounds exist in the field of goods and services, education, etc.). The case should have been adjudicated according to the Act on the Prohibition of Discrimination in the Labour Market etc. and thus appears not to comply with national law. No subsequent rulings on this topic have been found.

3.2.4 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Denmark, national legislation prohibits discrimination in relation to membership of, and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment, cf. Section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc.

In a concrete case, the Board of Equal Treatment dealt with the question of age discrimination in the regulations of a labour union.¹⁵³ The complainant in the case had been a sector president in the labour union. She was unable to run for re-election at the congress because of regulations stipulating that candidates for the post of sector president had to be under the age of 60. The Board referred to Section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc., which deals with involvement in workers' organisations. The Board also argued that the post of sector president in reality constituted 'occupation' in the words of Article 3(1)(a) of the Directive. On that basis, the Board concluded that the regulations of the labour union violated the prohibition of age discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the complainant was awarded compensation of EUR 3 350 (DKK 25 000).

3.2.5 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. This protection only extends to race and ethnic origin.

According to Section 50 of the Danish Health Act, all residents with a right to free treatment in hospitals, by general practitioners or by specialists, have a right to an interpreter when a doctor finds that an interpreter is necessary to explain the treatment. With the primary aim of further incentivising foreigners to learn Danish, new rules regarding interpreting fees came into force on 1 July 2018.¹⁵⁴ According to Section 50(2) of the Health Act,

¹⁵² Eastern High Court judgment of 27 June 2006, Case No. B-4028-05.

¹⁵³ Board of Equal Treatment, Decision No. 10073 of 22 June 2016.

¹⁵⁴ Consolidated Act No. 210 of 27 January 2022 (*Sundhedsloven*). Regulation No. 855 of 23 June 2018 (*Bekendtgørelse om tolkebistand efter sundhedsloven*). The rules are described in the official periodic report

patients who have a need for an interpreter and who have lived in Denmark for more than three years are charged a fee for the interpreting service. A report from DIHR and the Danish Medical Association examines the results of a survey in which more than 600 doctors account for their experiences with the interpreter services charge and its implications after one year in force.¹⁵⁵ The report shows that the fee has resulted in an increased use of relatives as interpreters, and that patients who do not speak Danish well may not receive the right healthcare. The rules may therefore cause indirect discrimination due to ethnic origin or race. The rules do not apply to people who use sign language interpretation.

In its 2021 parallel report to the UN Committee on the Elimination of Racial Discrimination (CERD), the DIHR noted that hatred towards minorities was exacerbated during the COVID-19 pandemic.¹⁵⁶ Ethnic minorities had been particularly exposed to hatred at the beginning of the COVID-19 crisis in Denmark. Experiences ranged from people shouting 'go home', spitting and threatening behaviour through derogatory words about Asians and accusations about being 'disease spreaders' to what people from ethnic minorities experienced as a general distancing by people in the public sphere.

The DIHR published a report in 2020 on ethnicity and the use of coercion in psychiatry.¹⁵⁷ The report shows that a patient of non-Western origin has about a 40 % increased risk of being subjected to coercion in contrast to a patient of Danish origin. This has been a trend throughout the period from 2005-2018. The report also shows that a patient of non-Western origin was, on average, 45 % more likely to experience fixation and physical coercion than a patient of Danish origin in the period from January 2017 to October 2018. Based on the analyses, the DIHR made a number of recommendations, including enhanced data collection and improved multilingual competencies among health professionals.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including social protection.

A 2019 decision by the Board of Equal Treatment dealt with a man with dyslexia who had been denied financial aid to purchase a computer, printer and internet connection under the Danish social legislation.¹⁵⁸ The complainant believed that the refusal constituted discrimination because of disability. In the case, the Board made reference to two 2018 decisions (Decision No. 9040 of 6 December 2018 and Decision No. 9041 of 6 December 2018). In these decisions, the Board had concluded that the Act on the Prohibition of Discrimination due to Disability does not cover or encompass the material content of decisions by public authorities or legislation enacted by the Parliament. In its 2019 decision, the Board argued that the complaint about the rejection of financial aid dealt with the application and interpretation of the Act on Social Services and the Order of Assistive Technology. Consequently, and in accordance with the two 2018 decisions, the complaint fell outside the scope of the Act on the Prohibition of Discrimination due to Disability. The Board therefore dismissed the complaint.

The discrimination grounds of religion/belief and age are not covered by the discrimination laws. However, discrimination in social protection is prohibited by the general principle of equality in administrative law.

from Denmark to the CERD-Committee covering the period from July 2013 to December 2018. See UN document CERD/C/DNK/22-24 of 7 February 2019, paragraphs 185-190.

¹⁵⁵ DIHR and the Danish Medical Association (Lægeforeningen) (2019), *Egenbetaling for tolkebistand – lægers erfaring med ordningen* (December 2019). See: <https://menneskeret.dk/udgivelser/egenbetaling-tolkebistand-laegers-erfaring-ordningen>.

¹⁵⁶ DIHR (2021) *Parallel Report Denmark to the UN Committee on the Elimination of Racial Discrimination (CERD)*, p. 24.

¹⁵⁷ DIHR (2020), *Etnicitet og tvang i psykiatrien* (Ethnicity and coercion in psychiatry). See: <https://menneskeret.dk/udgivelser/etnicitet-tvang-psykiatrien>.

¹⁵⁸ Board of Equal Treatment, Decision No. 9875 of 25 September 2019.

a) Article 3(3) exception (Directive 2000/78)

The exception in Article 3(3) of Directive 2000/78 is not directly repeated or implemented in the Act on the Prohibition of Discrimination in the Labour Market etc. However, Section 43 of the Act on Unemployment states that a member of an unemployment insurance fund will automatically stop being a member when he or she becomes eligible for the state pension – for most people at the age of 65.¹⁵⁹

In a concrete case, the Supreme Court dealt with the question of whether the Danish Act on Unemployment Insurance violated the Employment Equality Directive (2000/78/EC).¹⁶⁰ In the case, A was informed by his unemployment insurance fund that his membership would be terminated because of the fact that he turned 65 and would be eligible for the state pension. A was still working at that time and did not want to retire. One year later, he resigned from his job and declared himself unemployed as well as available. He did not take the state pension and requested unemployment benefit instead. The unemployment insurance fund declined his request, referring to Section 43 of the Act on Unemployment Insurance which states that a member of an unemployment insurance fund will automatically stop being a member at the age of 65. A sued the Ministry of Employment, claiming that Section 43 of the Act on Unemployment Insurance violated Article 2 of the Employment Equality Directive and the general EU principle on prohibition of age discrimination. The Supreme Court concluded that the Danish system of unemployment benefit should be regarded as a public scheme of social protection. The Court stressed the fact that the unemployment benefit scheme works independently of employers and that the benefit cannot be compared to a salary. According to the Court, the payment of unemployment benefit was therefore covered by the exception clause in Article 3(3) of the Employment Equality Directive. In conclusion, the Court stated that Section 43 of the Danish Act on Unemployment Insurance did not violate the Employment Equality Directive.

3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive, by Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including social advantages.

Section 1 of the Act on Equality between Men and Women prohibits of discrimination based on 'sexual orientation, gender identity, gender expression or gender characteristics' outside the labour market.¹⁶¹

Complementary to this protection in civil law is Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. of 1971. According to this Act, penalties are warranted for differential treatment of persons on the grounds of race, skin colour, national or ethnic background, belief, sexual orientation, gender identity, gender expression or gender characteristics in a number of areas of life, including social advantages. Any public or private leisure facilities, etc. open to the public, whether on a commercial or non-profit basis, must be offered on equal terms. According to the Act on the Prohibition of Discrimination due to Race etc. it is also an offence to refuse access on the same terms as others to social advantages or to social centres, or similar facilities open to the public, if the refusal is based on one of the protected grounds.

¹⁵⁹ Consolidated Act No. 234 of 10 February 2022 (*Lov om Arbejdsløshedsforsikring*).

¹⁶⁰ Supreme Court judgment of 19 January 2015, Case No. 308/2012. Printed in U2015.1303H.

¹⁶¹ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

As described, there is a certain overlap between the protection against discrimination offered by civil and criminal law – but not on all discrimination grounds. In theory, criminal law can make up for the fact that age and religion are not included in the protection offered by civil law. However, criminal law only protects against direct discrimination. In practice, no indictments or case law have been found regarding such discrimination. This means that it can be questioned whether the protection against discrimination due to age and religion is effective in relation to social advantages. It is not clear to the author of this report why the protection is not being invoked.

3.2.7 Education (Article 3(1)(g) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin. The protection against discrimination within education covers protection against bullying constituting harassment due to race and ethnic origin.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. of 1971 prohibits discrimination on account of race, skin colour, national or ethnic origin, belief and sexual orientation, gender identity, gender expression or gender characteristics. Both criminal and civil law apply to all aspects of education, including university education, and all types of schools.

All individuals within Danish jurisdiction are protected from discrimination according to the legislation above, regardless of their status, whether they have a permanent or time-limited residence permit or have status as undocumented immigrants, and irrespective of citizenship and nationality.

There is no access to Danish school for individuals who are not legal residents in Denmark. This means that undocumented migrants do not have access to education on an equal footing with other migrants and Danish citizens. No data has been found on whether this has led to direct or indirect discrimination based on race or ethnic origin in real life.

School segregation based on ethnic origin has been reported as a problem in Denmark.¹⁶² Hence, the European Commission against Racism and Intolerance (ECRI) states in its fifth report on Denmark that an education gap persists between ethnic Danes and ethnic minorities. Only 62 % of pupils belonging to ethnic minorities finished school with adequate skills for further education. Among ethnic Danes, the percentage was 87 %.¹⁶³

A report from the DIHR examines the status of segregation in Danish primary and lower secondary schools, focusing particularly on students from marginalised residential areas.¹⁶⁴ According to the DIHR, segregation means that students are distributed between schools based on the students' socioeconomic and ethnic background. The report shows neighbouring schools where one school has a high percentage of students from affluent homes, whereas the other school has a majority of students from homes with very limited socioeconomic resources. This uneven distribution of students between schools is also seen when the DIHR compares the ethnic backgrounds of students.

On 26 November 2019, the DIHR filed a complaint with the Board of Equal Treatment against the municipality of Herning, claiming discrimination against primary school children with an ethnic minority background. The municipality had established a special section in the primary school of Herningsholm almost exclusively for children with an ethnic minority

¹⁶² Council of Europe (2017), ECRI Report on Denmark (fifth monitoring cycle), 16 May 2017.

¹⁶³ Council of Europe (2017), *ECRI Report on Denmark (fifth monitoring cycle)*, 16 May 2017, para. 80.

¹⁶⁴ Søndergaard, J., Thomsen, T. and Witt, C. (2021) *Socialt og etnisk opdelte skoler – om skoler for børn i udsatte boligområder*, (Socially and ethnically divided schools – on schools for children in vulnerable residential areas), DIHR.

background (63 out of 64 children in the special section were bilingual). Children from the residential area of Holtberg starting in kindergarten in August 2019 had to start in the Holtberg section and children in 1st to 3rd grade from Holtberg were moved from their existing classes to the Holtberg section. On 2 March 2020, the DIHR published a statement that it had agreed with the municipality of Herning on an out-of-court settlement concluding the case before the Board of Equal Treatment.¹⁶⁵ In the settlement, the municipality of Herning acknowledged that the decision by the city council – although not intended – constituted discrimination based on ethnic origin because of the fact that the basis for the decision was the ethnic origin of the children and because the decision resulted in the segregation of children with an ethnic minority background. The statement on the out-of-court settlement does not detail efforts to close down the Holtberg section of the public school in Herningsholm and it does not cover efforts to combat future ethnic segregation in the city of Herning. Nevertheless, the out-of-court settlement illustrates that the segregation of ethnic minority children in special sections of a primary school constitutes stigmatisation, even though special resources are provided to this section. It also illustrates that segregation by itself constitutes discrimination against children with ethnic minority backgrounds.

In another case, the DIHR submitted a complaint to the Board of Equal Treatment, claiming discrimination on account of ethnic origin at the Langkær upper secondary school. In September 2016, the school had divided its new students into three classes with a 50 % limit of non-ethnic Danes in each, while the other four classes were comprised solely of pupils from ethnic minorities. On 15 March 2017, the DIHR published a statement that it had agreed with the Langkær school on an out-of-court settlement concluding the case before the Board of Equal Treatment. In the statement, the DIHR expressed the following: 'You cannot divide classes according to ethnicity as the Langkær school has done. That is illegal discrimination, no matter what the underlying intent has been.' In the statement, the Langkær school expressed the following: 'Langkær school agrees that it cannot use names of pupils as a criterion for dividing its classes in the future. We have had no intention to discriminate against anybody and we don't think that anybody has been put in a bad position compared to others by this practice. However, because of the complaint from the Institute for Human Rights, we note that it constitutes discrimination and we will therefore not reiterate this procedure in the future.'¹⁶⁶ The statement from the DIHR and the Langkær school does not reveal the actual settlement and it does not describe efforts to combat future ethnic segregation in the Langkær school.

The practice in relation to pupils with disabilities gives rise to problems. The level of education among persons with disabilities is declining in Denmark. In other words, the number of persons with disabilities who have completed a vocational education or a higher education is declining. This, among other problems, gives rise to increasing challenges on the labour market for persons with disabilities.¹⁶⁷

A 2021 report states that only two out of three 18-year-olds with a psychiatric diagnosis or a disability are in school or youth education, compared to 86 % of 18-year-olds overall.¹⁶⁸ Many young people with a diagnosis or disability end up on public benefits and have difficulty finding suitable education.

A 2019 report states that almost two out of three students with disabilities find that they do not achieve the same academic results from their higher education as their fellow

¹⁶⁵ Danish Institute for Human Rights, Description of the out-of-court settlement available at: <https://menneskeret.dk/nyheder/kommune-anerkender-opdeling-skole-diskrimination>.

¹⁶⁶ Danish Institute for Human Rights (DIHR), (2017) *Forlig i sag om fordeling af elever på grund af etnicitet* (statement regarding an out-of-court settlement between the DIHR and Langkaer school), 15 March 2017, available at: <https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet>.

¹⁶⁷ DIHR (April 2019) *Handicap – Status 2019*, p. 27.

¹⁶⁸ Pihl, M. and Salmon, R. (2021) *Unge med diagnoser har svær start på uddannelseslivet*, (Young people with a diagnosis have a difficult start to educational life), Arbejderbevægelsens erhvervsråd (Economic Council of the Labour Movement).

students.¹⁶⁹ The study also shows that almost half of all students with disabilities drop out of their higher education.

On 1 July 2018, it became illegal to discriminate on account of disability within education, cf. Section 2(1) of the Act on the Prohibition of Discrimination due to Disability. The provision prohibits discrimination on account of disability in all public and private activities in all areas of society, including education. In December 2020, the Act on the Prohibition of Discrimination due to Disability was amended to include a legal duty to provide reasonable accommodation for young people and children with disabilities in public and private day-care institutions and schools.¹⁷⁰

a) Trends and patterns regarding Roma pupils

In Denmark, there are no specific trends or patterns (whether legal or societal) in education regarding Roma pupils, such as segregation. The Roma population in Denmark consists of around 2 000 individuals and no information has been found about Roma and education. There are restrictions on data collection based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about Roma pupils in Denmark, including lack of knowledge about the experience of discrimination.

The municipality of Elsinore set up segregated classes for Roma children in 2002. The official explanation for these segregated classes was the need to make sure that the children would show up at school in the morning. This was not believed to be an objective justification by the Council of Europe Commissioner for Human Rights¹⁷¹ and the Complaints Committee for Ethnic Equal Treatment,¹⁷² which consequently stated that the segregation of Roma children was not in accordance with the law. In 2006, the municipality decided to cease the Roma classes and allow the children back into the ordinary classes in state schools in Elsinore. No recent cases regarding Roma have been reported in Denmark.

3.2.8 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the grounds of race, colour of skin, national or ethnic background, belief and sexual orientation, gender identity, gender expression or gender characteristics in a number of areas of life, including the supply of goods and services. The discrimination grounds of age and disability are not covered. Any public or private supply of goods and services open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

It is therefore a criminal offence to refuse a person admittance on the same terms as others to a place, restaurant, shop, or the like that is open to the public, if the refusal is based on one of the grounds protected by the Act on the Prohibition of Discrimination due to Race etc. In practice, the Act has been applied in few cases, although some doormen have been fined for denying access to restaurants, nightclubs, etc.

¹⁶⁹ Perspektiv (2019), *Nødvendigt for nogle – godt for alle. En undersøgelse af vilkår for studerende med funktionsnedsættelser på lange og mellemlange videregående uddannelser*.

¹⁷⁰ Act No. 2218 of 29 December 2020.

¹⁷¹ Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

¹⁷² Decisions of 5 December 2005, 730.7.

Civil legislation prohibits discrimination based on 'sexual orientation, gender identity, gender expression or gender characteristics' outside the labour market, cf. Section 1 of the Act on Equality between Men and Women.¹⁷³

Furthermore, civil legislation prohibits discrimination in access to and supply of goods and services, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

A Board of Equal Treatment case dealt with a man with a Turkish-sounding name who wanted to buy tickets to a football game in Germany between a Turkish and a German football team.¹⁷⁴ A company that had offered trips with tickets for football games declined to sell the trip and the tickets to the man. The company argued that they could not sell tickets to people with Turkish-sounding names because such ticket holders would be rejected at the stadium. The man argued that he had been discriminated against because of his ethnic origin in violation of Section 3 of the Act on Ethnic Equal Treatment. The Board emphasised that the company had directly stated that they could not sell tickets to people with Turkish-sounding names and concluded that the man had been subject to direct discrimination because of his ethnic origin. He was awarded a compensation EUR 670 (DKK 5 000). An older decision from the Board of Equal Treatment was legally challenged for years and reached its final decision in a ruling by the Western High Court in June 2017.¹⁷⁵ The case dealt with Mr. Ismar Huskic who was born in Bosnia and Herzegovina in 1975 and had lived in Denmark since 1993. He acquired Danish nationality in 2000. Mr. Huskic and his partner applied for a loan to purchase a used car. For the purpose of processing the loan application, the car dealer emailed the names, address, national identity numbers and copies of the applicants' driving licences to the credit institution, Jyske Finans. The driving licence of Mr. Huskic indicated that he was born in Bosnia and Herzegovina, but it did not state his nationality. In accordance with internal procedural rules, Jyske Finans requested additional proof of Mr. Huskic's identity in the form of a copy of his passport or residence permit. Mr. Huskic found the practice to be discriminatory. The Board of Equal Treatment ruled that Jyske Finans' procedural rules constituted indirect discrimination based on ethnic origin.¹⁷⁶ The case was taken to the civil courts, and the city court of Viborg concluded that the rules amounted to direct discrimination. The ruling was appealed to the Western High Court, which requested a preliminary ruling from the CJEU regarding the meaning of direct and indirect discrimination because of ethnic origin. In the ruling, the CJEU stated that the practice of requesting additional proof of identity for individuals born outside EU or EFTA countries was neither directly nor indirectly connected with the ethnic origin of the person applying for a loan.¹⁷⁷ Therefore, the practice could not be said to constitute direct or indirect discrimination based on ethnic origin within the meaning of the Race Directive. On that basis, the Board of Equal Treatment withdrew its claim against Jyske Finans. Accordingly, in June 2017, the Western High Court acquitted Jyske Finans.

Discrimination due to ethnic origin in access to nightclubs and discotheques has previously only been dealt with by the Board of Equal Treatment and city courts. The first High Court judgment on this issue was passed in 2018.¹⁷⁸ The case dealt with two young men of ethnic minority background. They were refused access to both a nightclub and a café. They received no explanation for the refusal and they could observe that several individuals of Danish origin were admitted to the nightclub and the café. For the courts, the nightclub and the café argued that the young men had been drunk. An independent witness explained for the court that she did not experience the two men to be drunk. According to the city court and the High Court, the nightclub and the café had not documented that the

¹⁷³ Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

¹⁷⁴ Board of Equal Treatment, Decision No. 9104 of 30 January 2019.

¹⁷⁵ Western High Court judgment of 30 June 2017, Case No. B-1750-13. Printed in U.2017.3119V.

¹⁷⁶ Board of Equal Treatment, Decision No. 10074 of 10 December 2010.

¹⁷⁷ Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278.

¹⁷⁸ Eastern High Court judgment of 17 September 2018, Case No. B-1860-17.

men were drunk. The High Court upheld the ruling of the city court and thus concluded that the two men had experienced discrimination because of ethnic origin in violation of Section 3 of the Act on Ethnic Equal Treatment. The two men were awarded compensation of EUR 670 (DKK 5 000). The ruling seems to illustrate that nightclubs and discotheques need to provide documentation when they reject guests with an ethnic minority background.

The Board of Equal Treatment has adjudicated a number of cases relating to discotheques and bars that deal with alleged ethnic discrimination in relation to access. In 2021, only one complaint dealt with ethnic discrimination in relation to access to a bar and the complaint was dismissed due to passivity from the complainant.¹⁷⁹ In the case, the Board concluded that based on the time that elapsed from the rejection at the bar in November 2019 to filing the complaint in February 2021, the complainant had shown such inaction that he had lost his right to make a possible claim.

In 2020, the Board concluded 17 cases relating to discotheques, bars and restaurants. In 16 out of 17 cases, the Board found that discrimination had taken place and the complainant was granted compensation of EUR 670 (DKK 5 000).

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including access to and supply of goods and services.

Before the adoption of the Act on the Prohibition of Discrimination due to Disability in 2018, there was no protection against discrimination outside the labour market for persons with disabilities in Denmark. Now persons with disabilities are able to access public goods and services on a more equal basis and can get redress from discrimination. However, the act does not include a general reasonable accommodation duty. The following three 2019 test cases illustrate the significance of a legal protection against disability discrimination outside the labour market.

The first case dealt with a family who were denied access to a restaurant. A couple came to a restaurant with their three children, including their two-year-old son. The son had Menke's syndrome and was in a baby carriage that served as a wheelchair. The family was rejected because the restaurant did not allow baby carriages due to fire safety and because escape routes should be free. There were few guests in the restaurant at the time. The Board concluded that the restaurant had not lifted the burden of proof that it was necessary to reject the family in order to achieve the purpose of fire safety and security. The Board concluded that indirect discrimination because of disability had taken place and the complainant was awarded compensation of EUR 670 (DKK 5 000).¹⁸⁰

The second case dealt with a complainant who had a guide dog. He was denied access to a café. The complainant had a visual impairment and was rejected on arrival at the café on the grounds that the café did not allow dogs inside for the sake of guests with possible allergies. It was clear that the dog was a guide dog. The Board found that the café had not, by reference to the possible allergies of other guests, lifted the burden of proof that the rejection of the man with a guide dog was objectively justified by an objective purpose. The Board concluded that indirect discrimination due to disability had taken place and the complainant was awarded compensation of EUR 670 (DKK 5 000).¹⁸¹

The third case dealt with a complainant who approached an ultrasound and x-ray clinic to book an appointment. The complainant, who was blind, arrived with his guide dog. He was informed that the clinic did not allow dogs in the examination room because of hygiene and other patients' possible allergies. The Board found that the indirect discrimination due

¹⁷⁹ Board of Equal Treatment, Decision No. 9803 of 8 September 2021.

¹⁸⁰ Board of Equal Treatment, Decision No. 9468 of 23 May 2019.

¹⁸¹ Board of Equal Treatment, Decision No. 9470 of 23 May 2019.

to disability was objectively justified because of the purpose of ensuring allergy-free and hygienic examination rooms in the clinic. The next question for the Board was whether it was necessary to refuse the complainant's access with his guide dog in order to ensure an allergy-free and hygienic examination. The members of the Board did not agree on that question. Four board members considered that there was such ambiguity about the course of events and the detailed content of the conversations that a decision on whether there had been illegal discrimination because of disability required evidence in the form of oral witness statements. Such evidence cannot be submitted to the Board, but must be done by the courts. These members therefore voted in favour of the Board not being able to deal with the complaint. One board member assessed that the clinic had not lifted the burden of proof that it was necessary to limit the guide dog's access to the examination room in order to achieve the purpose of ensuring an allergy-free and hygienic examination room. This member therefore voted in favour of the complainant. In accordance with the majority's assessment, the Board dismissed the complaint.¹⁸²

In a 2020 decision by the Board of Equal Treatment, the case dealt with a complainant who had Asperger's disorder and who had been granted a service dog by his local municipality.¹⁸³ In the case, the complainant had called a restaurant to make a reservation and had been told that he could not bring his service dog. The employee thought that only guide dogs for the visually impaired were exempted from the prohibition to bring dogs into the restaurant. The Board found that the complainant had experienced discrimination based on his disability. In its decision, the Board underlined the responsibility of the employer to instruct all employees that persons with disabilities are protected against discrimination and are allowed to bring guide dogs and service dogs to the restaurant.

A 2021 decision by the Board of Equal Treatment dealt with a complainant who was mobility impaired due to sequelae from polio.¹⁸⁴ The complainant had paralysis in her legs and depended on her walker and her electric scooter. The complainant and her travel companion had reserved a bus trip to France. A few weeks later, they informed the travel agent by email that the complainant had a disability and therefore would bring a walker and a foldable electric scooter on the reserved bus trip. In the email, they explained that the travel companion could handle the foldable scooter without the assistance of the bus driver. The travel agent answered that it was not allowed to bring an electric scooter on the journey because travelers must be 100 % self-reliant, in generally good physical shape and generally well-walking. The Board held that the general requirement to be 100 % self-reliant and thus the differential treatment of the woman was justified by the objective aim to show regard to the fact that a large group was traveling together. The Board, however, found that the travel agency had not lifted the burden of proof that in the case in question it was necessary to maintain the requirement towards the complainant. On that basis, the Board concluded that the woman was discriminated against due to her disability.

a) Distinction between goods and services available publicly or privately

In Denmark, national law distinguishes between goods and services that are available to the public (e.g. in shops, restaurants and banks) and those that are only available privately (e.g. those restricted to members of a private association). It follows from Section 2(1) of the Act on Ethnic Equal Treatment, which states that goods and services available to the public are covered by the provision. The term 'publicly available' in the law must be interpreted broadly. Goods and services made available exclusively for family members or close acquaintances, for example, fall outside the law. In the area of disability, the distinction follows from Section 2(3) of the Act on the Prohibition of Discrimination due to Disability, which specifically exempts execution of activities of a purely private nature from the scope of the Act.

¹⁸² Board of Equal Treatment, Decision No. 9467 of 23 May 2019.

¹⁸³ Board of Equal Treatment, Decision No. 9351 of 14 May 2020.

¹⁸⁴ Board of Equal treatment, Decision No. 9434 of 28 May 2021.

3.2.9 Housing (Article 3(1)(h) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. It follows from Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the grounds of race, colour of skin, national or ethnic background, belief and sexual orientation, gender identity, gender expression or gender characteristics in a number of areas of life, including housing. The discrimination grounds of age and disability are not covered. Any public or private housing open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

Section 2(1) of the Act on Ethnic Equal Treatment applies to public housing including social housing as well as private housing companies that rent houses, and real estate companies. The term 'available to the public' should be interpreted in a broad sense, but the Act does not apply to private persons letting out or sub-letting a room in their own home.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including housing.

A 2021 decision by the Board of Equal Treatment illustrate the prohibition of discrimination due to disability and the lack of obligation to provide reasonable accommodation outside the labour market.¹⁸⁵ The case dealt with a resident of a public housing association who claimed that he had been discriminated against because the housing association had declined to allocate him a disability parking space. The resident, who was partially paralysed, had applied for a permanent parking space for his disability car. The housing association refused his application on the ground that there were only a limited number of parking spaces available for the residents of the housing association. The Board noted that the Act on the Prohibition of Discrimination due to Disability does not involve an obligation to establish reasonable accommodation. The Board therefore concluded that the housing association was not obligated to establish a disabled parking space for the resident or to allocate him a permanent parking space.

In 2016, the Board of Equal Treatment dealt with a tenant who claimed that his landlord had harassed him.¹⁸⁶ The tenant had an African ethnicity. The landlord told him that he had been of the belief that the tenant was an 'extremist with a turban'. He had also referred to the tenant's temporary lodger as a 'black negro'. The Board found that the tenant had proven facts that gave rise to the suspicion that the landlord had exposed the tenant to harassment constituting discrimination because of ethnic origin. The landlord had failed to prove that harassment because of ethnic origin had not taken place. The tenant was therefore awarded compensation of EUR 670 (DKK 5 000).

In relation to public housing, discrimination is, moreover, prohibited by the general principle of equality in administrative law.

As of 1 January 2017, 24.7 % of people living in public housing were immigrants from non-Western countries and their descendants.¹⁸⁷ Various initiatives have been introduced to avoid segregation and promote integration. As a rule, public housing is assigned according to a seniority-based waiting list, but a number of exceptions apply. This means that public housing can use criteria other than length of time on a waiting list. The intention is to

¹⁸⁵ Board of Equal Treatment, Decision No. 9038 of 19 January 2021.

¹⁸⁶ Board of Equal Treatment, Decision No. 10087 of 10 August 2016.

¹⁸⁷ Official periodic report from Denmark to the CERD Committee covering the period from July 2013 to December 2018. See UN document CERD/C/DNK/22-24 of 7 February 2019, para. 166.

attract applicants from a broader segment of the population to so-called troubled areas with high numbers of residents outside the labour market.

Based on the previous Government's strategy called 'A Denmark without Parallel Societies – No Ghettos by 2030',¹⁸⁸ legislation on so-called ghettos entered into force in 2019. The legislation defines 'marginalised residential areas' according to a number of criteria. To be categorised as a 'marginalised residential area' at least two out of the following criteria must be met: low level of income, high number of individuals with criminal convictions, low level of education and high unemployment rate. A 'ghetto' is furthermore defined as a 'marginalised residential area' where the percentage of immigrants and descendants from third countries exceeds 50 %. A practical consequence of being categorised as a ghetto is that some apartment buildings in the so-called ghettos will be torn down. Residents of the demolished buildings will be offered alternative accommodation.

In 2021, the legislation was amended and the term 'ghetto' was replaced by the term 'parallel society' but the consequences are the same as being categorised as a 'ghetto'.¹⁸⁹ Furthermore, another and new category of housing area was introduced by the term 'preventive area' where the goal is to prevent the area from becoming a 'parallel society'.¹⁹⁰ This area is categorised as a residential area where the percentage of immigrants and descendants from third countries exceeds 30 % and at least two out of the following criteria must be met: low level of income, high number of individuals with criminal convictions, low level of education and high unemployment rate. A practical consequence of being categorised as a 'preventive area' is the application of stricter rental requirements, which will restrict access to housing for ethnic minorities. The DIHR has described how the toughened requirements put marginalised groups, including ethnic minorities, in a poorer position than others, when it comes to access to housing.¹⁹¹

To provide an overview of the 'parallel society initiatives', legislation outside the housing area will be included in the following brief description of the various acts:

- Mandatory education for any child over the age of one who lives in a marginalised residential area and who is not enrolled in a day care centre. The 25 hours a week training must include education in the Danish language as well as Danish traditions, norms and values.¹⁹²
- Distribution of young children in day care centres. The aim is to make sure that not more than 30 % of children in a day care centre come from a marginalised residential area.¹⁹³
- Act that makes it illegal for housing associations in marginalised residential areas to assign housing to applicants who receive public benefits.¹⁹⁴ The same prohibition applies if a spouse or partner of the housing applicant receives public benefits.
- Act that gives the police the authority to designate a demarcated geographical area as a strict penalty zone. See below for the consequences of an area being designated as a strict penalty zone. For a police commissioner to designate a strict penalty zone, the area must be experiencing an extraordinary crime situation that creates insecurity for people living in the area. This will often be the case in areas that the

¹⁸⁸ See <https://www.regeringen.dk/nyheder/2018/ghettoudspil/>.

¹⁸⁹ Act No. 2157 of 27 November 2021 (entering into force on 30 November 2021).

¹⁹⁰ Act No. 2157 of 27 November 2021 (entering into force on 30 November 2021).

¹⁹¹ DIHR (2021) 'Statement Hearing on "preventive areas"' (18 August 2021): <https://menneskeret.dk/hoeringssvar/indfoerelse-forebyggelsesomraader-ny-terminologi-aftalt-anvisningsret-private-lejemaal>.

¹⁹² Consolidated Act No. 1912 of 6 October 2021 with later amendments (*Dagtilbudsloven*), Section 44(a).

¹⁹³ Consolidated Act No. 1912 of 6 October 2021 with later amendments (*Dagtilbudsloven*), Section 26(a).

¹⁹⁴ Consolidated Act No. 1877 of 27 September 2021 with later amendments (*Lov om almene boliger*), Section 51(c).

police have designated as 'particularly vulnerable residential areas' (SUB areas). Examples include areas where maladjusted youth dominate an area and create insecurity with threats, violence, vandalism and drug dealing. Another example mentioned in the preparatory work includes the situation where postal services, the fire department and other public services experience difficulties entering the area because of threats and violence.¹⁹⁵

- Act that doubles the penalties for crimes committed in a designated strict penalty zone. Relevant crimes covered by the provision are violence, fights in public, vandalism, arson, theft and robbery, drug dealing. When evaluating the penalty for other crimes, the fact that the crime was committed in a designated strict penalty zone must be regarded as an aggravating circumstance.¹⁹⁶
- Proposal to establish mandatory Danish language tests in schools with a high percentage of students coming from marginalised residential areas. Passing the language test will be a requirement for the student's promotion to the next class.¹⁹⁷

The legislation primarily affects ethnic minorities. The various acts raise legitimate questions of possible illegal direct discrimination because of ethnic origin within the areas of housing, education and social services. The DIHR has continued to raise concerns of possible illegal direct discrimination.¹⁹⁸ In December 2021, the CERD Committee also raised concerns that the Danish package of laws previously known as 'Ghettopackage' has a discriminatory impact on ethnic minorities.¹⁹⁹

A practical consequence of being categorised as a ghetto/parallel society is that a certain percentage of apartment buildings in the housing area has to be torn down, renovated for other purposes or sold to private investors. In 2020, the city court of Helsingør issued the first judgment regarding what has been referred to as the 'ghetto laws'.²⁰⁰ The case in question in Helsingør dealt with eight ethnic minority families who were sued by their landlord. Along with many other families in the housing area called Nøjsomhed, they had been given notice by their landlord to move out of their apartments. In total, 96 families had been given notice. The landlord had plans to remodel the apartments into accessible housing for seniors and persons with disabilities in order to comply with the 'ghetto law'. Most of the tenants who had been given notice had moved to alternative accommodation but eight families refused to move out and the landlord therefore brought charges against them. The eight families argued that the terminations of their leases were, among other factors, based on their ethnic origin and thus constituted direct discrimination in violation of Section 3 of the Act on Ethnic Equal Treatment, Section 70 the Danish Constitution, as well as international human rights conventions. The city court of Helsingør found that the lease terminations had taken place in full accordance with the Social Housing Act. The court also found that Section 61(a) of the Social Housing Act defining 'marginalised residential areas' had been adopted by the Danish Parliament following traditional procedures. On that basis, the Court of Helsingør concluded that Section 61a was not discriminatory. The eight families were therefore ordered to move out of their apartments. The judgment has been appealed to the Eastern High Court by the families.

¹⁹⁵ Consolidated Act No. 1270 of 29 November 2019 with later amendments (*Lov om politiets virksomhed*), Section 6(a).

¹⁹⁶ Consolidated Act No. 1851 of 20 September 2021 with later amendments (*Straffeloven*), Section 81(c).

¹⁹⁷ Consolidated Act No. 1887 of 1 October 2021 with later amendments (*Lov om folkeskolen*), Section 5(6).

¹⁹⁸ DIHR (2021) 'Statement Hearing on "preventive areas"' (18 August 2021):

<https://menneskeret.dk/hoeringssvar/indfoerelse-forebyggelsesomraader-ny-terminologi-aftalt-anvisningsret-private-lejemaal>.

¹⁹⁹ Committee on the Elimination of Racial Discrimination (2021) *Concluding observations on the combined twenty-second to twenty-fourth reports of Denmark*, 3 December 2021, para. 12.

UN Doc. CERD/C/DNK/CO/22-24. See: https://tbinternet.ohchr.org/Treaties/CERD/Shared_Documents/DNK/CERD_C_DNK_CO_22-24_47280_E.pdf.

²⁰⁰ City Court of Helsingør judgment of 20 November 2020. Case No. BS-13867/2020 HEL.

Similar cases are currently being adjudicated by other courts in Denmark as well as by the Board of Equal Treatment.

A case that has gained particular media attention is a case against the Ministry of Transportation and Housing brought by tenants living in the housing association of Mjølnerparken in Copenhagen. In this case, which is currently being adjudicated by the Eastern High Court, three UN Special Rapporteurs in October 2020 urged the Danish Government to 'halt [the] contentious sale of ghetto buildings.'²⁰¹

The issue in question is whether the 'ghetto and parallel society laws' are discriminatory and thus a potential breach of the Racial Equality Directive as well as international human rights conventions. It is not surprising that the city court of Helsingør did not want to adjudicate such a highly sensitive question. An estimated 4 000 families are about to lose their homes because they live in so-called ghetto areas. The future Eastern High Court judgments are therefore of high importance.

a) Trends and patterns regarding housing segregation for Roma

In Denmark, there are no trends or patterns of housing segregation and discrimination against Roma. The Roma population in Denmark consists of around 2 000 individuals, and no information has been found about Roma and housing. There are restrictions on data collection based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about housing for Roma in Denmark, including lack of knowledge about the experience of discrimination.

²⁰¹ UNHRC (2020) 'UN human rights experts urge Denmark to halt contentious sale of "ghetto" buildings', press release, 23 October 2020: <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26414&LangID=E>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Denmark, national legislation provides for an exception for genuine and determining occupational requirements, cf. Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc.

According to Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., if it is of crucial significance that a person has a particular race, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin, has a particular skin colour, age or disability or is of a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the concrete work in question, the employer can apply for a dispensation from the relevant Government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition of differential treatment. Subsequently, the employer in question can legally make a requirement that the future employee for the job in question has a particular ethnic origin, etc. As an example, a police commissioner who wants to appoint a person with a particular ethnic origin for a particular job has to apply to the relevant and concerned Minister of Justice for a dispensation. As the minister responsible for the 'subject matter concerned', the Minister of Justice will subsequently provide a dispensation after having obtained a statement from the Ministry of Labour. A concrete example of an exemption to the prohibition of discrimination is a poultry slaughterhouse exporting to Arab countries that received a dispensation to hire a Muslim to perform halal slaughter. According to the Ministry of Labour, the ministry has only evaluated four dispensation cases regarding ethnic origin and religion.²⁰²

A 2016 case before the Board of Equal Treatment dealt with a 53-year-old woman who applied for a position as a personal assistant for a 13-year-old girl with muscular dystrophy.²⁰³ The woman received a written rejection, including an explanation that the girl's family preferred a team of personal assistants aged between 20 and 25. The woman issued a complaint to the Board, claiming that she had experienced discrimination based on her age. The Board referred to a decision of 13 October 2005 by the Ministry of Social Affairs allowing age to be taken into consideration when appointing personal assistants to persons with disabilities. In other words, the decision allowed persons with disabilities to look for employees in the same age group as themselves. The Board argued that the case in question was covered by the dispensation provided by the Ministry of Social Affairs and concluded that it was legitimate to reject the job applicant because of her age.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In Denmark, national law provides for an exception for employers with a special political opinion or an ethos based on religion or belief, cf. Section 6(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. None of the other discrimination grounds are covered by the exception.

According to this exception in Section 6(1), in particular situations the prohibition of discrimination does not apply to employers whose establishments have the aim of promoting a certain political or religious point of view (for example, a church that wants to hire a priest can exclude all applicants of another faith, because religion is an occupational requirement in this case). The same applies to organisations with a specific ethos (for example, private schools established on the basis of a specific religion).

²⁰² Andersen, S. and Justesen, P. (2017), *Hvornår må man lave etnisk særbehandling – Personer med etnisk oprindelse på arbejdsmarkedet*, Institut for Menneskerettigheder, p. 27.

²⁰³ Board of Equal Treatment, Decision No. 10111 of 7 September 2016.

The provision explicitly states that the political or religious requirement has to be of importance to the particular job in question to be covered by the exception. Whether the requirement is important to the particular job in question and thereby legal is a concrete assessment, which eventually will have to be made by the Board of Equal Treatment and the courts.

The Board of Equal Treatment ruled on the question in 2021.²⁰⁴ The case dealt with a man who complained of discrimination on the grounds of religion or belief. The reason was that a foundation in a job posting required that new employees working with veterans should be Christians. The Board assessed that the work as a veteran employee involved work that was within the foundation's core area, and that the employee's religious beliefs were important for the foundation's activities. The requirement of Christian faith was therefore not a violation of the Act on the Prohibition of Discrimination in the Labour Market etc. A previous 2018 case on the issue dealt with a social worker who complained that she had been rejected for a position in a shelter for drug users because she was not a member of the Danish National Church.²⁰⁵ The shelter was run by a Christian organisation. The Board found that the work in the shelter involved pastoral counselling and conversations and that the requirement for membership of the Danish National Church was therefore legitimate. The Board ruled in a similar case in 2020.²⁰⁶ In this case, an organisation made a requirement that job applicants to a position as a kitchen assistant in a shelter should be members of the Danish National Church and be able to work from the organisation's Christian view of human nature. The Board found that the work as a kitchen assistant in the organisation's shelter involved work within the core area of the organisation, including pastoral counselling. A requirement of membership of the Danish National Church was therefore not discriminatory according to the Board. It can be questioned whether these decisions by the Board are in accordance with the principle of proportionality outlined in the CJEU cases of *Egenberger* (C-414/16) and *IR v JQ* (C-68/17).

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

In Denmark, national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

According to Section 1(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., the Ministry of Defence can make exceptions for the armed forces in relation to age and disability. The Ministry of Defence has made use of this exception clause and exempted military personnel from the prohibition of discrimination on account of age and disability.²⁰⁷

In Denmark, the scope of the exception is not limited to safeguarding the combat effectiveness of the armed forces.

In Denmark, the scope of the exception extends to other non-combat staff, such as civilians employed in administrative positions in the army. Section 2 of the Executive Order No. 350 of 30 March 2012 directly mentions that the navy's mechanic personnel are exempted from the protection against discrimination based on age and disability.

The Board of Equal Treatment dealt with the issue of age discrimination in the military in a 2017 case where an applicant to the lieutenant-education was rejected admission based on several factors, including his age.²⁰⁸ The Board referred to the exemption in Executive

²⁰⁴ Board of Equal Treatment, Decision No. 9688 of 12 August 2021.

²⁰⁵ Board of Equal Treatment, Decision No. 9566 of 27 June 2018.

²⁰⁶ Board of Equal Treatment, Decision No. 9534 of 24 June 2020.

²⁰⁷ Executive Order No. 350 of 30 March 2012 (*Bekendtgørelse om undtagelse fra forbud mod forskelsbehandling på grund af alder og handicap*).

²⁰⁸ Board of Equal Treatment, Decision No. 10179 of 4 October 2017.

Order No. 350 of 30 March 2012 and concluded that the complainant was not covered by the protection against age discrimination provided in the Act on the Prohibition of Discrimination in the Labour Market etc.

Another case before the Board of Equal Treatment dealt with a senior sergeant who was diagnosed with type 1 diabetes.²⁰⁹ Shortly after the diagnosis, he was declared unfit for despatch. The sergeant was dismissed from his position as a senior sergeant and transferred to another job with a particular focus on education. In this job, he would not have to be sent to operations abroad. The complainant argued that the dismissal constituted discrimination based on disability. The Board stated that the situation was covered by the executive order exempting the military from the prohibition of discrimination based on disability. The Board did not evaluate whether type 1 diabetes constituted a disability. The Board simply concluded that the complainant was encompassed by the executive order and therefore not covered by the protection against discrimination based on disability. On that basis, the Board did not decide in favour of the complainant.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Denmark, national law includes exceptions relating to difference of treatment based on nationality.

In the public sector, 'Danish citizenship' is a selection criterion for the police, judges, etc.²¹⁰ This criterion is established by law as these are functions related to the essence of Danish sovereignty. However, public employees in most sectors are not required to be Danish citizens.

Apart from these particular job categories, requirements of nationality in the private and public sector may be considered indirect discrimination due to national or ethnic origin.

In Denmark, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

The Act on the Prohibition of Discrimination in the Labour Market etc. does not cover discrimination based on nationality, as citizenship is not covered by the list of discrimination grounds. Demanding a certain citizenship may constitute indirect discrimination based on ethnic origin.²¹¹ Since specific citizenship is not covered by the Act, it must be assumed that the same goes for stateless persons.

The Act on Ethnic Equal Treatment also does not cover discrimination based on nationality, as citizenship is not covered by the list of discrimination grounds.

b) Relationship between nationality and 'racial or ethnic origin'

Demanding a certain citizenship may constitute indirect discrimination based on race, ethnic or national origin.

An overlap between discrimination on grounds of nationality and ethnicity does not seem to be the case in Denmark. Case law regarding discrimination on grounds of nationality is either dealt with as nationality discrimination (not covered by discrimination law) or as

²⁰⁹ Board of Equal Treatment, Decision No. 9384 of 2 March 2016.

²¹⁰ Regulation No. 210 of 11 December 2000 with later amendments (*Cirkulære om anvendelse af tjenestemandsansættelse i staten og folkekirken*).

²¹¹ Preparatory work for Act No. 459 of 12 June 1996 on the Prohibition of Discrimination in the Labour Market etc.

indirect discrimination on account of race, ethnic or national origin (covered by discrimination law).

4.5 Health and safety (Article 7(2) Directive 2000/78)

In Denmark, there are specific rules with regard to disability and health and safety in accordance with Article 7(2) of the Employment Equality Directive. Section 18 of the Executive Order on the Arrangement of Permanent Workplaces obligates employers to take into consideration the needs of employees with disabilities when arranging the workplace.²¹² The aim of these obligations is to provide persons with disabilities the basic working conditions when establishing (new) permanent workplaces.

4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Denmark, national law provides for specific exceptions for direct discrimination on the ground of age. Subsections 3, 4 and 5 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. allow for direct discrimination due to age.

b) Justification of direct discrimination on the ground of age

In Denmark, national law provides for justifications for direct discrimination on the ground of age according to Subsections 3, 4 and 5 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. It follows from the law that such age limits must have a legitimate aim and be proportional. Potential legitimate aims are not explicitly listed in the Danish law.

A decision by the Board of Equal Treatment dealt with a doctor born in 1946 who filed a complaint to the Board over the age limit in the Authorisation Act.²¹³ According to this Act, the authorisation to pursue self-employed professional activities is repealed when the healthcare professional reaches the age of 75. The Act allows a physician to continue to be employed in a subordinate position and retain the right to call him or herself a specialist physician. Upon application, permission may also be granted to continue to pursue self-employed professional activities after the age of 75. The Board referred to Article 6(1) of the Employment Equality Directive and found that the age limit in the Authorisation Act is based on a legitimate aim to protect the safety of patients. The Board also found that the age limit was appropriate in order to achieve this aim and that it did not go beyond what was necessary. The complaint by the doctor was therefore unsuccessful.

According to Section 1(a) of the Act, the Minister of Defence can decide to exempt armed forces in active duty from the prohibition of differential treatment due to age and disability (see Section 3(4) of the Directive).

Furthermore, Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regard to older workers to promote the employment of elderly people. No concrete examples of positive action have been found.

Section 9(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. also allows for age requirements imposed by other legislation, if such requirements are established in order to protect children and young people.

²¹² Executive Order No. 96 of 13 February 2001 with later amendments (*Bekendtgørelse om faste arbejdssteders indretning*).

²¹³ Board of Equal Treatment, Decision No. 10174 of 29 November 2019.

c) Permitted differences of treatment based on age

In Denmark, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, provided that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary (see Article 6 of the Directive). This rule only applies to collective agreements. Collective agreements in both the private and the public labour market are covered.

A judgment from the Danish Maritime and Commercial Court in 2015 upheld an age limit in a collective agreement.²¹⁴ In June 2016, the Supreme Court upheld the judgment and referred to the reasoning of the Maritime and Commercial Court.²¹⁵ Referring to Section 5(a)(3), the Court concluded that the collective agreement did not constitute age discrimination. The provision in the collective agreement stipulated that service station employees under the age of 25, being students and not working more than 15 hours a week, would receive lower pay supplements than other employees. The Court stated that the purpose of the provision was to promote the occupational integration of young people enrolled in education and that the age limit was an appropriate and necessary means to achieve this purpose.

d) Fixing of ages for admission to occupational pension schemes

In Denmark, national law allows occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by Article 6(2).

According to Section 6(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., age requirements can be set for admission or right to occupational pension schemes and age can also be used in actuarial calculations as long as such requirements do not result in discrimination on account of gender.

In 2020, the Supreme Court adjudicated a case involving a woman who had resigned from her position in Post Denmark at the age of 62 years due to reduced working capacity.²¹⁶ Had she been under 60 years of age at the time of her resignation, she would have been entitled to a higher pension under Section 7(1) of the Civil Servants Pension Act. The case concerned whether the age condition in Section 7(1) constituted discrimination. The Supreme Court found that the provision did indeed discriminate but referring to CJEU case law (*Lesar*, C-159/15), the Supreme Court ruled that the provision was covered by the exemption in Article 6(2) of Directive 2016/2341 on occupational pension schemes. The Supreme Court also referred to CJEU case law (*Lesar*, C-159/15 and *Parris*, C-443/15) and ruled that Article 6(2) did not require a proportionality assessment of the occupational pension scheme in question. The Supreme Court finally found that Section 7 (1) of the of the Civil Servants Pension Act did not result in discrimination on account of gender. In conclusion, the Court ruled that discrimination had not taken place.

4.6.2 Special conditions for younger or older workers

In Denmark, there are special conditions set by law for younger and older workers in order to promote their vocational integration.

²¹⁴ Danish Maritime and Commercial Court judgment of 18 June 2015, Case No. F-7-14.

²¹⁵ Supreme Court judgment of 16 June 2016, Case No. 154/2015. Printed in U.2016.3281H.

²¹⁶ Supreme Court judgment of 16 April 2020, Case No. BS-9010/2019-HJR.

With regard to employment, payment and dismissal, Section 5(a)(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination against young people under 18 years of age if their payment and salary is covered by a collective agreement.

A Supreme Court judgment of 14 November 2013 deals with a 16-year-old who was hired to work in a supermarket.²¹⁷ During his employment, he received a salary that was significantly lower than the salary that his 18-year-old colleagues received. When the young employee turned 18, he was dismissed due to the fact that, according to the collective agreement in the area, he would now have the right to a higher salary. The Supreme Court concluded that Section 5(a)(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. was in accordance with EU law by not going further than allowed by Article 6(1) of Directive 2000/78/EC. The reasoning was that Section 5(a)(5) was justified by the need to ensure the integration of young people under 18 in the labour market.

With regard to employment, conditions of payment and dismissal, Section 5(a)(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination against young people under 15 years of age if their employment is not covered by a collective agreement.

Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regard to older workers, with a view to promoting the employment of elderly people.

4.6.3 Minimum and maximum age requirements

In Denmark, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

There is no minimum age for judges and bailiffs but there is a maximum age. According to Section 34(2) of the Civil Servants Act, judges and bailiffs must also retire when they reach the age of 70.²¹⁸ There is a minimum age for police officers. Applicants to the National Police Academy must be 20 years of age and must be 21 years of age before they can begin their training to become a police officer.²¹⁹

4.6.4 Retirement

a) State pension age

In Denmark, there is a state pension age at which individuals must begin to collect their state pensions. Individuals are entitled to begin collecting their state pensions according to the Act on Pensions.²²⁰ The retirement pension is an age-determined pension payable to women and men of 65 years and over if they were born before 1954. If they were born in or after 1954 the pension age increases to 68 years of age.

If an individual wishes to work beyond the state pension age, the pension can be deferred for a maximum of 10 years. In other words, if a person is entitled to a state pension, he or she can postpone the payment of the pension to a time after he or she has turned 65 if retirement is postponed. An individual can collect a pension and still work. The pension will, however, be reduced on the basis of the recipient's income.

²¹⁷ Supreme Court judgment of 14 November 2013, Case No. 185/2010. Judgment printed in U2014.470H.

²¹⁸ Consolidated Act No. 511 of 18 May 2017.

²¹⁹ Website of the Police Academy: <http://politiskolen.dk/adgangskrav>.

²²⁰ Consolidated Act No. 234 of 12 February 2021 with later amendments (*Pensionsloven*), Section 1a.

In 2019 the Supreme Court adjudicated a case involving an office worker who had a flex-job, which is an adapted job for persons with disabilities with reduced working hours and whose employer received a subsidy from the local municipality according to the flex-job legislation.²²¹ The office worker was paid for 37 hours of work per week but in reality, he worked 20 hours per week. According to the agreement, he could only do certain kinds of jobs due to his reduced ability to work. The local municipality paid the employer two thirds of the salary according to the flex-job arrangement. The office worker was dismissed from his position when he reached the state pension age. The reason for the dismissal was the fact that the employer stopped receiving the subsidy from the local municipality. This happens automatically according to the flex-job legislation at the time when an employee turns 65 years of age. The office worker had been interested in continued employment in the company after the automatic termination of the flex-job, but in a position where salary and working hours were in accordance with his ability to work. In other words, the office worker was interested in a part-time position with reduced salary. Before the courts, the office worker argued that the dismissal constituted discrimination based on his age and his disability.

In its ruling, the Supreme Court made clear that a flex-job arrangement contains two elements – certain conditions of employment and a subsidy from the municipality. The Court also stated that a flex-job must be considered to be an employment-creating arrangement (a positive action), which is allowed according to Section 9(2) of the Act on Prohibition of Discrimination in the Labour Market etc. Section 9(2) allows for positive action with regard to older employees and persons with disabilities. The Court referred to Articles 6(1) and 7 of Directive 2000/78/EC in regard to the positive action argument. The Court argued that the termination of such positive action when a person reaches the state pension age and the subsidy stops could not be considered discrimination because of neither age nor disability. Referring to the employment contract between the office worker and the employer, the Supreme Court noted that it was an obvious condition for the employment in question that the employer had received a flex-job subsidy from the municipality. The basis for the employment therefore lapsed when the office worker reached the state pension age and the subsidy was discontinued. On that basis, the Court did not find that the dismissal constituted discrimination because of age or disability in violation of the Act on Prohibition of Discrimination in the Labour Market etc. The Maritime and Commercial Court had reached the same conclusion in case No. F-5-17 of 28 June 2018.

b) Occupational pension schemes

In Denmark, there is no standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. Occupational pension schemes and other employer-funded pension arrangements are not legally regulated, and they are exempted from the general prohibition of age discrimination pursuant to Section 6(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. They are part of either collective agreements or individual arrangements. There are different age limits in the different collective agreements and different individual arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

An individual can collect a pension and still work.

The Supreme Court dealt with the issue of occupational pension schemes in a case of pension contributions increasing with older age.²²² The Court concluded that such schemes

²²¹ Supreme Court judgment of 17 April 2019, Case No. BS-25958/2018-HJR.

²²² Supreme Court judgment of 12 November 2015, Case No. 1/2015. Printed in U2016.749H.

do not constitute illegal age discrimination if they are legitimate and comply with the principle of proportionality. In the ruling, a 29-year-old woman was recruited by a company providing analytical and information services to businesses and consumers. Pursuant to her employment contract, she was included in a compulsory pension scheme where pension contributions from her employer would increase with her age. The woman resigned less than a year after and claimed that the pension scheme constituted unlawful discrimination on the ground of age. The employer claimed that pension schemes were not covered by the prohibition of age discrimination. A preliminary ruling from the CJEU was requested and a judgment was issued by the CJEU in case C-476/11 on 26 September 2013. On that basis, the Supreme Court stated that an occupational pension scheme is exempted from the prohibition of discrimination on grounds of age if it can be justified under EU law and especially under Article 6(1) of Directive 2000/78. The Supreme Court concluded that the aim of the pension scheme constituted a 'legitimate aim' as it took into account the interests of all employees in the company. Hereafter, the Court concluded that the detriments resulting from the differential treatment on account of age were offset by the benefits that the woman gained from the occupational pension scheme and that the principle of proportionality was not violated. Thus, the employer was acquitted.

c) State imposed mandatory retirement ages

In Denmark, there is no generally state-imposed mandatory retirement age. However, in some sectors, retirement ages are set by collective agreements for certain professions (see below). Furthermore, there is a state-imposed retirement age for some civil servants, as the Act on Civil Servants sets an age limit for certain civil servants working within the judiciary as well as for priests according to which they are dismissed at the end of the month that they turn 70.²²³

Section 43(a) of the Civil Servants Act stipulates the mandatory retirement of priests when they turn 70 years of age.²²⁴ The provision was dealt with in a decision by the Board of Equal Treatment.²²⁵ In the case, the complainant was a priest who argued that it constituted discrimination on account of age that he had to retire when he turned 70 years of age when all the other employees at his workplace (the organist, the verger, the parish clerk, etc.) could continue working after they turned 70 years of age. The Board held that the Danish Parliament amended the Civil Servants Act and the rules on forced retirement in 2008. By doing so, it maintained the forced retirement of priests, deans and bishops at the age of 70. According to the Board, the Danish Parliament must have taken the view at that time that Section 43(a) of the Civil Servants Act was not a violation of the prohibition of age discrimination. The Board furthermore opined that the Employment Equality Directive, the Act on the Prohibition of Discrimination in the Labour Market etc. as well as case law from Danish courts and the CJEU illustrate that, under certain conditions, exceptions from the prohibition of age discrimination would be allowed. The Board referred directly to Article 6 of the Employment Equality Directive. The Board also made reference to the preparatory works of the Civil Servants Act and the legitimate aims pursued by the Act described in the works, including that the purpose of preserving a retirement age of 70 years was to ensure consideration for the special conditions of employment for priests (that the congregational council's decisive importance for the appointment of priests is not rendered illusory and that no deeper discrepancies are made to exist between the pastor and the congregation). The Board concluded that it did not find reasons to set aside the assessment of the Danish Parliament. The Board therefore ruled that the exception from the prohibition of age discrimination in the Civil Servants Act was justified.

²²³ See Section 34(2) and Section 43(2) of Consolidated Act No. 511 of 18 May 2017.

²²⁴ Consolidated Act No. 511 of 18 May 2017 (*Tjenestemandsløven*).

²²⁵ Board of Equal Treatment, Decision No. 41/2014 of 5 March 2014.

d) Retirement ages imposed by employers

In Denmark, national law previously permitted employers to set retirement ages (or ages at which the termination of an employment contract is possible) by collective bargaining. However, since 1 January 2016, neither individual employment contracts nor collective agreements providing for automatic termination of employment at any age can be agreed.²²⁶ It also follows from the Act on the Prohibition of Discrimination in the Labour Market etc. that previous individual contracts providing for automatic termination cannot be enforced after 1 January 2016.

Collective agreements on automatic termination are, however, valid until the time when the collective agreement in question can be renegotiated. It follows from Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., which states that the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, provided that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary (see Article 6 of the Directive). This rule only applies to collective agreements. Collective agreements in both the private and the public labour market are covered.

A landmark Supreme Court judgment of 27 August 2013 dealt with an employee who was working in a telecommunications company.²²⁷ His employment was covered by an existing collective agreement containing a provision for retirement without notice at the age of 67. The Supreme Court referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and concluded that a forced retirement age of 67 years constituted appropriate and necessary means to achieve the purposes of an appropriate age distribution and the reduction of the workforce by age-related departures rather than dismissals.

In a case before the Board of Equal Treatment, a janitor was asked to retire three months after he had turned 65.²²⁸ The janitor filed a complaint about discrimination due to age. The compulsory retirement age followed from a collective agreement. The Board found that the retirement provisions in the collective agreement were objectively and reasonably justified by a legitimate aim and referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. The Board referred to case law from the CJEU, including the *Palacios de la Villa* case (C-411/05) and the *Rosenbladt* case (C-45/09), and argued that Member States have a wide margin of appreciation when it comes to social-political and employment-related objectives. The Board did not describe the legitimate aim in the case in question but spoke in general terms of legitimate aims. Furthermore, the Board referred to a similar case adjudicated by the city court of Svendborg.²²⁹ On that basis, the Board concluded that discrimination had not taken place.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

²²⁶ It follows from Act No. 1489 of 23 December 2014 repealing Section 5(a)(4) of the Act on Prohibition of Discrimination on the Labour Market etc., which allowed for automatic termination of employment by the age of 70 years or older.

²²⁷ *Weekly Law Journal*, U.2013.3130H.

²²⁸ Board of Equal Treatment, Decision No. 9903 of 12 October 2018.

²²⁹ City Court of Svendborg judgment of 20 June 2018, Case No. BS R3-516/2017.

f) Compliance of national law with CJEU case law

In Denmark, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Denmark, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. It follows from Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc., that it constitutes illegal discrimination to take age into consideration in selecting workers for redundancy.

b) Age taken into account for redundancy compensation

In Denmark, national law provides compensation for redundancy. Such compensation is not affected by the age of the worker.

If a redundancy is judged illegal, workers can be awarded compensation according to national law. The Dismissal Board (*Afskedigelsesnævnet*) adjudicating cases on redundancies covered by collective agreements has developed a 25-year rule in its case law. It follows from this rule that an employer has an obligation, if possible, to refrain from dismissing a person who has been employed for 25 years or longer. If an employee with seniority of 25 years or more is dismissed, the burden of proof shifts to the employer, who has to prove that there were strong reasons for dismissing this particular person. There is no case law indicating that the age of the worker has an influence on the amount of compensation awarded. No information has been found about legal challenges to this 25-year rule.

4.7 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Denmark, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.8 Any other exceptions

In Denmark, there are no other exceptions to the prohibition of discrimination (on any ground covered by this report) provided in national law.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In Denmark, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation, gender identity, gender expression or gender characteristics is permitted to a limited extent in national law. There is, however, no general provision for special or positive measures in Danish law embracing all the discrimination grounds.

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin, age or disability by virtue of other legislation, rules other than legislation and other public measures. Such special measures require legal authority and are primarily to be taken by the minister through public projects. According to the preparatory work, Section 9(2) of the Act is directed primarily at the public sector and general projects improving the integration of ethnic minorities.

The right to take special measures in Section 9(2) does not apply to private employers who want to improve employment opportunities for marginalised groups. Thus, legislation makes it difficult for private employers to actively offer equal opportunities in practice. The fact is that even simple outreach initiatives can be claimed to discriminate against the groups that are not the target of the individual outreach initiatives.

An exception follows from Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., which allows for private employers to take positive measures in relation to older persons and persons with disabilities.

Private employers who are interested in actively offering equal opportunities (which do not conflict with the prohibition of discrimination) are met with another legal barrier. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits employers to ask for, obtain, receive or use information about the race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, or national, social or ethnic origin of a job applicant or an employee. Neither anonymity nor informed consent nor any other exemption will allow an employer to use such information about ethnic origin, etc. and the prohibition applies no matter how the employer gets the information.²³⁰ This rule makes it difficult in practice for private employers to measure the results of their equal opportunity initiatives.

The legislative barriers in the Act on the Prohibition of Discrimination in the Labour Market etc. are assumed to prevent private employers from being active in creating actual equal opportunities in the labour market.

Outside the labour market, Section 4 of the Act on Ethnic Equal Treatment allows for the maintenance or adoption of specific and temporary measures to prevent or compensate for disadvantages linked to racial or ethnic origin. Both public authorities and private organisations and entities can initiate such measures. Section 8 of the Act on the Prohibition of Discrimination due to Disability permits similar temporary measures in the area of disability.

Race and ethnic origin

In the guidelines to Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., lawful public positive measures cover projects initiated by the different

²³⁰ Guidance on the Act on the Prohibition of Discrimination in the Labour Market (1 February 2019), p. 68.

ministries as part of national integration schemes, including projects with the aim of improving the qualifications of persons with an ethnic minority background. The guidelines emphasise that only public programmes whose aim is to improve access to employment are possible. Employers themselves are not allowed to give preferential treatment to racial and ethnic minorities.

The preparatory work for Section 4 of the Act on Ethnic Equal Treatment states that there has to be an *actual* disadvantage linked to racial or ethnic origin in order for specific measures to be initiated. It also states that it is possible for public authorities and private organisations and entities to initiate specific measures. The Act only covers equal treatment outside the labour market.

A 2019 decision by the Board dealt with a drop-in centre for the 'mentally ill and traumatised' with a focus on refugees and immigrants.²³¹ The centre offered a free communal meal for the target group once a week. At the dinner, it was also possible to receive advice, for example on contact with public authorities. A man with a Danish sounding name and of Danish origin complained that he had been discriminated against due to his ethnic origin. He had been rejected from accessing the communal meals because he was not included in the target group. The Board argued that the Act on Ethnic Equal Treatment does not preclude specific measures designed to compensate disadvantages linked to ethnic origin. The Board therefore concluded that the communal meals fell within the specific measures permitted by Section 4 of the Act on Ethnic Equal Treatment.

Age and disability

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to disability and age, allowing for a number of legislative or public measures that promote the employment opportunities of the elderly and persons with a disability.

A 2019 Supreme Court ruling dealt with an office worker who had a flex-job with reduced working hours and whose employer received a subsidy from the local municipality according to the flex-job legislation.²³² The Court stated that a flex-job must be considered to be an employment-creating arrangement (a positive action in favour of persons with disabilities), which is allowed according to Section 9(2) of the Act on Prohibition of Discrimination in the Labour Market etc. The Court referred to Article 6(1) and Article 7 of Directive 2000/78/EC in respect of the positive action argument.

According to Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., it is possible for public and private employers to take concrete positive measures in relation to 'older' age and disability. The purpose of the positive action has to be the improvement of employment possibilities for persons with disabilities or for older employees. If job applicants have the same qualifications, it is thus possible for the employer to prefer the applicant with the disability or the applicant who is 'older'.

The Act on Compensation for Persons with Disabilities in the Labour Market promotes the integration of persons with disabilities into the job market.²³³ This Act focuses on how compensation for impairments in the labour market is best provided and sets out general rules on how to promote and enhance employment for persons with (special) difficulties in finding a job. The general aim of the Act is to enhance the integration of persons with disabilities into the labour force by means of affirmative action and various other compensatory measures. Section 3 of the Act provides for preferential treatment of equally qualified job applicants with a disability to positions in the public administration. It also

²³¹ Board of Equal Treatment, Decision No. 9620 of 12 June 2019.

²³² Supreme Court judgment of 17 April 2019, Case No. BS-25958/2018-HJR.

²³³ Consolidated Act No. 108 of 3 February 2020 with later amendments (*Lov om kompensation til handicappede i erhverv m.v.*).

states that job applicants who have a disability have the right to a job interview for positions in the public administration.

Outside the labour market, Section 8 of the Act on the Prohibition of Discrimination due to Disability allows for the maintenance or adoption of specific and temporary measures to prevent or compensate for disadvantages linked to disability. Both public authorities and private organisations and entities can initiate such measures.

Religion or belief

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to religion and belief, allowing for a number of legislative or public measures that promote the employment opportunities of persons from different religions.

Since religion is understood as formally approved or recognised religions, there is a theoretical link between recognition as a religious community and the possibility of benefitting from these positive actions in Section 9(2). In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice.

Besides of such possible public measures, there are no provisions in Danish law explicitly allowing for positive measures on grounds of religion.

Sexual orientation

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to sexual orientation, gender identity, gender expression and gender characteristics allowing for legislative or public measures that promote the employment opportunities of persons with different sexual orientations. No concrete examples of such measures have been found.

Other than this, there are no provisions in Danish law explicitly allowing for positive measures on grounds of sexual orientation.

b) Quotas in employment for persons with disabilities

In Denmark, national law does not provide for a quota/quotas for the employment of persons with disabilities.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In Denmark, the following procedures exist for enforcing the principle of equal treatment:

Courts:

The lower city courts, the High Courts, the Maritime and Commercial Court and the Supreme Court hear cases, which involve provisions of the civil Act on Ethnic Equal Treatment and the civil Act on the Prohibition of Discrimination in the Labour Market etc., implementing Directive 2000/43 and Directive 2000/78. The courts will also hear cases involving the criminal Act on the Prohibition of Discrimination due to Race etc. and the civil Act on the Prohibition of Discrimination due to Disability. Judgments and decisions handed down by the courts are legally binding.

Labour courts:

The Labour Court and labour arbitration bodies only interpret collective agreements and adjudicate cases concerning violations of collective agreements. They do not deal with cases concerning violations of the legislation on discrimination.²³⁴ Judgments and decisions handed down by labour courts are legally binding.

However, Section 1(6) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not apply if equal protection is provided by a collective agreement. Trade unions engage in judicial procedures before the Labour Court on behalf of their members in cases concerning the violation of a prohibition of discrimination in a collective agreement. In the individual case, the trade union decides whether or not it wishes to bring a case. If an individual person covered by a collective agreement wishes to initiate a case concerning the violation of collective agreements, the case must be tried at the ordinary courts and the individual must provide proof that his or her trade union has no intention of pursuing the matter before the Labour Court.

Board of Equal Treatment:

In practice, most complaints of discrimination are dealt with by the administrative Board of Equal Treatment, which was established on 1 January 2009.²³⁵ The Board deals with complaints related to discrimination based on gender, race, colour, religion or belief, political views, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin *within* the labour market. In sectors outside the labour market, the Board has a mandate to hear individual cases on discrimination because of gender, sexual orientation, gender identity, gender expression, gender characteristics, disability, race and ethnic origin. The Board of Equal Treatment issues binding decisions and can order compensation to be paid.

Individuals making complaints to the Board of Equal Treatment must have an individual and current interest in the case in question. The Board of Equal Treatment cannot force the parties to produce documents, give their opinion or reveal the factual circumstances of a case. The Board secretariat can, however, request that the parties contribute to the elucidation of a case. If a party does not comply with this request within the stated time

²³⁴ Consolidated Act No. 1003 of 24 August 2017 with later amendments in the Labour Court and Labour Arbitration (*Lov om Arbejdsretten og faglige voldgiftsretter*).

²³⁵ Consolidated Act No. 1230 of 2 October 2016 with later amendments (*Bekendtgørelse af Lov om Ligebehandlingsnævnet*).

period, a new deadline will be set. If the party still does not respond, the Board can choose to decide the case based on the existing evidence, cf. Section 5 of the Act on the Equal Treatment Board. The Board can also procure expert evidence for use in specific cases, cf. Section 7 of the Act.

The Board of Equal Treatment cannot deal with a complaint if the situation is covered by a prohibition of discrimination in a collective agreement.

Decisions handed down by the Board of Equal Treatment are legally binding. According to Section 12(2) of the Act on the Board of Equal Treatment, the Board is obliged to bring its decisions to the civil courts if they are not followed and the applicants wish to pursue the matter. Both parties to a case can also bring a Board decision to the civil courts.

In the period from January 2015 to the end of 2019, the Board of Equal Treatment received 1 652 complaints in total.²³⁶ In the same period, the Board issued 1 147 decisions and its secretariat dismissed 152 complaints.²³⁷

Institute of Human Rights – the National Human Rights Institution of Denmark:

The DIHR is a national human rights institution (NHRI) in accordance with the UN Paris Principles.²³⁸ The Institute has been accredited as an A-status NHRI since 2001.

The DIHR functions as the national equality body in accordance with the Racial Equality Directive and the gender directives. Its mandate as a specialised body for the promotion of equal treatment irrespective of gender, racial or ethnic origin is laid down in the founding law of the Institute by replicating the EU law requirement to establish equality bodies. The DIHR's mandate is to promote equality with regard to gender, race and ethnicity by way of providing assistance to victims of discrimination, conducting independent surveys and publishing reports and recommendations about equality. The DIHR does not play any role in criminal proceedings.

According to Parliament Decision B15 of 17 December 2010, the DIHR is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities and thus deals with issues of disability. Finally, since January 2022, the DIHR also has the competence to deal with LGBTI issues.²³⁹

b) Barriers and other deterrents faced by litigants seeking redress

To initiate a civil court case in practice requires the appointment of a lawyer, which is a financial barrier for many victims of discrimination.

In theory, it is not necessary to obtain assistance from a lawyer to file a complaint with the Board of Equal Treatment. In practice, many victims cannot manage to file the complaint by themselves.

There is no time limit in the Act on the Board of Equal Treatment within which a procedure must be initiated. However, the Board of Equal Treatment has concluded in concrete cases that claims were statute-barred according to the Act on Limitations and on that basis the Board could not decide in favour of the complainants.²⁴⁰ According to the Act on Limitations, there is an absolute three-year period of limitation (five-year period of

²³⁶ Board of Equal Treatment (June 2020) *Annual Report 2019*, p. 33.

²³⁷ Board of Equal Treatment (June 2020) *Annual Report 2019*, p. 33.

²³⁸ Consolidated Act No. 553 of 18 June 2012 on the Institute for Human Rights – the National Human Rights Institution of Denmark with later amendments.

²³⁹ Act No. 2591 of 28 December 2021, entering into force on 1 January 2022.

²⁴⁰ Board of Equal Treatment, Decision No. 29/2015 of 4 March 2015, Decision No. 9386 of 2 March 2016.

limitation for employment-related cases), which means that a procedure must be initiated three years (or five years), at the latest, after the unlawful violation has occurred.²⁴¹

Furthermore, the Board has rejected concrete complaints of discrimination on the basis that the complainants acted passively and thus had lost any claim against the employer. According to a general principle of Danish law, a person can lose his or her claim before the statutory period of limitation by acting passively. Whether a person has acted passively is determined by an individual assessment carried out by the civil courts or other law enforcement agencies, including the Board of Equal Treatment.

On 11 December 2018, a man filed a complaint to the Board of Equal Treatment arguing that he had been discriminated against because of his ethnic origin.²⁴² In the spring of 2017, the complainant wanted to rent an allotment garden but was rejected by the garden association. On 20 April 2017, the complainant received an email with the following wording: 'Like many other garden associations, the board does not want the percentage of foreigners & their direct descendants in our garden association to be higher than in the society as a whole, i.e., about 7 %.' The complainant immediately (on the same day) contacted the municipality and reported the garden association to the police. In the case, the Board found that, by filing the complaint with the Board on 11 December 2018, the complainant had acted passively and had therefore lost any claim against the garden association. The Board emphasised the time that had elapsed since the complainant was rejected by the garden association and thus the time when he had or should have known of a possible claim under the Act on Ethnic Equal Treatment to when he filed the complaint with the Board. In conclusion, the Board did not decide in favour of the complainant.

There are no statistics on the number of cases for which the Board decides that a complainant loses his or her claim by acting passively. Also, there is no fixed number of months or years that will prompt the Board to decide that a complainant has acted passively. The Board conducts specific and individual case-by-case evaluations. In its 2019 annual report, the Board explains that in cases of rejection of access to bars and restaurants it should, as a rule, be presumed and expected that persons who experience such discrimination will complain immediately after the rejection or at least within a reasonably short time thereafter.²⁴³

No absolute time limit is indicated in the Act on Labour Courts.²⁴⁴ With regard to the civil courts, there is a three-year period of limitation (five-year period of limitation for employment-related cases), which means that a procedure must be initiated three years (or five years) at the latest after the unlawful violation.²⁴⁵

A person can file a complaint even after his or her employment relationship has ended. There is therefore no deadline for filing a complaint, but practical difficulties can arise in relation to collecting evidence.

The assistance given by the DIHR to victims of discrimination deals primarily with the provision of information and with advice on how and where victims can complain about discrimination.²⁴⁶ Typically, the DIHR does not file complaints with the Board of Equal Treatment on behalf of a victim, but rather provides information on how the complainant can do it on his or her own. On the DIHR's website, a telephone number and an email address is listed if a person needs assistance and advice on discrimination issues and ways to complain.

²⁴¹ Act on Limitations (*Forældelseslov*), Sections 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

²⁴² Board of Equal Treatment, Decision No. 9996 of 9 October 2019.

²⁴³ Board of Equal Treatment (June 2020) *Annual Report 2019*, p. 22.

²⁴⁴ Consolidated Act No. 1003 of 24 August 2017 with later amendments in the Labour Court and Labour Arbitration (*Lov om Arbejdsretten og faglige voldgiftsretter*).

²⁴⁵ Act on Limitations (*Forældelseslov*), Sections 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

²⁴⁶ See <https://menneskeret.dk/raadgivning>.

Chapter 31 of the Administration of Justice Act deals with legal aid and free legal proceedings.²⁴⁷ The Minister of Justice can financially support legal aid offices where individuals can seek free legal advice and representation.²⁴⁸ No public data is available on the practice of supporting and representing victims of discrimination.

Only a few NGOs specialise in assisting victims of discrimination in filing complaints and initiating court proceedings. Many Danish labour unions provide counselling and legal advice on discrimination, in particular discrimination because of disability in the labour market.

c) Number of discrimination cases brought to justice

In Denmark, statistics on the number of cases related to discrimination brought to justice are not available.

Statistics on cases brought to the city courts are not available as they are not registered or published in the *Weekly Law Journal (Ugeskrift for Retsvæsen)*. Only selected judgments from the Supreme Court, the high courts and the Maritime and Commercial Court are published in the *Weekly Law Journal*. The *Weekly Law Journal* is a paid journal not freely available to the public.

d) Registration of national court decisions on discrimination cases

In Denmark, court decisions on discrimination are not registered as such by national courts.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Denmark, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination under certain conditions.

There are very few specialised NGOs providing legal aid to victims of discrimination and using litigation as a method to generate public discourse on equality.

The Danish judicial system is regulated in the Administration of Justice Act.²⁴⁹ Under Danish procedural rules in Section 260 of the Administration of Justice Act, a person may either go to court himself or herself or authorise a process agent to appear in court on his or her behalf. As a general rule, in Danish procedural law, only jurists authorised to practise law, i.e. certified lawyers, may serve as process agents for a party. As an exception, the Minister of Justice may allow for interest groups, labour unions and the like to represent their members in court through an in-house jurist in cases concerning pay and employment conditions. This is the case even when the in-house jurist is not a certified lawyer, cf. Section 260(6) of the Administration of Justice Act.

Trade unions and other membership organisations can therefore represent their members in civil court cases dealing with pay and employment conditions. The trade union employees representing the individual member must have a Danish bachelor's or master's degree in legal studies. According to established case law, a trade union may also be allowed to serve a function similar to that of a process agent for its members in the sense that the union files a suit in its own name on behalf of its member (in Danish: *mandatar*). However, it is still the member and not the union who is a party to the case.

²⁴⁷ Consolidated Act No. 1835 of 15 September 2021 with later amendments.

²⁴⁸ Regulation No. 637 of 11 June 2014 (*Bekendtgørelse om tilskud til retshjælpskontorer og advokatvagter*).

²⁴⁹ Consolidated Act No. 1835 of 15 September 2021 with later amendments.

No particular legislation exists regarding the possibility of NGOs and other associations representing victims of discrimination in civil court proceedings. In comparison with trade unions on questions of pay and employment conditions, NGOs do not have the same general legal standing before domestic courts of law in relation to cases of discrimination. According to Section 260(2), only certified lawyers who have obtained a mandate from the individual victim of discrimination can litigate a case for the civil courts. This means that the NGO can help to examine the case but when it comes to representing and promoting the case before the civil courts, the individual victim of discrimination must get legal representation from a certified lawyer.

Some public bodies have been given express statutory power to represent complainants in court. According to Section 12 of the Act on the Board of Equal Treatment, the Board of Equal Treatment is thus obliged to bring a case to the civil courts if the defendant refuses to follow the decision of the Board and the applicant wishes to pursue the matter. In practice, the Board of Equal Treatment is represented by the private law firm Kammeradvokaten, which is the legal adviser to the Danish Government.²⁵⁰

There are no formal requirements for giving a mandate to represent one's case. In practice, a mandate will always be in writing.

In Board of Equal Treatment cases, trade unions and NGOs are entitled to represent individuals who have a legitimate interest in the case. A victim of discrimination is represented before the Board in accordance with traditional administrative law, cf. Section 8 of the Public Administration Act.²⁵¹

The DIHR is competent to take cases of principle to the Board of Equal Treatment, including individual cases of discrimination of general public interest.²⁵² Test cases on, for example, job advertisements on Facebook illustrate the importance of the competence of the DIHR to take cases of principle to the Board and to engage in strategic litigation.²⁵³ Individual companies' settings on Facebook advertisements that discriminate based on age and gender would most likely not have been dealt with by the Board if these cases had not been initiated by the Danish Institute for Human Rights.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Denmark, associations/organisations/trade unions are entitled to act in support of victims of discrimination. According to Section 252 of the Act on Administration of Justice, *bi* intervention is allowed in existing court proceedings, where the association has a legal interest in the outcome of the case.

As an example, the DIHR may intervene in civil court cases in support of a victim of discrimination if the Institute determines that such support may help to clarify the general interpretation of the discrimination law in Denmark. Since 2016, the DIHR has acted as *amicus curiae* in 11 court cases.²⁵⁴

²⁵⁰ As described in Jacobsen, B.D. (2010), *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States – a Scandinavian Perspective*, DJØF Publishing, Copenhagen.

²⁵¹ Consolidated Act No. 433 of 22 April 2014 (*Forvaltningsloven*).

²⁵² Section 1(7) of Consolidated Act No. 1230 of 2 October 2016.

²⁵³ Board of Equal Treatment, Decision Nos. 9134 and 9135 of 25 February 2021.

²⁵⁴ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018 and in emails from the DIHR Equal Treatment Department on 5 April 2019, 12 March 2021 and 10 March 2022.

c) *Actio popularis*

In Denmark, national law does not directly allow associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

The competence of the DIHR to take principle cases to the Board of Equal Treatment could be considered as a form of *actio popularis* as the Institute does not need a specific victim of discrimination to initiate such a principle case.

In Decision No. 88/2011 issued by the Board of Equal Treatment, an NGO working against discrimination because of race and ethnic origin filed a complaint with the Board. The complaint dealt with ethnic discrimination because of a newspaper article. In the article, an owner of a campground stated that he would refuse access to the campground for Roma people. The NGO argued that the newspaper article was a violation of the Act on Ethnic Equal Treatment. The Board refused to adjudicate the complaint because of the fact that the NGO did not file the complaint on behalf of or in support of a concrete individual claiming that his or her rights had been violated.

No *actio popularis* court cases exist in relation to discrimination. In individual cases in other fields, the Supreme Court has accepted cases filed on the constitutional legality of Denmark's membership of the EU, for example, (see U 1996.1300 H and U 1998.800 H). So one could argue that there is a willingness to accept *actio popularis* cases within the Danish judicial system.

d) Class action

In Denmark, national law allows associations/organisations/trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

Chapter 23a of the Danish Administration of Justice Act specifies rules on collective action.

A collective action is a special type of procedure prepared with a view to combining several – especially a large number of – uniform claims in the same proceedings. The term 'collective action' implies that the action relates to the claims of a group of persons, a representative of this group (not individual members of the group) being regarded as a party to the action. Collective actions seem to be the same as class actions.

The rules on collective actions are based on a main rule that the members of the group must opt for the action (the opt-in model). At the request of the group representative, the court may also decide that a collective action must comprise the group members who do not opt out of the collective action (the opt-out model). This is, however, subject to two additional conditions being satisfied.

First of all, the case must concern claims that are so small that it is evident that they cannot generally be expected to be brought through individual actions, not because the persons concerned do not think that they have a justified claim, but merely because the inconvenience and financial risk of individual litigation are deemed to be disproportionate to the outcome of the individual action.

A number of conditions for bringing a collective action have been laid down, including the condition that the court must approve the case as being suitable for a collective action. A number of 'control mechanisms' also apply. For example, the court must approve the group representative and may decide that the representative must provide security for the legal costs that he or she may have to pay to the other party if he or she loses the case.

As for associations, there are no specific requirements as to age, number of members, financial situation, etc., but in order to be appointed as group representative, the association must have sufficient financial means, including, for example, insurance to be able to cover legal costs.

No information has been found on collective actions in discrimination cases.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Denmark, national law requires a shift of the burden of proof from the complainant to the respondent.

Section 7 of the Act on Ethnic Equal Treatment, Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc., and Section 10 of the Act on the Prohibition of Discrimination due to Disability all deal with the principle of a shared burden of proof.²⁵⁵ This means that if a person who considers himself or herself to be discriminated against is able to establish facts of possible discrimination, then the employer, shop owner, landlord etc. has to prove that no discrimination has taken place. This shared burden of proof is in line with the directives.

The shared burden of proof is to be applied in cases of direct and indirect discrimination, harassment and instruction, but not in cases regarding victimisation.

In cases of discrimination based on disability, it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability of the employee.

A number of judgments and decisions handed down by the Board of Equal Treatment illustrate the shared burden of proof in practice.

In a landmark judgment on disability of 22 November 2017, the Supreme Court underlined that the burden of proof rests with the employee with regard to proving that the employee has a disability, including that the impairment is of a long-term nature.²⁵⁶ However, in the ruling, the Supreme Court also clarified that to have a disability covered by the discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case. It makes no difference whether dizziness, for example, is an illness or a symptom of an illness as long as the condition involves a long-term impairment.

A decision from the Board of Equal Treatment illustrates the kind of facts that can establish possible discrimination resulting in a shift of the burden of proof.²⁵⁷ The case dealt with a man who had an Arabic-sounding name and who applied for a position as a marketing manager. His application and résumé were written in English. The company sent a written rejection in English explaining that they wanted a Danish employee. The Board argued that the company assumed that the applicant was not Danish based on his Arabic-sounding name and the fact that his application was written in English. On that basis, the Board concluded that the complainant had established facts of possible discrimination because of ethnic origin, reversing the burden of proof. The company could not prove that it had not violated the prohibition of discrimination and the complainant was awarded compensation of EUR 3 350 (DKK 25 000).

²⁵⁵ Section 7 of the Act on Ethnic Equal Treatment and Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc.

²⁵⁶ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

²⁵⁷ Board of Equal Treatment, Decision No. 9641 of 26 April 2017.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Denmark, there are legal measures of protection against victimisation.

National law prohibits subjecting a person to any adverse treatment or adverse consequence as a reaction to a complaint or to any type of proceedings aimed at enforcing compliance with the principle of equal treatment.

Section 7(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 8 of the Act on Ethnic Equal Treatment and Section 9 of the Act on the Prohibition of Discrimination due to Disability all prohibit adverse treatment as a reaction to a complaint concerning discrimination. According to these laws, a person who experiences negative treatment or unfavourable consequences because of the fact that he or she has asked for equal treatment can be granted compensation by the court.

The commentary to the Act on the Prohibition of Discrimination in the Labour Market etc. reads: 'Protection against victimisation applies in cases where a formal letter of complaint has been filed with a court of justice or another public authority, as well as in cases where a certain incident is criticised verbally at the place of work, or where the employee has contacted his or her trade union and related the circumstances to the union.'²⁵⁸

Both in the labour market as well as outside the labour market, protection applies to a person who files a complaint regarding differential treatment of himself or herself as well as to a person who files a complaint of differential treatment of another person.

It is a prior condition that a causal link can be established between the victimisation and the employee's or the complainant's request for equal treatment. Adverse treatment is not considered as a violation of the prohibition of discrimination in the directives. The burden of proof is therefore not shared in cases of victimisation

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

Discrimination in the private and public labour market may result in pecuniary compensation and discriminatory job advertisements may result in a fine, cf. Section 7(1) and Section 8 of the Act on the Prohibition of Discrimination in the Labour Market etc.

In public and private employment as well as in a field outside the area of employment, a person who has been subject to discrimination can be awarded compensation for non-economic damages, as stipulated in Section 7(1) of the Act on the Prohibition of Discrimination in the Labour market etc., in Section 9 of the Act on Ethnic Equal Treatment, and in Section 11 of the Act on the Prohibition of Discrimination due to Disability.

Furthermore, Danish civil courts can award damages for an established economic loss according to the general Danish rules concerning damages. The Danish law of torts is developed through Danish case law. Damages can be awarded if negligent behaviour has resulted in an economic loss and there is a causal link between the negligent behaviour and the loss. Furthermore, the loss has to be foreseeable to the person acting negligently.

Finally, a person who is responsible for an unlawful violation of another person's freedom, honour or integrity is liable to pay compensation, according to Section 26 of the Act on Damage Liability. There is a three-year period of limitation, meaning that compensation

²⁵⁸ Preparatory work for Act No. 253 of 7 April 2004 amending the Act on the Prohibition of Discrimination in the Labour Market etc.

claims must be brought to the courts three years, at the latest, after the unlawful violation.²⁵⁹

In reality, the scope of the Danish tort legislation is very narrow. This is illustrated by a 2020 judgment from the Eastern High Court about a young woman with an intellectual disability.²⁶⁰ The municipality illegally took away the funding of the woman's personal assistant. The judgment showed that according to Danish law, the woman could not get financial compensation for the unjustified loss of service or welfare. The judgment leaves individuals with disabilities in an insecure place if their local municipalities issue faulty decisions. In 2021, the Supreme Court upheld the ruling from the Eastern High Court and acquitted the municipality.²⁶¹

b) Compensation – maximum and average amounts

There is no ceiling on the maximum amount of compensation that can be awarded.

Typically, the following amounts of compensation will be awarded to victims of discrimination:

- in cases of denial of access to public places like bars, restaurants and discotheques: from EUR 670 (DKK 5 000) to EUR 1 340 (DKK 10 000);
- in cases of discriminatory job advertisements: EUR 3 350 (DKK 25 000);
- in cases of discriminatory denial of employment/new job: EUR 3 350 (DKK 25 000);
- in cases of discriminatory dismissals: 6 to 12 months' salary.

In the landmark Supreme Court judgment of 1 October 2014,²⁶² the Court dealt with the level of compensation in cases of age discrimination. The Supreme Court referred to case law on gender discrimination in the labour market, stating that the pilots in question would be eligible to more than six months' salary in compensation. However, according to the Court, there were a number of mitigating circumstances, which meant that the compensation in these cases should be determined at a lower level. The result was that the Court granted four months' salary in compensation to each of the pilots. According to the Court, the mitigating circumstances were the following:

- the dismissals were necessary because of work and workforce reductions;
- the criterion for dismissing the pilots (eligibility for retirement benefits) was collectively negotiated with the pilot union;
- this criterion was the most humane and gentle in a situation where – no matter what – a number of pilots had to be dismissed.

This approach was corroborated in a Supreme Court judgment of 12 March 2015.²⁶³ In this case, the Court underlined that, when determining the amount of compensation, it must emphasise the 'coarseness', meaning the seriousness of the violation including the background for the violation and the infringement of the individual in question.

In another landmark Supreme Court judgment of 13 June 2013,²⁶⁴ a young woman was appointed as a secretary at a law firm. She was dismissed instantaneously, only four days after she had started working. The woman had a diagnosis of ADHD²⁶⁵ and the employer's reason for dismissing her was her 'special conditions'. The Supreme Court concluded that the dismissal was a violation of the prohibition of discrimination in the labour market and

²⁵⁹ Section 3 of Act on Limitations (*Forældelseslov*), Consolidated Act No. 1238 of 9 November 2015.

²⁶⁰ Eastern High Court judgment of 22 January 2020, Case No. BS-12019/2019.

²⁶¹ Supreme Court judgment of 22 April 2021, Case No. BS-19523/2020-HJR.

²⁶² Supreme Court judgment of 1 October 2014, Case No. 322/2012. Printed in U.2015.1H.

²⁶³ Supreme Court judgment of 12 March 2015, Case No. 180/2014. Printed in U.2015.2027H.

²⁶⁴ Printed in U.2013.2575H.

²⁶⁵ Attention deficit and hyperactivity disorder.

she was awarded compensation amounting to six months' salary. When setting the compensation, the Supreme Court referred to the case law on discrimination on account of gender and stated that in the case in question, there was no reason to depart from the compensation practice in the gender case law.

In a judgment by the Eastern High Court, the court addressed the consequences of the violation for the individual in question when determining the compensation.²⁶⁶ The case dealt with the dismissal of a shop manager. According to the Act on Salaried Employees, an employee can be dismissed with a shorter notice period if he or she has been sick for a total of 120 days within the last 12 months. In the case in question, a shop manager with a disability was dismissed according to this special rule. The court, however, found that her sickness absence was a result of her employer's lack of provision of reasonable accommodation. The court therefore ruled that the shop manager had experienced discrimination because of her disability in violation of the Act on the Prohibition of Discrimination in the Labour Market etc. When ruling on the level of compensation the court argued that the violation has resulted in a long and unnecessary sickness absence for the shop manager, that the shop manager had lost a job in a workplace where she had been happy and where she had been working with few interruptions since 2004. The court therefore awarded a compensation equal to 12 months' salary.

In a judgement by the city court of Roskilde, the compensation awarded by the Board of Equal Treatment was reduced by half.²⁶⁷ The court argued that a teacher who had been dismissed from her full-time position because of her disability would not have been able to work more than part-time. Generally, if a person is dismissed from a full-time position, the compensation for unlawful discrimination will be based on a full-time salary. This ruling illustrates that specific circumstances may justify a change in this approach. It also illustrates that when determining the level of compensation, the court may emphasise the number of hours that the employee is actually capable of working at the time of dismissal – and not the conditions and hours of employment in the contract.

c) Assessment of the sanctions

In reality, compensation is almost the only sanction used in cases of unlawful discrimination on the labour market. Fines are used so rarely that it is difficult to evaluate whether these sanctions are effective.

The level of compensation in discrimination cases is higher than in traditional cases of unfair dismissal and seem proportionate. Hypothetically the higher sanctions, combined with the increased knowledge that employers have about discrimination laws, are likely to have a dissuasive effect when it comes to discrimination in the labour market.

The Supreme Court has made a clear statement about the level of compensation in discrimination cases in the labour market. There was previously a tendency to award lower amounts of compensation in cases of discrimination on account of ethnic origin, age, disability, sexual orientation and religion/belief than in cases of discrimination because of gender. This is not the case anymore.

In its 2018 annual report, the Board stated that if there are multiple violations in a case, it might trigger a higher compensation.²⁶⁸ As in the case below, this can be relevant in a case where the employer has violated both the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on Equal Treatment of Men and Women as regards access to employment etc. The case dealt with a man, born in 1999, who was laid off from his position as a substitute teacher for which he was paid by the hour.²⁶⁹ In the dismissal,

²⁶⁶ Eastern High Court judgment in Case No. BS-37426-2018 of 4 November 2011.

²⁶⁷ City Court of Roskilde judgment of 7 May 2020, Case No. BS-33137/2018-ROS.

²⁶⁸ Board of Equal Treatment, Annual Report 2018 (June 2019), p. 25.

²⁶⁹ Board of Equal Treatment, Decision No. 9435 of 24 April 2019.

the school referred to the modest age difference between the teacher and the pupils, and the school stated that the girls in the older classes 'were crazy about him'. The man was dismissed less than three months after he started as a substitute teacher. In the case, the Board argued that although the teacher worked only four hours a week, his position constituted employment encompassed by the EU directive. The Board also argued that there was no doubt that the dismissal was based on both the age and gender of the complainant. The Board concluded that the dismissal constituted discrimination in violation of both the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on Equal Treatment of Men and Women as regards access to employment etc. Evaluating the level of compensation, the Board based its decision on the length of the period of employment as well as other information in the case. The Board found it to be an aggravating circumstance that the complainant was dismissed in violation of both laws. The teacher was therefore awarded a compensation equal to about nine months of salary.

The Board has underlined that the amount of the compensation is determined by case law as well as the facts of the case in question. In a decision from 2020, the Board awarded compensation of EUR 2 000 (DKK 15 000) in a case of discriminatory denial of employment, which normally results in compensation of EUR 3 350 (DKK 25 000).²⁷⁰ The case dealt with a man who was deaf and who was denied employment as a bricklayer. The Board found that the complainant was discriminated against because of disability. The fact that the complainant had sent an unsolicited application was instrumental in the awarding of compensation of only EUR 2 000 (DKK 15 000).

Outside the area of employment, on the other hand, within the realm of the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination due to Disability, sanctions are typically EUR 670 and so mild that it must be questioned whether they are sufficiently effective, proportionate and dissuasive. This is in particular the situation when it comes to nightlife and discotheques where discrimination because of ethnic origin is a big problem. The risk of having to pay very little compensation does not seem to sufficiently prevent discrimination in nightlife.

²⁷⁰ Board of Equal Treatment, Decision No. 9151 of 20 February 2020.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Danish Institute of Human Rights (DIHR) is designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive.²⁷¹ Section 2(2) of the Act on the Institute for Human Rights – the National Human Rights Institution of Denmark stipulates that the DIHR must promote equal treatment of all persons without discrimination on grounds of gender, race or ethnic origin. According to Parliament Decision B15 of 17 December 2010, the DIHR is also responsible for monitoring the Danish implementation of the UN Convention on the Rights of Persons with Disabilities and thus deals with issues of disability. In 2021, Section 2(2) of the Act was amended to include the discrimination grounds of sexual orientation, gender identity, gender expression and gender characteristics.²⁷²

The DIHR addresses discrimination in any domain, including employment, education, housing, social services, etc. The mandate stipulated in the Act on the Institute for Human Rights covers gender, sexual orientation, gender identity, gender expression and gender characteristics, race and ethnic origin. Due to Parliament Decision B15 of 17 December 2010, the DIHR also covers disability. More broadly it follows from the Act, that the DIHR is mandated to work on the promotion of human rights in general. The DIHR writes on its website that the principle of equal treatment and non-discrimination is a cornerstone of human rights advocacy. In its work, the DIHR therefore frequently applies a horizontal perspective. In practice, this means that all grounds of discrimination have been addressed, taking into account gender, age, disability, sexual orientation, religion and faith, ethnicity and race.²⁷³

The act establishing the DIHR exempts Greenland and the Faroe Islands from the competence of the DIHR.²⁷⁴ This exemption still applies to the Faroe Islands but in 2014, it was decided by decree that the DIHR has a mandate to work in Greenland in the same way that it does in Denmark.²⁷⁵ The DIHR evaluates, promotes and monitors human rights in Greenland and publishes ongoing status reports on its activities and on the human rights situation in Greenland. It presents these reports to the *Inatsisartut*, the Parliament of Greenland.²⁷⁶

In accordance with the requirements of Article 13 of the Directive, the Institute has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination.

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. It is a quasi-judicial institution that is limited to adjudicating individual complaints about discrimination.²⁷⁷ The Board is not officially designated as an Article 13 body.

²⁷¹ Consolidated Act No. 553 of 18 June 2012 with later amendments on the Institute for Human Rights – the National Human Rights Institution of Denmark.

²⁷² Act No. 2591 of 28 December 2021, entering into force on 1 January 2022.

²⁷³ See <https://www.humanrights.dk/about-us/mandate>.

²⁷⁴ Section 15 of Consolidated Act No. 553 of 18 June 2012.

²⁷⁵ Decree No. 393 of 23 April 2014 about the entry into force for Greenland of the Act on the Institute for Human Rights – the National Human Rights Institution of Denmark.

²⁷⁶ For information on the DIHR's work in Greenland, see <https://menneskeret.dk/emner/groenland>. For the latest status report on equal treatment in Greenland, see <https://humanrights.dk/publications/equal-treatment-greenland-status-2019>.

²⁷⁷ Consolidated Act No. 1230 of 2 October 2016 on the Act on the Board of Equal Treatment.

b) Political, economic and social context of the designated body

In 2015, legislation was amended to give the DIHR the authority to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or in cases that are a matter of general public interest.²⁷⁸ The amendment represented a strengthening of the DIHR's position. Furthermore, most of the DIHR's general budget comes from the Danish state (the national budget and various Government resources). During the last couple of years, the overall budget for the DIHR has largely been unchanged.

There have been many populist debates during the last couple of years that have been hostile towards international human rights in general, and the human rights obligations of Denmark in particular. The populist debates also illustrate that there is little acknowledgement of the existence of racism and racial discrimination in Denmark.

c) Institutional architecture

In Denmark, the designated body forms part of a body with multiple mandates.

The Act on the Institute for Human Rights – the National Human Rights Institution of Denmark establishes the DIHR as a separate and independent human rights institution.²⁷⁹ The Act clarifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies that the Institute also has a mandate under the EU directives as a specialised equality body on race and ethnic origin as well as on gender. Apart from being a specialised equality body, the DIHR is also an 'A' accredited NHRI according to the UN Paris Principles.

Furthermore, the DIHR is responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities, which follows from Parliament Decision B15 of 17 December 2010.

The Equal Treatment Department is a separate department in the DIHR that works to fulfil the functions and tasks assigned to the DIHR by virtue of its role as a specialised equality body in respect of race, ethnic origin and gender. The department also monitors, promotes and oversees the implementation of the UN Convention on the Rights of Persons with Disabilities.²⁸⁰ The Equal Treatment Department works on issues of discrimination based on gender, race/ethnic origin and disability within all spheres of society and has divided its tasks between three teams centred around gender, race/ethnicity and disability. The Equal Treatment Department works on issues of equality in general and does not limit its work to the material scope of the EU directives.

The DIHR is established by law as an independent autonomous institution within the public administration. The DIHR works with human rights in general and is accountable to the Danish Parliament by the obligation to submit a yearly report to the Parliament and by the fact that the DIHR can only be abolished by legislation. With regard to its budget, the DIHR is technically accountable to the Ministry of Finance.

By the end of 2021, the DIHR had 146 full-time equivalent employees and the Equal Treatment Department had 15 full-time equivalent employees.²⁸¹

The DIHR publishes a number of reports every year within the area of human rights and equality.

²⁷⁸ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁷⁹ Consolidated Act No. 553 of 18 June 2012 with later amendments.

²⁸⁰ Table of DIHR departments. See <https://www.humanrights.dk/about-us/departments>.

²⁸¹ Information provided by the DIHR Equal Treatment Department in an email, 10 March 2022.

- d) Status of the designated body – general independence
 - i) Status of the body

The DIHR is established by law as an independent autonomous institution within the public administration. The Equal Treatment Department works to fulfil the functions and tasks assigned to the DIHR by virtue of its role as a specialised equality body.

The Danish Council for Human Rights (*Rådet for Menneskerettigheder*) is established to assess the development and execution of the activities of the DIHR and may propose new activities to the DIHR Board. The Council meets four times a year to discuss the work of the DIHR and also appoints six members of the Board. Members of the Council are appointed to reflect the attitudes of civil society organisations working with human rights as well as public and governmental institutions and authorities. Only members from civil society organisations have the right to vote in the Council.

The Board members of the DIHR are appointed by various institutions: one member is appointed by the University of Copenhagen; one member is appointed by the University of Aarhus; one member is appointed by the University of Southern Denmark; one member is appointed by the University of Aalborg; two members are appointed by the Danish Conference of Rectors (*Rektorkollegiet*); one member is appointed by the employees of the DIHR; and six members are appointed by the Danish Council for Human Rights. The Board of Equal Treatment is not represented on the DIHR's Board. The Executive Director of the DIHR is appointed by the Board.

Most of the DIHR's total budget comes from the Danish state (the national budget and various Government resources). The budget for 2021 for the whole of DIHR was approximately EUR 24 million).²⁸² With regard to its budget, the DIHR is technically accountable to the Ministry of Finance.

In relation to resources, via the Danish national budget, the DIHR has permanent funding for its work on equal treatment, which provides security for the Equal Treatment Department. The basic budget for equal treatment in 2021 was EUR 1 472 522, granted from the national budget.²⁸³ This covers the expenses for all equal treatment work and the Equal Treatment Department, including the advice unit. No information could be found on the specific budget for the advice unit.

The Equal Treatment Department has 15 employees²⁸⁴ divided between three teams focused on gender, race/ethnicity and disability. Within the teams, employees are competent to work broadly on the individual discrimination ground, i.e. conducting surveys, preparing reports and drawing up recommendations. Most of the employees have academic backgrounds in law and the social sciences.

The DIHR is an independent autonomous institution within the public administration. The DIHR management has the power to recruit and manage staff.

The DIHR is accountable to the Danish Parliament by the obligation to submit an annual report to the Parliament about the status of human rights in Denmark, and by the fact that the DIHR can only be abolished by legislation.

²⁸² See DIHR (2022) *2021 Annual Report*:
https://menneskeret.dk/sites/menneskeret.dk/files/media/document/Årsrapport_2021.pdf.

²⁸³ Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

²⁸⁴ Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

ii) Independence of the body

The DIHR is established by law as an independent autonomous institution within the public administration. The DIHR can only be abolished by legislation.

e) Grounds covered by the designated body

The Act on the Institute for Human Rights – the National Human Rights Institution of Denmark establishes the Institute as a separate and independent institution.²⁸⁵ The Act also clarifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute under the EU directives as a specialised equality body on race and ethnic origin as well as on gender.

As mentioned above, according to Parliament Decision B15 of 17 December 2010, the DIHR is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities. It follows from the Act on the Institute for Human Rights that the DIHR is mandated to work on the promotion of human rights in general. It therefore also works to promote disability rights including the protection against disability discrimination more broadly than is described in Decision B15.

The Equal Treatment Department works to fulfil these DIHR functions and has divided its tasks between three teams centred around gender (including sexual orientation), race/ethnicity (including religion) and disability. All three teams work to focus on their specific discrimination ground as well as on their intersections when relevant.²⁸⁶ Since January 2022, the DIHR has also had the mandate to work on the discrimination grounds of sexual orientation, gender identity, gender expression and gender characteristics.²⁸⁷ In its work, the DIHR frequently applies a horizontal perspective. In practice, this means that all grounds of discrimination are addressed, taking into account gender, age, disability, sexual orientation, gender identity, gender expression or gender characteristics, religion and faith, ethnicity and race. In 2019 for example, the DIHR filed a gender and age discrimination complaint with the Board on Equal Treatment because of an allegedly discriminatory job advertisement on Facebook.²⁸⁸

Competences of the designated body – and their independent exercise

According to Section 2(3) of the Act on the Institute for Human Rights – the National Human Rights Institution of Denmark, the DIHR must issue a yearly report to the Parliament on the human rights situation in Denmark. It must also publish the report. This includes the situation of persons with disabilities. According to Parliament Decision B15 of 17 December 2010, the Institute is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities.

The duties and powers of the Institute with regard to the equality mandates are specified in the Act on the Institute for Human Rights – the National Human Rights Institution of Denmark. According to Section 2(2) of the Act, the Institute must promote equal treatment of all persons without discrimination on grounds of gender, race or ethnic origin by, among other things:

- assisting victims of discrimination in pursuing their complaints about discrimination in the light of the rights of victims, associations, organisations and other legal entities;
- conducting independent surveys concerning discrimination; and

²⁸⁵ Consolidated Act No. 553 of 18 June 2012 with later amendments.

²⁸⁶ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018.

²⁸⁷ Act No. 2591 of 28 December 2021, entering into force on 1 January 2022.

²⁸⁸ DIHR (2020), *Menneskerettigheder i Danmark 2020 – Beretning til Folketinget* (Human Rights in Denmark), p. 28.

- publishing reports and making recommendations on discrimination issues.
- i) Independent assistance to victims

In Denmark, the designated body does have the competence to provide independent assistance to victims.

The DIHR has an advice unit in the Equal Treatment Department, which is responsible for giving advice relating to individual cases of alleged discrimination. The unit is part of the DIHR, which is established by law as an independent autonomous institution within the public administration and which has the status of an NHRI. The advice unit acts as independently as the rest of the DIHR.

People can call for advice and counselling every Monday, Tuesday, Wednesday and Thursday from 12.00 to 15.00, or they can send an email to the Equal Treatment Department. Employees with the Institute provide independent legal assistance to victims of alleged discrimination. This includes assistance in applying to the authorities for free legal aid in court and filing a complaint with the Board of Equal Treatment.

The DIHR can take up cases about discrimination on its own initiative. Since January 2016, the DIHR has been able to bring complaints to the Board of Equal Treatment in cases regarding a matter of principle or in cases of general public interest.²⁸⁹ The Institute does not necessarily act on behalf of individual victims of discrimination in these complaints. Thus, it is not a condition that the Institute must identify a victim of discrimination by name to file such complaints.²⁹⁰

In relation to the effectiveness of the assistance, the advice unit of the DIHR receives relatively few discrimination inquiries on an annual basis. In 2021, the DIHR provided advice in 47 cases of discrimination because of gender; in 3 cases of discrimination because of sexual orientation; in 24 cases of discrimination because of race/ethnic origin; in 3 cases of discrimination because of religion/belief; in 6 cases of discrimination because of national origin; in 67 cases of discrimination because of disability; and in 7 cases of multiple discrimination.²⁹¹ The DIHR does not engage in outreach activities vis-a-vis the general population to inform people about rights or about the assistance it provides to victims of discrimination.

Information has not been found that can clearly establish whether the reason for so few people approaching the advice unit of the DIHR is lack of knowledge about the opportunity or whether it is lack of trust. Either way, based on the low number of inquiries, it can be questioned whether the provision of assistance to victims of discrimination is effective. However, numbers of inquiries have gone up in 2021 compared to previous years, which may illustrate a new development. The Equal Treatment Department has set a goal to strengthen its advice unit in 2022.²⁹²

- ii) Independent surveys and reports

In Denmark, the designated body does have the competence to conduct independent surveys and publish independent reports.

In relation to independence, the DIHR provides general information to the public on human rights. It conducts courses, seminars and other promotional activities. It also undertakes surveys, reports and analyses on human rights in general as well as on all grounds of

²⁸⁹ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²⁹⁰ Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

²⁹¹ Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

²⁹² Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

discrimination. The DIHR is obliged by law to submit an annual report to the Danish Parliament on human rights in Denmark in general.²⁹³ The DIHR also publishes more detailed status reports on the situation of human rights in Denmark with recommendations, including specific reports with recommendations on the current situation of women,²⁹⁴ ethnic minorities²⁹⁵ and persons with disabilities in Denmark.²⁹⁶

Besides being a specialised body according to Directive 2000/43, the DIHR is also an 'A' accredited national human rights institution according to the UN Paris Principles. Hence, it is independent, which means that published reports and recommendations must be independent. In 2019, for example, the DIHR and the Equal Treatment Department published a report with recommendations on the issue of interpreting services in the health sector.²⁹⁷ In 2020, DIHR published several reports with recommendations on equality, for example the report on ethnicity and coercion in psychiatry²⁹⁸ and a report regarding the labour market and women wearing religious head scarfs.²⁹⁹

In some areas, the DIHR is quite effective in setting the agenda for public debate in Denmark.

iii) Recommendations

In Denmark, the designated body does have the competence to issue independent recommendations on discrimination issues. The DIHR website has sections on human rights and equality issues in Denmark where it publishes its latest recommendations on an ongoing basis.³⁰⁰ There are recommendations on housing, children, ethnic origin, refugees, prisons, disability, gender, LGBT+, police, private life, religion, fair trial, citizenship, undocumented migrants, freedom of speech, and age. See above regarding independence, effectiveness and resources.

iv) Other competences

The DIHR does some promotional work for equal treatment through cooperation with key stakeholders, such as municipalities and private companies. The DIHR does not conduct specific equality campaigns. The Equal Treatment Department is not involved in primary school education, but the general human rights education provided by the DIHR in primary schools does include elements of non-discrimination and equal treatment.

Furthermore, as an example, the DIHR has introduced the Disability Barometer, which provides an ongoing state of play regarding the fulfilment of the human rights of persons with disabilities.³⁰¹ The Barometer covers 10 essential areas of life, including employment.

g) Legal standing of the designated body

In Denmark, the designated body only has legal standing in the following areas:

The DIHR does not have explicit legal standing to bring discrimination complaints to court. However, the DIHR may intervene in existing court cases on discrimination if a legal

²⁹³ DIHR (2021), *Beretning til Folketinget 2020*. See

<https://menneskeret.dk/sites/menneskeret.dk/files/media/document/Beretning2020WEB.pdf>.

²⁹⁴ See <https://menneskeret.dk/koen-ligestilling>.

²⁹⁵ See <https://menneskeret.dk/etnicitet>.

²⁹⁶ See <https://menneskeret.dk/status/handicap-psykiatri>.

²⁹⁷ See <https://menneskeret.dk/udgivelser/egenbetaling-tolkebistand-laegers-erfaring-ordningen>.

²⁹⁸ DIHR (2020) *Ethnicity and coercion in psychiatry*, see: <https://menneskeret.dk/udgivelser/etnicitet-tvang-psykiatrien>.

²⁹⁹ DIHR (2020) *Kvinder med tørklæde – ti kvinders erfaringer med arbejdsmarkedet* (Women and the headscarf - ten women's experiences in the labour market). See: <https://menneskeret.dk/udgivelser/kvinder-toerklæde-ti-kvinders-erfaringer-arbejdsmarkedet>.

³⁰⁰ See the webpage on human rights in Denmark: <https://menneskeret.dk/status>.

³⁰¹ See <https://handicapbarometer.dk/>.

interest in the matter at issue can be proven. Thus, the DIHR may intervene and act as *amicus curiae* in principle cases on discrimination based on race, ethnic origin, gender or disability.

Since 2016, the DIHR has acted as *amicus curiae* in 11 court cases.³⁰² The cases dealt with family reunification, the right to vote for persons under legal guardianship, children's rights and citizenship, and housing.

The DIHR can assist and provide advice to individuals or lawyers in concrete court cases.

The DIHR can also assist a complainant in bringing his or her case to the ECtHR or other international human rights bodies.

The DIHR can bring a discrimination complaint on behalf of an individual to the Board of Equal Treatment.

In 2016, the Institute was also given a mandate to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or in cases that are a matter of general public interest.³⁰³ According to the preparatory work for this law, it is not a condition that the Institute can identify a victim of discrimination by name to file such complaints.³⁰⁴ Thus, the Institute does not necessarily act on behalf of individual victims of discrimination in such complaints. Since 2016, the DIHR has filed seven discrimination complaints on matters of principle.³⁰⁵

Since 2016, the DIHR has had a strategy to strengthen its legal efforts with regard to individual cases of human rights violations. The focus on individual cases is aimed at improving protection of the individual person as well as clarifying more general legal questions of human rights. Even though the DIHR has been involved in more cases for the civil courts and for the Board of Equal Treatment, it has only initiated a limited number of individual cases. Typically, lawyers working at the DIHR are not lawyers authorised to litigate in the civil court system, which may constitute a barrier for the intervention of the DIHR in such individual cases before the courts and the Board of Equal Treatment.

h) Quasi-judicial competences

In Denmark, the DIHR is not a quasi-judicial institution but rather a specialised body to assist and advise victims of discrimination.

In Denmark, the Board of Equal Treatment is a quasi-judicial institution:

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. It is a quasi-judicial institution that is limited to adjudicating individual complaints about discrimination.³⁰⁶ The Board deals with individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin while outside the labour market the Board only deals with complaints related to discrimination based on race, ethnic origin, disability, gender, sexual orientation, gender identity, gender expression and gender characteristics.

³⁰² Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018 and in emails from the DIHR Equal Treatment Department on 5 April 2019, 12 March 2021 and 10 March 2022.

³⁰³ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

³⁰⁴ Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

³⁰⁵ Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

³⁰⁶ Consolidated Act No. 1230 of 2 October 2016 on the Act on the Board of Equal Treatment.

The Board is part of the public administration and is funded by public funds. The Board's expenses include remuneration of Board members and secretarial staff as well as fees to the legal advisor to the Danish Government (the law firm Kammeradvokaten), which represents the Board in civil court cases. At the end of 2019, the secretariat of the Board consisted of 3.1 full-time-equivalent employees.³⁰⁷ The total expenditure on the Board of Equal Treatment in 2019 was EUR 587 950 (DKK 4 391 462).³⁰⁸

The Board consists of one president and two vice-presidents, who are judges, as well as nine members, who are lawyers with specific expertise in discrimination law. The president of the Board must be a High Court judge and the vice-presidents must be city court judges. Both genders must be represented in the presidency.³⁰⁹ The Board members are independent of the ministries that have nominated and appointed them. The Board members do not represent any specific political or organisational views.

In 2015, the Act on the Board of Equal Treatment was amended to clarify that the Board can only adjudicate complaints if the complainant has an individual and current interest in the case in question.³¹⁰ Since 1 January 2016, it has not been possible for an individual to file a complaint because of the fact that he or she belongs to a group of people (based on ethnic origin, for example) who have been discriminated against. The requirement for *locus standi* has resulted in a number of cases being dismissed. One example is a case of possible discrimination due to ethnic or national origin.³¹¹ The complainant was of Danish origin and he complained about a temp agency that had a positive description and coverage of foreign labour on its website. The complainant argued that he felt slighted as a Dane because of the content on the website and thus did not apply for a position at the temp agency. The Board argued that even though the complainant was looking for a job, he had not been directly affected by the content of the website and thus did not have an individual and current interest in the case in question. The Board therefore dismissed the case. When the Board dismisses a case, it informs the DIHR about the case. This allows the DIHR to consider whether it will bring a complaint to the Board based on the case being a matter of principle or a matter of general public interest.³¹²

The Board does not have the power to take up cases on its own initiative or to allow for oral proceedings in individual cases.

When handling a complaint, the president or a vice-president of the Board participates together with two additional members. In 2015, the Act on the Board of Equal Treatment was amended to clarify that complaints, which can be adjudicated in accordance with well-established case law, can be decided by just one member of the Board's presidency.³¹³ In complaints concerning matters of principle, the president can decide that four additional members participate instead of two.

The Board does not hold public hearings. The decisions of the Board of Equal Treatment are legally binding and generally well respected. The Board does not have the power to follow up on individual cases to track and secure implementation of its decisions. But if a decision by the Board is not respected, and if a complainant makes a request, the Board must bring the case before the courts pursuant to Section 12 of the Act on the Board of Equal Treatment.

³⁰⁷ Information provided by the Board secretariat in an email, 20 March 2020.

³⁰⁸ Information provided by the Board secretariat in an email, 20 March 2020.

³⁰⁹ Consolidated Act No. 1230 of 2 October 2016.

³¹⁰ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

³¹¹ Board of Equal Treatment, Decision No. 9361 of 25 April 2018.

³¹² Board of Equal Treatment (2018) *Ligebehandlingsnævnets Årsberetning 2017* (Annual Report 2017), p. 28.

³¹³ Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

A decision by the Board cannot be appealed to another administrative body but may be taken to the civil courts. The time limit in the statute of limitation is suspended by the Board's decision. See section 6.1.b above for a description of the Danish rules on limitation. According to Section 2 of the Act of the Board of Equal Treatment, the Board has the power to award financial compensation.

i) Registration by the body of complaints and decisions

In Denmark, the DIHR registers the number of requests received for advice in individual cases of possible discrimination. The number of inquiries for information on general discrimination issues is not registered by the DIHR.

The DIHR assists victims of discrimination and has a unit responsible for giving advice relating to individual cases of alleged discrimination. The DIHR's data is not generally available to the public. In 2021, the advice unit provided advice by phone or in writing in 47 cases of discrimination because of gender; in 3 cases of discrimination because of sexual orientation; in 24 cases of discrimination because of race/ethnic origin; in 3 cases of discrimination because of religion/belief; in 6 cases of discrimination because of national origin; in 67 cases of discrimination because of disability; and in 7 cases of multiple discrimination.³¹⁴

In Denmark, the Board of Equal Treatment registers the number of discrimination complaints that it receives as well as the number of decisions issued. Statistics on the number of complaints and the Board's decisions could previously be found on the website of the Board of Equal Treatment. This is no longer the case and the Board's 2021 annual report is the source of the statistics below:³¹⁵

Number of complaints received:

- 2015: 314
- 2016: 393
- 2017: 297
- 2018: 341
- 2019: 363
- 2020: 635 (222 complaints concern the same housing issue (the 'ghetto legislation') regarding possible discrimination based on ethnic origin and await rulings from the Eastern High Court)
- 2021: 471

Number of decisions made:

- 2015: 234
- 2016: 247
- 2017: 238
- 2018: 285
- 2019: 137
- 2020: 192
- 2021: 183

Decisions regarding race and ethnic origin:

- 2015: 22
- 2016: 25
- 2017: 44

³¹⁴ Information provided by the DIHR Equal Treatment Department by email, 10 March 2022.

³¹⁵ Board of Equal Treatment (2022) *Annual Report 2021*, pp. 31-36.

- 2018: 37
- 2019: 46
- 2020: 68
- 2021: 32

Decisions regarding age:

- 2015: 80
- 2016: 50
- 2017: 52
- 2018: 102 (68 decisions were part of the same case)
- 2019: 30
- 2020: 36
- 2021: 18

Decisions regarding disability:

- 2015: 47
- 2016: 44
- 2017: 32
- 2018: 73 (new legislation prohibiting discrimination outside the labour market entered into force on 1 July 2018)
- 2019: 61
- 2020: 87
- 2021: 105

Decisions regarding multiple discrimination and other cases:

- 2015: 15
- 2016: 18
- 2017: 11
- 2018: 32
- 2019: 8
- 2020: 14
- 2021: 14

j) Roma and Travellers

The DIHR does not treat Roma and Travellers as a priority issue.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

In theory, the Ministry of Foreigners and Integration works to promote the integration and equal treatment of ethnic minorities in Denmark. However, no information on discrimination is found on the ministry's website. The Ministry of Social Affairs and the Interior has the overall responsibility for coordinating policies regarding disability.³¹⁶

The DIHR serves as a specialised equality body, disseminating information about discrimination and equal treatment. In its annual reports, the DIHR deals with selected human rights issues and provides recommendations to promote the protection of general human rights in Denmark.³¹⁷ The latest status report on the issue of race and ethnic origin is from June 2016. In this report, the DIHR describes how Denmark faces a number of challenges in terms of implementing the principle of equal treatment and non-discrimination when it comes to race and ethnic origin, including the high number of ethnic minorities in Denmark who experience discrimination and the large salary gap between non-Western immigrants and ethnic Danes.³¹⁸ In a 2020 report, the DIHR focused on the situation of ethnic minority women wearing religious head scarfs and the legal protection against discrimination based on religion or belief.³¹⁹ The report documented that a religious head scarf negatively affects an applicant's job opportunities. In the status report on disability, the DIHR describes challenges around accessibility, education, the labour market and the use of coercion in psychiatry.³²⁰

The national integration barometer run by the Danish Ministry of Foreigners and Integration documents that 45 % of immigrants of non-Western origin and their descendants experienced discrimination because of their ethnic background in 2020.³²¹ The same indicator was 45 % in 2012 and has gone up and down only slightly over the years between 2012 and 2020. Numbers on discrimination have not been updated in 2021.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Apart from the general work of the DIHR, no recent actions have taken place when it comes to measures to encourage dialogue with NGOs.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

No recent actions have taken place when it comes to measures to promote dialogue between social partners.

³¹⁶ See: <https://english.sm.dk/responsibilities-of-the-ministry/disability-policy/>.

³¹⁷ DIHR (2020), *Human Rights in Denmark* – report to the Folketinget.

³¹⁸ See <https://menneskeret.dk/udgivelser/etnisk-oprindelse-statusrapport-2015-16>.

³¹⁹ DIHR (2020) *Women and the headscarf - ten women's experiences in the labour market*. See: <https://menneskeret.dk/udgivelser/kvinder-toerklæde-ti-kvindes-erfaringer-arbejdsmarkedet>.

³²⁰ See <https://menneskeret.dk/udgivelser/handicap-status-2019>.

³²¹ See numbers for the whole country of Denmark: https://integrationsbarometer.dk/barometer/sammenlign/?v=0ce07f1c837d&include_country%3Aboolean=on&indicators%3Alist=5N1.

d) Addressing the situation of Roma and Travellers

There is no specific body to address current Roma issues in Denmark. Denmark submitted a new Roma Strategy to the EU in December 2021.³²² The strategy includes no information about the number of Roma people living in Denmark and no information about their specific social situation. The Danish Government argues that no statistics are available because registration of individuals' ethnicity is illegal and therefore not undertaken by Danish authorities. However, according to the strategy, it is estimated that around 2 000 Roma people live in Denmark.

The strategy does not include information about homeless Roma migrants who live on the streets in Denmark for shorter or longer periods, collecting bottles and selling magazines.

There is no information about the extent of discrimination against the Roma population in Denmark. Discrimination against the Roma population living permanently in Denmark and the homeless Roma migrants is not mentioned in the strategy.

The strategy basically refers to existing equality and integration policies as well as general anti-discrimination legislation, stating that the small Roma population in Denmark is encompassed by these general laws and policies.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

A general non-discrimination assessment of all relevant legislation has never been carried out in Denmark. Furthermore, measures to ensure the abolition of laws, regulations, and administrative provisions contrary to the principle of equal treatment have not been put in place. However, to the knowledge of the author, there are no laws in direct conflict with the principle of equality.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

A general non-discrimination assessment of all relevant contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations has never been carried out in Denmark. Furthermore, measures to ensure the abolition of regulations contrary to the principle of equal treatment have not been put in place.

The rules of *lex specialis* and *lex posterior* apply as part of Danish law.

Moreover, it is a general principle of Danish anti-discrimination law as well as most employment law that a person cannot sign away or agree to be placed in a less favourable position than that prescribed by law. A person cannot waive his or her right not to be subjected to discrimination through a contract or agreement with his or her employer.

³²² The strategy is only available in Danish: 'Danmarks strategi om romaernes ligestilling, inklusion og deltagelse'.
See: https://ec.europa.eu/info/sites/default/files/brurepprn02_brurep4xx05_1854_001.pdf.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Employment is responsible for issues of discrimination in the labour market.³²³

The Ministry of Foreigners and Integration is responsible for integration issues.³²⁴ It is not clear from the ministry's website what kind of efforts the ministry will make to protect genuine ethnic equality and non-discrimination.

No recent national action plan on equality and anti-discrimination has been published.

The Ministry of Social Affairs and Senior Citizens has the overall responsibility for coordinating disability policies.³²⁵ In August 2018, more than 60 Danish disability organisations wrote a letter to the previous Minister of Children and Social Affairs urging the minister to prepare a comprehensive action plan on disability.³²⁶ A future national action plan on disability is still one of the main recommendations from the DIHR when it comes to the protection of persons with disabilities in Denmark.³²⁷

³²³ See <https://bm.dk/>.

³²⁴ See <https://uim.dk/arbejdsmraader/integration-af-nye-borgere/>.

³²⁵ See <https://sm.dk/arbejdsmraader/handicap>.

³²⁶ See <https://menneskeret.dk/nyheder/organisationer-faelles-opraab-regeringen-danmark-mangler-handicappolitisk-handlingsplan>.

³²⁷ See <https://menneskeret.dk/status/handicap-psykiatri-toc-vores-vigtigste-anbefalinger>.

10 CURRENT BEST PRACTICES

Status reports and annual reports prepared for the Danish Parliament by the DIHR document discrimination and provide recommendations to promote the protection of human rights and equality rights in Denmark. The DIHR re-organised its website and provided clear and usable information about the status of equality and human rights in Denmark when it comes to a number of discrimination grounds. As an illustration, the webpage on ethnic origin provides the following oversight and information:³²⁸

- most important recommendations from the DIHR
- status on ethnic origin in 2021
- case law
- progress and retrogression in 2021
- latest news on ethnic origin
- publications on ethnic origin
- statement hearings on ethnic origin regarding new bills and legislative initiatives by the DIHR
- contact information

The same information is provided with regard to disability, gender, LGBT+, religion, age etc.

The Ministry of Finance published its *2021 Inequality Report* in December 2021.³²⁹ The intention of the report is to shed light on inequality and barriers to social mobility in Danish society. The report does not mention discrimination or differential treatment. It provides information about different dimensions of inequality in the areas of welfare, income and wealth distribution. It also describes barriers to social mobility across generations. The report concludes that inequality is not only about income disparities. It mentions that lack of academic skills from primary school or mental vulnerabilities constitute barriers to success in the youth education system. The inequality report is published annually in order to provide an overview of general economic inequality and to monitor development in Denmark.

No information has been found in relation to tackling discrimination caused by artificial intelligence (AI).

³²⁸ See: <https://menneskeret.dk/status/etnicitet>.

³²⁹ Ministry of Finance (2021) *Ulighedssredegørelsen 2021* (Inequality Report 2021). See https://fm.dk/media/25426/ulighedssredegørelsen-2021_web_a.pdf.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

- Possible indirect discrimination based on ethnic origin and race

Discrimination and access to healthcare

According to Section 50 of the Danish Health Act, all residents with a right to free treatment in hospitals, by general practitioners or by specialists have a right to an interpreter when a doctor finds that an interpreter is necessary to explain the treatment. With the primary aim of further incentivising foreigners to learn Danish, new rules regarding interpreting fees came into force on 1 July 2018.³³⁰ According to Section 50(2) of the Health Act, patients who need an interpreter and who have lived in Denmark for more than three years are now charged a fee for the interpreting service. Among patients who need interpretation, there is presumably an over-representation of persons with an ethnic minority background other than Danish. Although the incentive to learn Danish and the push to strengthen integration are legitimate aims, the means of achieving those aims does not seem appropriate and necessary. Many of the patients who are affected by the legislation have low incomes and in spite of their need, will not be able to afford an interpreter. Many patients with an ethnic minority background therefore risk not getting equal access to healthcare. This is documented in a report by the DIHR and the Danish Medical Association, which reports on the results of a survey in which more than 600 doctors account for their experiences with the interpreter services charge and its implications after one year in force.³³¹ The report shows that the fee has resulted in an increased use of relatives as interpreters, and that patients who do not speak Danish may well not receive the right healthcare. The rules may therefore cause indirect discrimination due to ethnic origin or race in violation of Racial Equality Directive 2000/43/EC Article 2(2)(b) and Article 3(1)(e).

No ghettos in Denmark by 2030!

As described above in section 3.2.10 (Housing), a number of laws were adopted in 2018 to prevent and dismantle so-called ghettos and parallel societies in Denmark. The laws were amended in 2021 and introduced a new category of housing area with even stricter requirements. The legislation primarily affects ethnic minorities and raises legitimate questions of possible illegal direct discrimination because of ethnic origin within the areas of housing, education and social services.

Overall, the acts include strict requirements that refugees, immigrants and descendants from non-Western countries assimilate into Danish society, including adapting to Danish traditions, norms and values. The legislation sends strong negative signals that everything about the so-called ghettos, parallel societies and marginalised residential areas is bad and sad. All in all, the rules may cause direct discrimination due to ethnic origin or race in violation of Racial Equality Directive 2000/43/EC Article 2(2)(b) and Article 3(1)(e), (g) and (h).

A number of cases are currently being adjudicated by courts in Denmark as well as by the Board of Equal Treatment. The issue in question is whether the 'ghetto and parallel society laws' are discriminatory and thus a potential breach of the Racial Equality Directive as well

³³⁰ Consolidated Act No. 210 of 27 January 2022 (*Sundhedsloven*). Regulation No. 855 of 23 June 2018 (*Bekendtgørelse om tolkebistand efter sundhedsloven*). The rules are described in the latest official periodic report from Denmark to the CERD-Committee covering the period from July 2013 to December 2018. See UN document CERD/C/DNK/22-24 of 7 February 2019, paragraphs 185-190.

³³¹ DIHR and the Danish Medical Association (Lægeforeningen) (2019), *Egenbetaling for tolkebistand – lægers erfaring med ordningen* (December 2019). See: <https://menneskeret.dk/udgivelser/egenbetaling-tolkebistand-laegers-erfaring-ordningen>.

as international human rights conventions. An estimated 4 000 families are about to lose their homes because they live in the marginalised housing areas.

A case against the Ministry of Transportation and Housing brought by tenants living in the housing association of Mjølnerparken in Copenhagen has gained particular media attention. In this case, which will be adjudicated by the Eastern High Court, three UN Special Rapporteurs urged the Danish Government to 'halt [the] contentious sale of ghetto buildings'.³³²

11.2 Other issues of concern

Denmark faces challenges and barriers for minorities to take part in society on an equal footing. Research should be undertaken to examine institutional barriers that prevent minorities from gaining access to the labour market and obtaining jobs that match their education.

In Denmark in 2020, 45 % of immigrants of non-Western origin and their descendants experienced discrimination because of their ethnic background.³³³ New research from the University of Copenhagen using situation testing found that wearing a hijab has a negative effect on a job applicant's chances of employment.³³⁴ In general, there is a profound lack of recognition that such discrimination takes place in Danish society. Moreover, there is a serious lack of statistics and general research on discrimination.

Monitoring case law in Danish courts is severely hindered due to a lack of free public access to case law. All judgments handed down by the Supreme Court and a few selected cases from the High Courts and city courts are posted on the internet. Cases not posted can be obtained from the courts by paying a fee. Case law in the court systems, however, is sorted without reference to the legislation applied. A complete list of case law concerning specific legislation is not available through public registers. It is possible to subscribe to an expensive private database (the *Weekly Law Journal*), which contains all Supreme Court cases and select High Court cases. City court cases are only rarely published. This lack of access to case law constitutes a problem, especially for monitoring discrimination cases, in particular city court cases, which are rarely appealed and therefore often remain unknown.

The Danish Institute for Human Rights (DIHR) has the mandate as the specialised equality body. The DIHR seems focused on influencing decision makers and does not seem to engage in outreach activities with regard to the anti-discrimination advice unit. The obligation set out in the EU directive and the Danish legislation to provide assistance to victims of discrimination has not seemed to be a priority in previous years. It may be that this will change in 2022 according to the new priorities of the Equal Treatment Department. Currently, the low number of discrimination inquiries illustrate that, for possible victims of discrimination, the DIHR is either invisible or there is no confidence that approaching the DIHR would help.

With regard to the Board of Equal Treatment, a number of issues should be raised:

- Although there has been a general rise in the number of complaints to the Board since the Board was established in 2009, the visibility of the Board among possible

³³² UNHRC (2020) 'UN human rights experts urge Denmark to halt contentious sale of "ghetto" buildings', press release, 23 October 2020: <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26414&LangID=E>.

³³³ See numbers for the whole country of Denmark: https://integrationsbarometer.dk/barometer/sammenlign/?v=db476d9e901f&include_country%3Abooleant=on&indicators%3Alist=5N1.

³³⁴ Dahl, M. (2019) 'Alike but different: How cultural distinctiveness shapes immigrant-origin minorities' access to the labour market' in *Detecting Discrimination. How Group-based Biases Shape Economic and Political Interactions: Five Empirical Contributions*, PhD dissertation, University of Copenhagen.

victims of discrimination is still relatively low. This is especially the case for ethnic minority groups and persons with disabilities.

- It is not possible to present a complaint to the Board in person. Complaints have to be submitted in writing.
- The Board of Equal Treatment does not have a mandate to take up cases on its own initiative.
- The Board of Equal Treatment cannot force the parties to disclose material, produce documents, give their opinion or reveal the factual circumstances of a case in order to elucidate a case.
- The Board of Equal Treatment is not empowered to hear oral testimonies.

There are few NGOs and legal aid/citizen advice offices assisting victims of discrimination in filing complaints and initiating court proceedings. Only very few NGOs specialise in providing legal aid to victims of discrimination.

Outside the area of employment, in the cases relating to restaurants, bars and discotheques, for example, sanctions are so mild that it can be questioned whether they are sufficiently effective, proportionate and dissuasive, as required by the directives.

In more concrete terms, a number of legislative initiatives targeting foreigners were introduced in the last couple of years. The ghetto and parallel society initiatives and laws are described above. The burqa ban, the handshake requirements and the anti-homeless initiatives are described below:

Adoption of burqa ban

The Danish Parliament amended the Penal Code on 31 May 2018 and made it a crime to wear face coverings in public.³³⁵ The prohibition entered into force on 1 August 2018. The preparatory work states that the following garments will be illegal in the public sphere if they cover the face: hats, hoods, scarves including burqas and niqabs, masks, helmets, artificial beards.³³⁶ Wearing a hijab in public is not prohibited.

According to the preparatory works, the aim of the prohibition is to demonstrate that it is incompatible with Danish values and social cohesion in Danish society to have the face covered in the public sphere. The fine for the first violation of the prohibition is EUR 134 (DKK 1 000). The fine will increase in the event of further violations. In the period from 1 August 2018 to 1 August 2019, 23 women received fine notices.³³⁷

In spite of its neutral language, it follows from the political debate about the bill in the Danish Parliament, that the criminalisation of face coverings in public was targeted at Muslim women wearing burqas and niqabs.³³⁸ The prohibition may constitute indirect discrimination based on religion or ethnic origin.³³⁹ The practical result may be that some Muslim women are prevented from moving around in the public sphere. The EU anti-discrimination directives do not include the prohibition of face covering in the public sphere. However, the prohibition is important for the general situation of ethnic minorities, and Muslim women in particular, in Denmark.

³³⁵ Section 134(c) of the Act No. 1851 of 20 September November 2021 (Penal Code).

³³⁶ Bill No. L 219 on Act amending the Penal Code (prohibition of face covering) adopted on 31 May 2018.

³³⁷ Information from the Police to the newspaper *Kristeligt Dagblad* in an article from 31 July 2019:

<https://www.kristeligt-dagblad.dk/danmark/effekten-af-burkaforbud-er-vanskeligt-spaa-om>.

³³⁸ Debate between elected politicians in Danish Parliament of Bill L 219 on 19. April 2018. See:

<https://www.ft.dk/samling/20171/lovforslag/L219/BEH1-85/forhandling.htm-tE938EC74786F4740AEF33CB26067233Btab1>.

³³⁹ In Denmark, case law on religious headscarves has been adjudicated as possible indirect discrimination because of ethnic origin. Most Muslims in Denmark are from ethnic minorities.

Handshake as requirement for Danish citizenship

In June 2018, the previous Danish Government entered into a political agreement with the Danish People's Party and the Social Democratic Party regarding naturalisation. The parties agreed that, in addition to passing a naturalisation test and fulfilling a number of financial and residential requirements, obtaining Danish citizenship should be determined by participation in a municipal ceremony.

On that basis, the Danish Parliament adopted an amendment to the Act on Danish Citizenship.³⁴⁰ The rules require that individuals who have been awarded Danish citizenship by law must also take part in ceremonies in their local municipalities. At the ceremonies, the individuals are required to sign a document to demonstrate that they will respect Danish laws and values. The Act authorises the Minister of Foreigners and Integration to establish more detailed rules for holding the ceremonies. These regulations were tightened in 2021 to underline that individuals have to shake hands with the mayor or alderman (shaking hands with another public authority representative will no longer fulfil the requirements).³⁴¹ The regulations also describe the handshake as a handshake 'without gloves, palm against palm, to celebrate and clearly mark the moment in the participants' lives where they become Danish citizens' (author's translation).³⁴²

If an individual does not live up to these ceremonial requirements, he or she will lose the right to become a Danish citizen.

A minority of Jews and Muslims in Denmark believe that it is against their religion to shake hands with a mayor, in particular if the representative is of the opposite gender.

For participants at the naturalisation ceremonies who believe that it is against their religion to shake hands with a person of the opposite gender, the gender of the individual mayor may determine whether they will obtain Danish citizenship or not.

On that basis, the handshake requirement may constitute indirect discrimination because of religion, and possibly multiple discrimination based on religion and gender.

More specifically, the handshake requirement may constitute a violation of Article 9 of the European Convention on Human Rights, which deals with freedom of religion and/or a violation of the prohibition of discrimination as outlined in Article 14 of the European Convention on Human Rights, cf. Articles 8 and 9.³⁴³

Discrimination against homeless unregistered migrants

In recent years, there has been an intense public debate regarding the presence of homeless foreign nationals in public spaces in Denmark. In response to these public order issues, the Danish Government and the Danish Parliament adopted a range of legislative initiatives in 2017 and 2018. The initiatives are specifically aimed at homeless foreign nationals.³⁴⁴

³⁴⁰ Consolidated Act No. 1191 of 5 August 2020 with later amendments (*Lov om dansk indfødsret*).

³⁴¹ Regulation No. 2546 of 16 December 2021, Section 5.

³⁴² Regulation No. 2546 of 16 December 2021, Section 8.

³⁴³ See <https://menneskeret.dk/monitorering/hoeringssvar> for hearing statement from the DIHR: *Høring over udkast til lovforslag til lov om ændring af lov om dansk indfødsret og lov om danskuddannelse til voksne udlændinge m.fl.* (5 October 2018).

³⁴⁴ Kiørboe, E. (2018), *Uregistrerede Migranter – Status 2018* (Unregistered migrants – status report 2018), Institut for Menneskerettigheder. See <https://menneskeret.dk/udgivelser/uregistrerede-migranter-status-2018>.

A ban has been introduced on establishing or residing in camps that disrupt public order.³⁴⁵ Homeless people, who, according to the police, have established or resided in a camp that disrupts public order, may be sentenced to fines or imprisonment for up to 18 months. They may also receive a zonal ban. Furthermore, tougher sanctions for begging have been introduced.³⁴⁶ The tougher sanctions were supposed to be temporary and to be abolished on 1 July 2020. The Danish Parliament decided to make the sanctions permanent and new rules entered into force on 30 June 2020.³⁴⁷

In the public debate leading to the legislative changes, both parliamentarians and cabinet ministers referred to the problematic camps of homeless people as 'Roma camps'. The latest national survey of homelessness from 2019 shows that there are 519 unregistered homeless migrants in Denmark.³⁴⁸ In 2015, that figure was just 125. The latest figures indicate that the legislation has neither reduced the number of homeless migrants without permanent residence or the number of homeless people generally sleeping on the streets.³⁴⁹

In 2019, the UN Committee on Economic, Social and Cultural Rights expressed its concern at the criminalisation of begging and at the instances of criminalisation of homeless people.³⁵⁰ Statistics imply that there may be serious issues of discrimination because of ethnic origin in the application of the rules criminalising homelessness in Denmark. For example, 97.4 % of the persons who received a zonal ban between April 2017 and December 2020 were foreigners.³⁵¹

Artificial Intelligence

No information has been found in relation to concerns regarding the use of AI.

³⁴⁵ *Bekendtgørelse nr. 305 af 31. marts 2017 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger.* Regulation No. 305 of 31 March 2017. See: <https://www.retsinformation.dk/eli/lt/2017/305>.

Bekendtgørelse af lov nr. 1270 af 29 November 2019 om politiets virksomhed (bemyndigelse til at fastsætte regler om zoneforbud i § 23(2)). Consolidated Act No. 1270 of 29 November 2019. See: <https://www.retsinformation.dk/eli/lt/2019/1270>.

Bekendtgørelse nr. 427 af 7. maj 2018 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger. Regulation No. 427 of 7 May 2018. See: <https://www.retsinformation.dk/eli/lt/2005/511>.

³⁴⁶ Act No. 753 of 19 June 2017.

³⁴⁷ Act No. 804 of 9 June 2020.

³⁴⁸ VIVE (2019) *Hjemløshed i Danmark 2019 – National kortlægning* (Homelessness in Denmark 2019).

³⁴⁹ VIVE (2019) *Homelessness in Denmark 2019*.

³⁵⁰ UN Doc. E/C.12/DNK/CO/6 of 12 November 2019, par. 47-48.

³⁵¹ DIHR (2021) *Parallel Report Denmark – UN Committee on the Elimination of Racial Discrimination (CERD)*, p. 18.

12 LATEST DEVELOPMENTS IN 2021

12.1 Legislative amendments

In December 2021, the Danish anti-discrimination acts were amended to include the discrimination grounds of 'sexual orientation, gender identity, gender expression or gender characteristics'.³⁵² The following laws were amended to include the new discrimination grounds:

The Act on the Prohibition of Discrimination due to Race etc.³⁵³

The Act on the Prohibition of Discrimination in the Labour Market etc.³⁵⁴

The Act on Equal Treatment of Men and Women in Society.³⁵⁵

The Act on The Board of Equal Treatment.³⁵⁶

The Act on the Institute for Human Rights – the National Human Rights Institution of Denmark.³⁵⁷

The amendments entered into force on 1 January 2022.

12.2 Case law

Race, ethnic and national origin

Name of the court: Board of Equal Treatment

Date of decision: 26 February 2021

Reference number: Decision No. 9151

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210915125>

Brief summary: The case dealt with a schoolteacher who was born and raised in Poland. She was fired from her position as a schoolteacher, with reference to, among other things, her problematic linguistic Danish skills. On that basis, the Board found that the school teacher had demonstrated factual circumstances that gave reason to believe that she had been subject to indirect discrimination because of her ethnic origin. However, the Board also argued that the language requirements were justified in the learning considerations of the students. The Board therefore assessed that the language requirement was objectively justified as well as appropriate and necessary. The Board finally argued that it did not find reasons to override the assessment by the school of the teacher's linguistic competencies in relation to the teaching of students and therefore did not find the dismissal to be discriminatory.

Name of the court: Board of Equal Treatment

Date of decision: 7 April 2021

Reference number: Decision No. 9302

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210930225>

Brief summary: The complainant argued that she had been discriminated against based on her national origin when she applied for a service job. According to the job

³⁵² Amendment Act No. 2591 of 28 December 2021 entering into force on 1 January 2022.

³⁵³ Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race etc.*), Consolidated Act No. 626 of 29 September 1987 with later amendments.

³⁵⁴ Act on the Prohibition of Discrimination in the Labour Market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), Consolidated Act No. 1001 of 24 August 2017 with later amendments.

³⁵⁵ Consolidated Act No 751 of 26 April 2021.

³⁵⁶ Consolidated Act No. 1230 of 2 October 2016 with later amendments.

³⁵⁷ Act No. 553 of 18 June 2012 with later amendments.

advertisement, the company was looking for a 'Danish speaking mature girl'. The complainant who has a foreign sounding name wrote a note to the company. The company thanked her for the inquiry and asked her which country she came from. The woman replied that she is Turkish and also asked if that mattered for the job. The company wrote back: 'Yes, unfortunately.' The company subsequently wrote to the woman to say that they had many foreign customers who would not come if the company employed a Turkish lady. The Board found that the complainant had been discriminated against because of her national origin and mentioned that the content of the advertisement also constituted discrimination based on age and gender. She was awarded discretionary compensation of EUR 3 360 (DKK 25 000).

Name of the court: Board of Equal Treatment

Date of decision: 15 October 2021

Reference number: Decision No. 9923

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210992325>

Brief summary: The complainant was a man born in Gaza, Palestine, in 1945. He wanted the place of birth in his passport to be indicated as 'Palestine'. The complainant had contacted his local municipality in connection with the renewal of his passport. The municipality stated that neither Gaza nor Palestine existed as country codes in the system. He was informed that for his passport, he could choose between 'Israel' or 'The Middle East' as his place of birth. Before the Board of Equal Treatment Board, the complainant argued that he was a victim of discrimination based on ethnic origin. The Board found that the indication of place of birth in the passport was not encompassed by the material scope of the Act on Ethnic Equal Treatment and emphasised that the passport issuing authority could not be considered to provide social protection, social advantages or education. According to the Board, the passport issuing authorities also could not be considered as supplying goods and services, as the issuing of passports was part of the exercise of public authority. Against that background, the Board could not process the complaint.

Disability

Name of the court: Board of Equal Treatment

Date of decision: 3 December 2020

Reference number: Decision No. 9082

Address of the webpage: <https://www.retsinformation.dk/eli/accn/W20210908225>

Brief summary: The case dealt with a complainant who wanted to shop in a kiosk but was denied access as he would not put on a facemask. The facemask requirement was introduced as a result of the global COVID-19 pandemic, but due to breathing difficulties and choking sensations, the complainant was covered by a broad exemption from the facemask requirement set by the Danish Health Authority. The Board adjudicated this complaint about disability discrimination outside the labour market in accordance with the Act on the Prohibition of Discrimination due to Disability. Despite several requests from the Board of Equal Treatment, the complainant did not submit documentation of his disability and on that basis the Board refused to process the complaint.

Name of the court: Board of Equal Treatment

Date of decision: 19 January 2021

Reference number: Decision No. 9038

Address of the webpage: <https://www.retsinformation.dk/eli/accn/W20210903825>

Brief summary: The case concerned a resident of a public housing association who claimed that he had been discriminated against due to disability because the housing association had declined to allocate him a disability parking space. The resident, who was partially paralysed, had applied to the housing association for a permanent parking space for his disability car. The housing association refused his application on the ground that there were only a limited number of parking spaces available for the residents of the housing association.

The Board noted that the Act on the Prohibition of Discrimination due to Disability does not involve an obligation for the housing association to establish reasonable accommodation. The Board therefore concluded that the housing association was not obligated to establish a disabled parking space for the resident or to allocate him a permanent parking space. On that basis, the Board did not uphold the resident's complaint.

Name of the court: Board of Equal Treatment

Date of decision: 26 January 2021

Reference number: Decision No. 9121

Address of the webpage: <https://www.retsinformation.dk/eli/accn/W20210912125>

Brief summary: Another facemask case dealt with a woman who wanted to stay in an indoor playground, but was denied access as she would not put on a facemask. As in the above case, the complainant was reportedly exempt from the requirement to wear a facemask due to breathing difficulties. Despite several requests from the Board of Equal Treatment, the complainant did not submit documentation of her disability and the Board refused to process the complaint.

Name of the court: Board of Equal Treatment

Date of decision: 22 March 2021

Reference number: Decision No. 9226

Address of the webpage: <https://www.retsinformation.dk/eli/retsinfo/2021/9226>

Brief summary: The case concerned a visually impaired employee who was using a guide dog. In connection with a relocation to another office, restrictions were imposed on her use of her guide dog. Among other things, the guide dog had to stay in a special room separated from the open-plan office. The employee could work in the separate office as well as in the open-plan office. The guide dog, however, had to stay in the separate room and could not guide her to her desk in the open-plan office. The employer introduced the restrictions referring to a colleague who was allergic to dogs. The employee found that the restrictions put her in a worse position than her colleagues. She also found that the restrictions made it difficult to carry out her profession on an equal footing with the others. On that basis, the employee ultimately chose to resign. She filed a complaint to the Board of Equal Treatment arguing that she was discriminated against because of disability when the employer imposed restrictions on her use of the guide dog at the workplace.

The Board assessed that facts had been established, which gave reason to believe that discrimination on the grounds of disability had taken place. The Board found that when relocating the complainant, the employer had not sufficiently investigated whether there was an office without employees allergic to dogs. In that regard, the Board referred to the fact that the employer was a large workplace with a high number of employees having the same kind of educational background as the complainant. Overall, it was the Board's assessment that the employer had not sufficiently examined whether appropriate measures could have been initiated to meet the employee's need to have the guide dog by her side. Thus, the employer had not established reasonable accommodation and the complainant was awarded financial compensation equal to six months' full salary.

Name of the court: Board of Equal Treatment

Date of decision: 21 April 2021

Reference number: Decision No. 9313

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210931325>

Brief summary: The complainant is deaf and during his working hours he received a telephone call to his private phone from an electricity company. The complainant asked his interpreter to pick up the phone and interpret the conversation. With the assistance of the interpreter, he informed the electricity company that he was deaf, and that the interpreter could only be used for work-related contexts. The complainant asked the electricity company to contact him by email, as he wanted to know more about the special offer on the supply of electricity. The electricity company rejected the request, citing that they only

made offers over the telephone. Before the Board, the complainant argued that he had been discriminated against based on his disability.

The Board initially stated that the Act on the Prohibition of Discrimination due to Disability does not involve an obligation to provide reasonable accommodation. In the case in question, the Board argued that facts had been established, which gave reason to believe that the complainant had experienced indirect discrimination. It was therefore incumbent on the electricity company to prove that discrimination had not taken place. The Board assessed that the company's rejection of the request to send a written offer with reference to fixed practices was objectively justified by cost reducing purposes. However, after an overall evaluation of the information in the case, the Board concluded that the electricity company had not lifted the burden of proof that it was necessary to reject the request for a written offer to achieve the purpose of reducing the company's costs. The Board therefore upheld the claim and the complainant was awarded compensation of EUR 670 (DKK 5 000).

Name of the court: Supreme Court

Date of decision: 18 May 2021

Reference number: Case No. BS-19523/2020-HJR.

Address of the webpage:

https://domstol.fe1.tangora.com/media/-300016/files/BS-19523_Anonymiseret_dom.pdf

Brief summary: The case dealt with a young woman with a mental disability. She was a swimmer and had done well in disability sports, both in Denmark and internationally. She used a personal assistant for social-education support when she was participating in swimming competitions. According to several decisions from the Social Appeals Board, the municipality had wrongly taken away the funding of her personal assistant when she turned 18 years of age. The young woman took the case to the civil courts and claimed that the failure of the municipality to comply with the decisions of the Social Appeals Board had caused significant consumption of resources and significant inconvenience to herself and her family. She argued that she was entitled to tort compensation under Section 26 of the Act on Damage Liability (*Erstatningsansvarsloven*) or according to the European Convention on Human Rights, Additional Protocol 1, Article 1 (a violation of her 'property' – her right to receive social benefits).

On the basis of the decisions by the Social Appeals Board, the Supreme Court found that it was a mistake that the woman did not receive the social-educational support from a personal assistant during a period of eight months when she was attending swimming competitions. However, following the evidence, the Court found that there was no basis to establish that the inconvenience for the young woman had been of such magnitude or character that it had violated her self-esteem or reputation. The Court therefore concluded that there was no basis for granting compensation for tort in accordance with Section 26 of the Act on Damage Liability.

The Court also concluded that according to case law of the European Court of Human Rights on the right to social benefits, the municipality's decisions did not violate the woman's rights under the Additional Protocol 1, Article 1. Thus, the European Convention on Human Rights also did not provide a basis for tort compensation.

Thus, the Supreme Court upheld the ruling from the Eastern High Court and acquitted the municipality.

Name of the court: Board of Equal Treatment

Date of decision: 28 May 2021

Reference number: Decision No. 9434

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210943425>

Brief summary: The complainant is a woman who is mobility impaired due to sequelae from polio. She has paralysis in her legs and depends on her walker and her electric scooter. The complainant and her travel companion had reserved a bus trip to France. A few weeks later, they informed the travel agent by email that the complainant had a disability and therefore would bring a walker and a foldable electric scooter on the reserved bus trip. In the email, they explained that the travel companion could handle the foldable scooter without the assistance of the bus driver. The travel agent answered that it was not allowed to bring an electric scooter on the journey. Before the Board of Equal Treatment, the woman argued that she had been discriminated against based on her disability.

The Board initially assessed that the woman's paralysis constitutes a disability within the meaning of the Act on the Prohibition of Discrimination due to Disability. The travel agency's refusal was based on their policy that travellers must be 100 % self-reliant, in generally good physical shape and generally well-walking. The Board argued that the woman had demonstrated factual circumstances that gave reason to believe that at the time of the refusal she was subjected to indirect discrimination. The Board held that the general requirement to be 100 % self-reliant and thus the differential treatment of the woman was justified by the objective aim to show regard to the fact that a large group was traveling together. The Board, however, found that the travel agency had not lifted the burden of proof that in the case in question it was necessary to maintain the requirement towards the complainant. On that basis, the Board concluded that the woman was discriminated against due to her disability. The complainant was awarded compensation of EUR 670 (DKK 5 000).

Name of the court: Board of Equal Treatment

Date of decision: 28 October 2021

Reference number: Decision No. 9915

Address of the webpage: <https://www.retsinformation.dk/eli/accn/W20210991525>

Brief summary: The complainant is a woman who is diagnosed with post-traumatic stress disorder. She is a member of an association that trains and certifies psychiatric service dogs. She owns a psychiatric service dog that is trained and certified through the association. The association required her to use a vest for her service dog with the text: 'psych service dog'. The complainant had asked the association to use an alternative vest with the words 'service dog', or 'support dog' etc. She claimed that by using a service dog vest with the word 'psych', she would stick out in public and be further stigmatised. The complainant and the association had a long correspondence on the issue and the association finally stated that to be a certified member of the association, she was required to use the service dog vest with the word 'psych', otherwise the certification of the complainant and her dog would be terminated with immediate effect and the vest and her ID card would be revoked.

The complainant argued that the requirement of marking the word 'psych' on the service dog vest constituted discrimination due to disability. The association argued that the requirement for 'psych' applied to the service dog vest was justified by the association's goal and purpose of creating recognition of mental illness and spreading knowledge about psychiatric service dogs.

The Board emphasised that health information is of a very private nature, and that as far as possible it should be up to the individual whether he or she wants to share such information publicly. The Board also noted that the complainant felt exposed and stigmatised by the fact that the outside world, against her will, would become aware that she has a psychosocial disability. On that basis, the Board found that facts had been established, which gave reason to believe that the complainant had been subjected to direct discrimination in violation of the the Act on the Prohibition of Discrimination due to Disability. The Board then assessed the claim by the association that mental illness was

still taboo, and that there was a task in making the service dog vest visible to inform the public about mental illness and psychiatric service dogs. Based on Section 7 of the Act, the Board argued that the requirement was objectively justified by the goal of the association, including the dissemination of knowledge about mental illness and service dogs. However, the Board also found that the association had not lifted the burden of proof that it was necessary and reasonable to maintain the requirement of using the word 'psych' on the service dog vest in order to achieve the desired purpose. In this assessment, the Board emphasised that it must be possible to spread the knowledge of mental illness without individuals being obliged to display that they have a psychiatric service dog because of a psychosocial disability. Thus, the Board concluded that the complainant had been discriminated against based on her disability.

The complainant had also argued that she was subjected to harassment because of the fact that the management of the association had sent an email to all members about her complaint to the Board of Equal Treatment. In that email, the management criticised the complaint. The Board assessed that the complainant was subjected to unfavourable treatment as a result of her complaint to the Board. On that basis, the Board concluded that the complainant had been subjected to discrimination in the form of harassment.

The complainant was awarded total compensation of EUR 1 345 (DKK 10 000).

Age

Name of the court: Board of Equal Treatment

Date of decision: 25 February 2021

Reference number: Decision No. 9134 and No. 9135

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210913425> and

<https://www.retsinformation.dk/eli/accn/W20210913525>

Brief summary: The Board of Equal Treatment dealt with two test cases regarding job advertisements on Facebook. The question for the Board was whether it was contrary to the Act on the Prohibition of Discrimination in the Labour Market etc. to target job advertisements on Facebook, so that the advertisements were only displayed on profiles belonging to Facebook users of a certain gender and age. The cases were brought before the Board by the Danish Institute of Human Rights. The respondent companies had advertised for labour on Facebook. The companies had not indicated in the actual advertisement that they preferred a person of a certain gender or of a certain age. However, by using Facebook's advertising platform, the companies arranged for the advertisements to appear only on the profiles belonging to certain Facebook users. In other words, the companies had actively indicated in the Facebook settings that the advertisements should be targeting certain age and gender groups.

One case concerned a company's advert for a manager (Decision No. 9134). The job advertisement was shown only on the profiles that belonged to Facebook users between 20 and 50 years of age. The Board noted that the company had advertised the position broadly via other channels as well, including on LinkedIn and the company webpage, and that the company had encouraged Facebook users to share the job posting. Also, the company ended up hiring an applicant who was older than 50 years of age for the position. On that basis, the Board did not find that the advertisements on Facebook were in breach of the advertisement prohibition in Section 5 of the Act on the Prohibition of Discrimination in the Labour Market etc. The Board then considered whether the advertisements were in breach of the general prohibition against discrimination on grounds of age under Section 2, cf. Section 1 of the Act. The Board found that advertising specifically to a group delimited by age created a presumption that people outside this age group did not have the same opportunity to be considered for the position. However, the defendant had encouraged Facebook recipients to share the advertisement to anybody, and in the end the defendant hired an applicant who was older than 50 years of age for the position. Under these specific

circumstances, the Board found, that the advertisements were not in breach of prohibition against discrimination on grounds of age.

The second case concerned a company's advertising for 'stagehands' (Decision No. 9135). The job advertisement was displayed only on the profiles belonging to male Facebook users between 20 and 43 years of age. In the overall assessment, the Board took into consideration that the company had also advertised the job on the company's website and on the company's general Facebook page. Furthermore, the company had encouraged Facebook users to share the post. The Board found that advertising specifically to a group delimited by age and gender created a presumption that women and individuals outside this age group did not have the same opportunity to be considered for the position. Based on an overall assessment of the available information in the case, the Board concluded, that the company had not lifted the burden of proof that the principle of equal treatment had not been violated. On that basis, the Board upheld the complaint from the Danish Institute for Human Rights.

Religion and belief

Name of the court: Board of Equal Treatment

Date of decision: 12 August 2021

Reference number: Decision No. 9688

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20210968825>

Brief summary: The case dealt with a man who complained of discrimination on the grounds of religion or belief. The reason was that a foundation in a job posting required that new employees working with veterans should be Christians. The Board assessed that the work as a veteran employee involved work that was within the foundation's core area, and that the employee's religious beliefs were important for the foundation's activities. The requirement of Christian faith was therefore not a violation of the Act on the Prohibition of Discrimination in the Labour Market etc.

Name of the court: Board of Equal Treatment

Date of decision: 15 December 2021

Reference number: Decision No. 9031

Address of the webpage:

<https://www.retsinformation.dk/eli/accn/W20220903125>

Brief summary: The case dealt with a female Muslim student teacher who was attending a welcome meeting at the school where she was starting an internship. At the welcome meeting, the student for religious reasons did not want to shake hands with a male internship supervisor. Instead, she greeted him by placing her right hand on the left side of her chest, at the same time as bending her head. Subsequently, the school stated that it was a condition for continuing the internship that the student teacher override her religious beliefs by giving her hand to all persons regardless of their gender. In connection with this stipulation the school asked the student to indicate whether she wanted to continue the internship or not. The student teacher stated that she did not want to continue and the internship ended with immediate effect. The Board found that school's requirement was objectively justified in a legitimate purpose of ensuring equal treatment. The board also found the requirement to be appropriate. However, according to the Board, the school had not lifted the burden of proof that it was necessary to maintain this practice towards the student teacher in order to achieve the purpose of ensuring equal treatment. The student teacher was therefore awarded compensation of EUR 3 360 (DKK 25 000) for indirect discrimination based on religion.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Denmark
Date: 1 January 2022

Title of the law: Act on the Prohibition of Discrimination in the Labour Market etc.

Date of adoption: 24 May 1996

Entry into force: 1 July 1996

Latest amendments: 1 January 2022

Web link: <https://www.retsinformation.dk/Forms/R0710.aspx?id=179869>

Grounds protected: Race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin

Civil law

Material scope: Employment

Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate

Title of the law: Act on Ethnic Equal Treatment

Date of adoption: 28 May 2003

Entry into force: 1 July 2003

Latest amendments: 1 January 2013

Web link: <https://www.retsinformation.dk/forms/r0710.aspx?id=141404>

Grounds protected: Race and ethnic origin

Civil law

Material scope: Access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession

Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate

Title of the law: Act on the Prohibition of Discrimination due to Race etc.

Date of adoption: 9 June 1971

Entry into force: 1 August 1971

Latest amendments: 1 January 2022

Web link: <https://www.retsinformation.dk/forms/r0710.aspx?id=59249>

Grounds protected: Race, skin colour, national or ethnic background, belief or sexual orientation, gender identity, gender expression or gender characteristics

Criminal law

Material scope: Provision of goods or services and access to public places or events

Principal content: Direct discrimination (denial of services)

Title of the law: Act on the Board of Equal Treatment

Date of adoption: 27 May 2008

Entry into force: 1 January 2009

Latest amendments: 1 January 2022

Web link: <https://www.retsinformation.dk/Forms/R0710.aspx?id=179851>

Grounds covered: Gender, race, skin colour, religion or belief, political opinion, sexual orientation, gender identity, gender expression or gender characteristics, age, disability or national, social or ethnic origin

Civil law

Material scope:

- Within labour market: all protected discrimination grounds
- Outside labour market (access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and

services, including housing, and membership of and access to services from organisations whose members carry out a particular profession): gender, disability, race and ethnic origin Principal content: Creation of a specialised body
Title of the law: Act on the Institute for Human Rights – The National Human Rights Institution of Denmark Date of adoption: 18 June 2012 Entry into force: 1 January 2013 Latest amendments: 1 January 2022 Web link: https://www.retsinformation.dk/forms/r0710.aspx?id=142116 Grounds protected: Race, ethnic origin, disability, gender, sexual orientation, gender identity, gender expression or gender characteristics Civil law Material scope: Overall Principal content: Creation of a specialised body
Title of the law: Act on the Prohibition of Discrimination due to Disability Date of adoption: 8 June 2018 Entry into force: 1 July 2018 Latest amendments: 29 December 2020 Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=201823 Grounds covered: Disability Civil law Material scope: All public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Denmark
Date: 1 January 2022

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	13.04.1953	No	Yes	Yes
Protocol 12, ECHR	Not signed	Not ratified			
Revised European Social Charter	05.1996	Not ratified		Not signed the collective complaints protocol	
International Covenant on Civil and Political Rights	20.03.1968	06.01.1972	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	22.09.1997	Only recognised minority: Germans in southern Jutland	No	Yes
International Covenant on Economic, Social and Cultural Rights	20.03.1968	06.01.1972	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	21.06.1966	09.12.1971	No	Yes	Yes
ILO Convention No. 111 on Discrimination	05.06.1958	22.06.1960	No	No	Yes

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of the Child	26.01.1990	19.07.1991	No	No (on 10.11.2014 the Danish Government decided that it would accede to the complaints protocol)	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	24.07.2009	No	Yes (acceded to the complaints protocol on 23.09.2014)	Yes

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en.

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via: https://europa.eu/european-union/contact_en.

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en.

EU publications

You can download or order free and priced EU publications from: <https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1951 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>.

Open data from the EU

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

