Dynamic Interpretation
European Anti-Discrimination Law in Practice III

Case Studies 2008

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For Diversity
Against Discrimination

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Preface

Equinet's Working Group on Dynamic Interpretation focuses on interpretation of legal concepts of discrimination laid down by EU ant-discrimination Directives as well as how national legislation has implemented those Directives in order to secure harmonised and maximum levels of equality in the EU. The working group consists of legal experts working for national Equality Bodies which assures a practical approach to their contribution, analysing how the Directives and national legislation are applied in practice.

Members of the working group use real-life cases to form a basis for a comparative analysis of the application of anti-discrimination legal provisions stipulated by national and European laws. This approach permits a comparison of the different national legal solutions to the cases which achieves a number of objectives: identifying patterns in the way in which Directives have been implemented and applied in national laws: identifying potential gaps in protection or areas requiring legal clarification in the Directives; and identifying potential and existing legislative gaps in national legal systems.

The Working Group on Dynamic Interpretation also provides an opportunity for mutual learning and sharing legal experiences among its members which results in the improvement of practical skills of Equality Bodies' lawyers working in the field of anti-discrimination.

In 2008, the working group members were asked to focus on three real-life cases that had taken place in their countries and to apply their own national anti-discrimination laws to the facts of these cases[1]. The three cases concerned the application of the Employment Directive 2000/78 and in particular 1) discrimination on the ground of disability in employment, 2) discrimination on the ground of sexual orientation in employment, with a special focus on the exceptions concerning occupational activities within churches and other public or private organisations, the ethos of which is based on religion or belief, 3) discrimination based on the ground of age in the context of redundancies and collective bargaining.

The cases raise and attempt to resolve some of the fundamental issues concerning EU anti-discrimination laws such as the scope of who is considered to be disabled and the duty to make reasonable accommodation for them in the workplace, the balance between the rights of persons not to be discriminated on grounds of sexual orientation and the right of religious organisations to employ persons based on religious ethos, and proper approach for private bodies to take to prevent age discrimination in making redundancies.

The summary of the findings for each case contains a number of conclusions or observations which we hope will be of practical value for Equality Bodies, national governments, the EU institutions and other stakeholders in their work on EU anti-discrimination law.

It is to be noted that the conclusions and observations are based only on the work of staff members of eight Equality Bodies and not of all the members of Equinet. As a result the conclusions and observations may not represent the definitive position either in an individual Member State or on the effect of the Directives. In addition the conclusions and observations do not necessarily represent the position or opinion of the Equality Bodies either that have been involved in preparing this report or the other Equality Bodies that are members of Equinet

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[1] Working group members were asked to answer several questions prepared by WG moderator and Equinet Secretariat. Working Group on Dynamic Interpretation met on 12th September 2008 in London and 26th November 2008 to review their inputs and to discuss the final shape of the report. Whilst the answers cannot be read as official statements of the bodies, all information used in this report was approved by the bodies before publication. All the information contained in the report is accurate as of 22nd December 2008.

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Chapter 1
Case study on disability discrimination

Case

In country Z, general or logistical harbour work can only be executed by recognised harbour workers (according to national regulations). In order to obtain this official status, candidates have to meet certain conditions, including the passing of a medical exam.

The medical guidelines for the industrial doctors screening the candidates are generally set out in a so-called “quality manual”, which has been agreed upon by the harbour trade unions and harbour employers. At the harbour of city X, the guideline on diabetes mellitus is follows: “The candidate with diabetes mellitus who is treated with insulin or blood sugar-lowering tablets which in therapeutic doses can provoke episodes of hypoglaecemia, is unfit.
The candidate with diabetes mellitus who is treated with a diet or blood sugar-lowering tablets which in therapeutic doses cannot provoke episodes of hypoglaecemia, may be found fit. The candidate has to be free of complications, have a stable diabetes, be under regular medical supervision, have complete insight in his condition and show strict therapeutic fidelity. A report from an endocrinologist is required”.

Once a person has obtained the official statute of harbour worker, he/she may apply for a job at the harbour. There are many different categories of work, such as general harbour worker, marker, crane worker, special vehicle driver, guard. It is important to legally distinguish between the status of harbour worker (as a required prerequisite to perform any type of harbour work) and the labour contract of an official harbour worker with one of the employers at the harbour. Since specific types of harbour work often require special skills and/or may represent special health and safety risks, access to these functions may require the passing of additional tests (including medical).

In exceptional cases, when there are insufficient harbour workers, a person who has not (yet) obtained this official status of harbour worker may be recruited to perform a specific duty on a temporary basis (occasional worker). This was the case for Ms. Y (°1972), a woman with insulin-dependent diabetes (type 1), who was recruited as a marker at the harbour of city X. This function implies the marking of containers, registration of loaded/unloaded charges on the dock side, controlling the external condition of goods, etc.

Since occasional workers are also required to pass a medical exam, Ms. Y was called to see the industrial doctor one month after the beginning of her contract. When the doctor found out that she was an insulin-dependent diabetic, he referred to the quality manual to declare her unfit for harbour work without any further examination. The next day, she received a letter stating that her contract would be terminated after the common two-week notice period for occupational workers, during which she could however continue working as a marker.

Ms. Y feels that in her personal situation it is unfair to consider insulin-dependent diabetes as an absolute contra-indication for medical fitness, since – as confirms her endocrinologist – she is under regular medical supervision, has full insight in her condition (cf. phenomenon of hypoglaecemia awareness) and is meticulous in following her treatment. She also refers to her experience as a marker, which did not include her accessing ships, working on heights (although the harbour authorities argue that this may occur) or driving special vehicles. For every dock crane there is one crane driver, one marker, 2 or 3 general harbour workers and 3 or 4 straddle drivers. There are specific working procedures which provide that crane and straddle drivers cannot move when the marker is out of sight, and there is constant radio contact. Furthermore, Ms. Y argues that if indeed there are insuperable health and safety arguments to exclude all insulin-dependent diabetics from harbour work, how come she only had to pass the medical exam after one month of having worked as a marker and was able to continue working in this position during her two-week notice period? Finally, she mentions

that there are some examples of official harbour workers who developed insulin-dependent diabetes after having obtained this status, and are still allowed to work.

The authorities at the harbour of city X argue that, since their medical guideline on diabetes mellitus clearly and uniformly applies to all (candidate) harbour workers and occasional workers, it could not be found discriminatory. Given the hazardous working environment at the harbour, they a priori consider insulin-dependent diabetes to represent unacceptable occupational health and safety risks (cf. the worst case scenario of a harbour worker losing consciousness as a result of a bad episode of hypoglaecemia). Also, the harbour authorities feel that harbour workers need to be polyvalent, since they often have day-to-day contracts in different jobs (meaning also different working environments and occupational risks). This explains why the general standard for medical fitness, applied to both candidates for the official statute of harbour workers and occasional workers, is so high.

Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

2. Which court, tribunal, equality body or organisation would be competent?

3. Is there direct or indirect discrimination on the ground of disability? Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling?

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?
In your answer please consider whether in your country you have a provision linked to article 7(2) of the Directive which justifies either direct or indirect discrimination against disabled people on grounds of health and safety, and would it be satisfied in this case?

5. In your country is there a Genuine Occupational Requirement exception pursuant to article 4(1) of the Directive linked to the ground of disability and if so would it be applicable in this case?

6. What could be the role of 'reasonable accommodation' in this case and would the company have failed to comply with those requirements?

7. Would the court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so, how would it be applied to the facts of this case?

8. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

Legislation

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article 2
Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Article 4
Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground (...).

Article 5
Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 7

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Summary of findings

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

All of the Equality Bodies believed that the facts of the case fell within the scope of the Directive and national legislation prohibiting discrimination in employment on grounds of disability.

The one exception to this was the answer of the Danish Institute for Human Rights which indicated that facts may not fall within the scope of national legislation on disability discrimination because of the way in which the concept of a disability has been interpreted by the Danish courts. This is discussed in more detail below.

2. Which court, organisation would be competent?

This response was in similar terms as the answers for the cases on age and sexual orientation:

- some of the Equality Bodies are able to issue non-binding decisions;
- a claimant can also bring proceedings directly before a court or on appeal from an Equality Body's decision;
- other Equality Bodies are able to represent the general interest of claimants or individual claimants in proceedings before the courts or tribunals.

Of particular note, and similarly to cases of age and sexual orientation discrimination, in Denmark there is still no administrative complaints body dealing with disability discrimination claims but that will be rectified from 1 January 2009 when a new law comes into force.

Also of note is that in Austria they have a particular arbitration system regarding disability claims. Arbitration must be commenced in the Federal Office for Social Affairs and the aim is to find an out of court solution acceptable to both parties. These proceedings will normally be required to take place for a period between one and three months after which time a person can make a claim in a court.

Lessons learnt:

It was pointed out by the Working Group that in order to fill a gap in the scope of powers of Equality Bodies, the new Directive relating to Goods, Facilities and Services should include provisions requiring Equality Bodies to provide assistance to individuals on grounds on age, disability, religion or belief or sexual orientation and ensure that this covers the sectors of providing goods, facilities and services. The Working Group also pointed out that Employment Directive should be amended in the same respect to guarantee assistance to individuals provided by Equality Bodies in the field of employment.

3. Is there direct or indirect discrimination on the ground of disability?

Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling?

Definition of Disability

In most Member States the definition of disability is quite broad. In Belgium the federal legislation merely uses the word "disability" as under the Employment Directive. Most Member States however have a set of broad criteria of what constitutes a disability including

impairment of physical, mental and sensory functions and chronic long term illnesses. The length of time for which a person must be suffering from a disability varies: in some countries it is not defined, in others it is where the impairment is expected to last more than six months (Austria and Germany) and in Britain where the impairment must be expected to last more than one year.

All of the Equality Bodies thought that type 1 diabetes would fall within the definition of disability both under their national legislation and pursuant to the ECJ judgment in Chacon Navas.

The one exception to this was in Denmark whose anti-discrimination legislation does not contain a definition of disability and whose national courts have applied a narrow interpretation of what constitutes a disability. In the Western High Court judgment of U.2008.306V the court held that a disability will only exist where “a physical, mental or intellectual disability which results in the need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life”.

It is unlikely that this complies with the intention of the Directive or international notions of a disability under the United Nations Convention on the Rights of Disabled Persons which has been signed by all Member States and the European Community. The Convention defines a disability in a broad and non restrictive way under article 1 as: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"

Thus, under human rights law, the impairment is not required to have resulted in a limitation in social participation compared to others without an impairment. In Denmark however, the impairment must have resulted in limitation in social participation which gives rise to a need for compensation. In addition, it seems unclear which situations should give rise to compensation and what kind of compensation is required. In the above case, the alleged victim of discrimination was given compensation in relation to work in the form of reduced working hours, but this was not considered to qualify as compensation in the sense of the Act on Differential Treatment.

Lessons learnt:

It was pointed out by the Working Group that all Member States should interpret the concept of disability broadly and in accordance with the principles in the United Nations Convention on the Rights of Disabled Persons and the Member State of Denmark may want to review whether it would be appropriate to define disability in their national discrimination legislation to achieve this aims.

In order to achieve consistency and clarity in the interpretation of the concept of disability, the European Commission should consider amending the Employment Directive by defining the term disability in the same manner as under the Convention.

Direct Discrimination

Most of the Equality Bodies believed that this would be a clear case of direct discrimination as there was an absolute prohibition for a person with type 1 diabetes from being a harbour worker. In Sweden they had a very similar case of discrimination against a person with type 1 diabetes and it was held that the employer (Oil Refinery) had directly discriminated against the person by not giving him the role of surveilling the process.

Several Equality Bodies including the Belgium Centre for Equal Opportunities and Opposition to Racism and the British Equality and Human Rights Commission emphasised that treatment of people based on stereotypes and generalisations amounts to unlawful direct disability discrimination. Direct discrimination cannot be justified unless the GOR (Genuine Occupational Requirements) exception would apply.

In Britain there is also the concept of disability related discrimination. This is where someone is less favourably treated for a reason related to his/her disability and not on the basis of the disability itself. Britain is unique in this sense as it is a hybrid form of discrimination that can be justified where there is a legitimate aim. The factors relevant to the health and safety policy would be considered in the context of this form of disability discrimination. However the recent House of Lords decision of Lewisham London Borough Council v Malcolm [2008] UKHL 43 made it harder to prove disability related discrimination in light of its decision on who is an appropriate comparator. As a result the British government is considering introducing legislation to create indirect disability discrimination which currently does not exist in British law.

Indirect Discrimination

Most of the Equality Bodies believed that this would also be a case of indirect discrimination and the health and safety policy would be considered to be a criterion that puts the person at a particular disadvantage when compared with others. The question would be whether that treatment was justified which is considered in Question 4 below.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In your answer please consider whether in your country you have a provision linked to article 7(2) of the Directive which justifies either direct or indirect discrimination against disabled people on grounds of health and safety, and would it be satisfied in this case?

Article 7(2) of the Employment Directive provides that:

"With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work..."

None of the Member States have a specific exception in their discrimination legislation relating to health and safety and all answers of the Equality Bodies indicated that the factor of health and safety would be dealt with either in terms of indirect discrimination or Genuine Occupational Requirements.

In relation to justification for indirect discrimination, a number of factors were considered crucial in this case by the Equality Bodies:

- a person would need to be considered on the basis of his or her individual circumstances and not on the basis of generalisations about people with type 1 diabetes;
- a risk assessment should have been carried out to determine what real risk Ms Y posed to the health and safety of others and herself;
- the fact that Ms Y was permitted to carry out the work as a marker for four weeks before she was called for the medical examination and for two weeks during her notice period represented evidence that the reliance on health and safety reasons was not proportionate;
- some Equality Bodies also drew analogies with other areas where health and safety issues were involved, referring in particular to the fact that persons with type 1 diabetes were permitted to drive cars.

Most of the Equality Bodies considered that in light of the above factors the discrimination against Ms Y was not justified.

Conclusion:

In relation to article 7(2) of the Directive, none of the Member States have a specific exception in their discrimination legislation relating to health and safety and all answers of the Equality Bodies indicated that the factor of health and safety would be

dealt with either in terms of indirect discrimination or Genuine Occupational Requirements.

5. In your country is there a Genuine Occupational Requirement exception pursuant to article 4(1) of the Directive linked to the ground of disability and if so would it be applicable in this case?

Most Member States have a general exception for GOR similar to article 4(1) but very few have a GOR exception which specifically refers to the ground of disability. In Austria there is a GOR exception in the Act of the Employment of Person with Disabilities but there must be a legitimate aim and proportionality.

The answers of both Austria and Germany indicated that the GOR exception could not be used in relation to refusals to employ disabled persons where the requirements relate to core tasks of employment. For example, denying disabled persons in wheelchairs jobs as salespersons in a sports store would be unlikely to be justified whereas denying the same person a role as an assembly worker that required climbing ladders would be likely to satisfy the GOR test.

Conclusion:

Most Member States have a general exception for GOR similar to article 4(1) but very few have a GOR exception which specifically refers to the ground of disability. In Austria there is a GOR exception in the Act of the Employment of Person with Disabilities but there must be a legitimate aim and proportionality.

6. What could be the role of 'reasonable accommodation' in this case and would the company have failed to comply with those requirements?

Article 2(2)(b)(ii) of the Employment Directive refers to indirect discrimination and the obligation that in relation to disabled persons employers are required to make reasonable accommodation to eliminate disadvantage caused by a provision, criterion or practice.

Article 5 is the specific provision which requires employers to provide reasonable accommodation unless it would impose a disproportionate burden.

All of the Member States apart from Austria and Germany have in their national anti-discrimination legislation both a specific requirement to provide reasonable accommodation to disabled persons and a provision that a failure to provide reasonable accommodation is unlawful discrimination. The absence of such provisions may not be compliant with the Employment Directive.

It is arguable that the Employment Directive is not sufficiently clear that the denial of reasonable accommodation constitutes unlawful discrimination. The current version of the draft Directive on Goods, Facilities and Services on grounds of disability, age, religion or belief or sexual orientation is different from the reasonable accommodation provisions under the Employment Directive as the draft Directive specifically states that the denial of reasonable accommodation is unlawful discrimination. This is also consistent with the United Nations Convention on the Rights of Disabled Persons which all Member States have signed and are anticipated to ratify in the next year or two.

In relation to those Member States that do have reasonable accommodation provisions, all the Equality Bodies considered that the employer had clearly failed to consider what adjustments could be made as the employer immediately discounted Ms Y from the position. In most Member States this was therefore also unlawful disability discrimination

Lessons learnt:

It was pointed out by the Working Group that the Member States of Austria and Germany may want to consider reviewing their anti-discrimination legislation in employment and establish whether it is compliant with the reasonable accommodation provisions in the Employment Directive.

The European Commission should consider making amendments to the Employment Directive to make it clear that the denial of reasonable accommodation is unlawful discrimination. As the European Community is also a signatory to the United Nations Convention on the Rights of Disabled Persons, such an amendment would also be in furtherance of its obligations as a party to the Convention.

7. Would the court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so how would it be applied to the facts of this case?

All of the Equality Bodies stated that as their Member States had signed but not ratified the Convention (except Austria which has signed the Convention on 30th March 2007 and ratified on 26th September 2008), the tribunals and courts would not currently be able to refer to or apply the Convention.

As discussed above though, as the European Community is a signatory to the Convention as well, it will need to consider whether provisions in the Employment Directive are consistent with obligations under the Convention.

Lessons learnt:

It was pointed out by the Working Group that, considering the European Community is a signatory to the United Nations Convention on the Rights of Disabled Persons, when the European Commission produces its report on the application of the Employment Directive in 2010, it should consider whether the provisions in the Employment Directive are compliant with the Convention.

8. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

The remedies and sanctions available to the tribunals and courts would be similar to those in the age and sexual orientation discrimination cases which would include damages for loss of future earnings and injury to feelings. In Austria it is possible to recover damages for actual loss (and only in exceptional cases: damages for loss of future earnings) and injury to feelings[2].

[2] Please, see also the answers to case study on sexual orientation discrimination (p. 22) and age disrimination (p. 30)

Chapter 2
Case study on sexual orientation discrimination

Case

Mr Reaney applied for a job as a youth worker with the Church of England. He had extensive experience in this field and previously worked for another church district. He also was a committed Christian.

He said in his application that he was gay, but was not currently in a relationship and was not intending to enter one. He also explained in his application that he had been in a same sex relationship while working at the other church district and because this caused conflict with parts of the church he left his position prematurely.

Mr Reaney attended an interview and was unanimously recommended for the job by an interview panel of eight people.

Subsequently the Bishop met separately with Mr Reaney and questioned him for two hours about his private life, previous relationship, planned future relationships and his sexuality. The Bishop indicated that a condition for the position was to either remain celibate or be married. The Bishop questioned whether he would be able to remain celibate as required by the position and whether it was appropriate for a youth worker to have a homosexual relationship. Both engaged in a dialogue about the Church and sexuality. This was conducted without aggression or abuse of each other.

After the meeting the Claimant said he felt very dejected and upset, that when he drove home he had to pull over to cry and he was sick. He did not feel able to work for two days.
Three days after the meeting the Bishop wrote to Mr Reaney rejecting his application for appointment with the church, claiming that his lifestyle "had the potential to impact on the spiritual, moral and ethical leadership within the diocese" and that "The issue is not about sexual orientation but rather about practice and lifestyle..." The Bishop did not believe that he would be able to live a celibate lifestyle.

Mr Reaney brought a claim in an Employment Tribunal for discrimination and harassment based on sexual orientation.

The Church argued that a heterosexual person would not have been subjected to the same level of intrusive questioning as Mr Reaney was and that the bishop had made it clear to Mr Reaney that a person in a committed sexual relationship outside of marriage, whether they were heterosexual, homosexual, bisexual or transgender, would be turned down for the post.
The Church also argued that a specific exception, based on a genuine occupational requirement for a person working for an organised religion to be heterosexual, applied in this case.

Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does the case fall within the scope of anti-discrimination law in your country? Please, explain how or why not.
2. Which court, tribunal, equality body or organisation would be competent?

3. Is there direct and indirect discrimination on the ground of sexual orientation?
In relation to indirect discrimination, could applying the criterion of being married be indirect discrimination based on sexual orientation?

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

5. Would an exception of a genuine occupational requirement based on sexual orientation apply?
In particular, in your country do you have a general GOR exception based on article 4(1) of the Employment Directive 2000/78/EC such that a characteristic linked to sexual orientation is a GOR and would it be applicable in this case?

6. Would an exception of a genuine occupational requirement based on belonging to a particular religion or belief apply?
In particular, in your country do you have a genuine occupational requirement exception based on article 4(2) of the Employment Directive 2000/78/EC such that being of a religion or belief is a GOR and would it apply in this case?

7. Would the facts establish harassment based on sexual orientation?

8. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

Legislation

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Recital 24
The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

Article 2
Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary,
(...)
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1

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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

Article 4
Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Summary of findings

1. Does the case fall within the scope of anti-discrimination law in your country? Please explain how or why not.

There were differing views about whether this case would fall within the scope of anti-discrimination national laws.

Whilst several of the Equality Bodies stated that it would clearly fall within the scope of anti-discrimination law as it relates to discrimination in access to employment (for example Denmark, Germany and Britain), five of the Equality Bodies (Belgium, Netherlands, Austria, Sweden and Norway) emphasised that their national Constitutions contained exceptions relating to religious organisations. In those Member States, the State is unable to regulate the internal workings of religious organisations. This is reflected in part by recital 24 of the Employment Directive which states that the European Union respects the status of churches and religious associations.

However, a crucial factor would be whether or not Mr Reaney's position as a youth worker would be considered to be part of the inner core of internal workings of religious organisations such as the appointment of Priests and Bishops. The answers from the Belgium Centre for Equal Opportunities and Opposition to Racism and the Austrian Ombud for Equal Treatment indicated that this position would not be likely to be considered part of the inner core of religious activity, whereas in Britain it was considered that the nature of the role in promoting the teachings of the Christian church would be considered a fundamental part of the Church's religious activity.

According to the Netherlands, the answer of the Dutch Equal Treatment Commission indicated that following a formal notice of the European Commission of 31 January 2008 to the Dutch government, they provided advice in March 2008 on their national exception for Churches (article 3 of the Equal Treatment Act) and concluded that the wording and scope of the exception was not within the scope of article 4 of the Employment Directive. They recommended to the Dutch government that the exception be amended but to date no amendments have been made.

Conclusion:

Although in a number of Member States Constitutional laws provide that the State is unable to interfere with the internal workings of religious organisations and therefore the Employment Directive does not apply, this is only the case for the inner core of religious activities and employment. Member States and Equality Bodies should apply the Employment Directive to other situations of employment in religious or religious based organisations.

Lessons learnt:

It was pointed out by the Working Group that, following the notice of the European Commission and the advice from the Equal Treatment Commission, the Dutch government may want to consider whether its national exception for religious organisations is within the scope of the Genuine Occupational Requirement exception under article 4 of the Employment Directive.

2. Which court, organisation would be competent?

Similar responses were provided as in relation to the case of age discrimination, given this is also a case of discrimination in employment:
- some of the Equality Bodies are able to issue non-binding decisions;
- a claimant can also bring proceedings directly before court or on appeal from an Equality Body's decision;
- other Equality Bodies are able to represent the general interest of claimants or individual claimants in proceedings before the courts or tribunals.

Of note is that in Denmark there is still no administrative complaints body that covers sexual orientation although such a body will be established from 1st January 2009. The Employment Directive (unlike the Race Directive or Recast Gender Directive) contains no specific requirement for Equality Bodies to be established with a remit over discrimination on the grounds of sexual orientation, age, disability and religion or belief. As stated in relation to the age discrimination case, the Proposed Directive on Goods Facilities and Services is an opportunity to ensure that Equality Bodies are required to have competence on grounds of age, disability, religion or belief, and sexual orientation.
In Austria the Equal Treatment Commission is responsible for issuing non-binding decisions whereas the Ombud for Equal Treatment can only file complaints and support claimants within these proceedings.

Lessons learnt:

It was pointed out by the Working Group that in order to fill a gap in the scope of powers of Equality Bodies, the new Directive relating to Goods, Facilities and Services should include provisions requiring Equality Bodies to provide assistance to individuals on grounds on age, disability, religion or belief or sexual orientation and ensure that this covers the sectors of providing goods, facilities and services. The Working Group also pointed out that Employment Directive should be amended in the same respect to guarantee assistance to individuals provided by Equality Bodies in the field of employment.

3. Is there direct and indirect discrimination on the ground of sexual orientation? In relation to indirect discrimination, could applying a criteria or being married be indirect discrimination based on sexual orientation?

Direct Discrimination

The anti-discrimination laws regarding employment in all of the Member States apply not only to conditions of employment but also access to employment and the interview process. All of the Equality Bodies thought that the treatment of Mr Reaney in subjecting him to several hours of questioning relating to his sexual orientation and his sexual behaviour did amount to direct discrimination on grounds of sexual orientation. They also believed that the refusal to appoint Mr Reaney to the position as a youth worker was direct discrimination.

Indirect discrimination

The answers to whether or not there was indirect discrimination were primarily dependent on the criteria for appointment for being married or celibate and marriage legislation in the Member States.

Recital 22 of the Employment Directive states that the Directive is "without prejudice to national laws on marital status and the benefits dependent thereon". This indicates that Member States retain jurisdiction to decide which categories of people can or cannot marry.
It is important to note the recent ECJ decision of Maruko Case C-267/06 which was decided by the Grand Chamber in April 2008. The case involved a German Pension organisation that decided it would not pay a widower's pension to Mr Maruko when his same sex partner died as they said it was only available for married couples. Mr Maruko brought a claim of sexual orientation discrimination. The Grand Chamber held that recital 22 only indicated that national laws on marital status were within the competence of Member States and that the exercise of that competence must still comply with the principle of non-discrimination.

In a number of Member States a form of civil marriage is available for same sex couples (Belgium, Netherlands). In some, registered partnerships are available (for example in Britain and Germany) whereas in other Member States marriage is not available at all for same sex couples (Austria). In Norway same sex couples will be able to apply for marriage under the Marriage Act form 1 January 2009 but it will not compel Churches to marry same sex couples.

In those countries where marriage is available for same sex couples the criteria for marriage would not in principle constitute indirect discrimination on grounds of sexual orientation. However it was pointed out that in some Member States, it is possible that religious organisations may in practice distinguish between civil marriages between same sex couples (not consecrated by the Church) and marriages between heterosexual couples (consecrated by the Church) which could amount to indirect discrimination. In addition, in those countries where marriage is not available to same sex couples the criteria of marriage would be indirectly discriminatory.

Conclusion:

In some Member States, it is possible that religious organisations may in practice distinguish between civil marriages that have or have not been consecrated by the Church and such difference of treatment could amount to indirect discrimination on grounds of sexual orientation.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Direct discrimination under the Directive is not justifiable except where one of the Genuine Occupational Requirements exceptions under article 4 applies (see below).

In relation to indirect discrimination, there was no evidence that having a requirement of marriage would be a proportionate means of achieving a legitimate aim in the context of employment as a youth worker. As a result it is likely that in those countries where marriage is not available for same sex couples, the criterion would amount to unlawful indirect discrimination in employment on grounds of sexual orientation.

Lessons learnt:

It was pointed out by the Working Group that, following the principles in the Maruko ECJ judgment, although Member States retain competence regarding national laws on marital status, they should ensure that in the exercise of that competence they comply with non-discrimination principles.

The criterion of marriage, for any position in employment, should be carefully scrutinised as it is likely to indirectly discriminate against persons based on their sexual orientation.

5. Would an exception of a genuine occupational requirement based on sexual orientation apply?

In particular, in your country do you have a general GOR exception based on article 4(1) of the Employment Directive 2000/78/EC such that a characteristic linked to sexual orientation is a GOR and would it be applicable in this case?

Although all Member States stated that they have a general Genuine Occupational Requirement (GOR) exception based on article 4(1) of the Directive, most member States (Austria, Denmark, Sweden, Germany and Belgium) do not have a specific exception relating to sexual orientation and religious organisations.

In the Member States that have a general GOR exception the Equality Bodies believed that a requirement as to sexual orientation or sexual practices (celibacy) did not constitute a legitimate aim nor was proportionate in the case of employment as a social worker. An analysis needs to be conducted on the nature of the occupational activities of the position and whether a requirement as to sexual orientation or sexual practices was proportionate. They concluded that their GOR exception would not apply and the discrimination against Mr Reaney was unlawful.

In Norway and Britain there is a specific GOR exception relating to sexual orientation or characteristic relating to sexual orientation in employment for religious organisations.
In Norway the exception can relate to a person's sexual orientation or homosexual forms of cohabitation but only applies where the role involves the promotion of particular religious, political or cultural views, the role is essential for the fulfilment of the organisation's objectives and the advertising for the position must state that information will be required.
In Britain the exception under Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 applies where:
- the employment is for the purpose of an organised religion;
- the employer applies a requirement related to sexual orientation to comply with the doctrines of a religion;
- the employer does not meet the requirement.

The lawfulness of this exception has been considered by the High Court in Britain in the decision of Amicus v Secretary of State for Trade and Industry [2004] EWHC 860 which held that the exception was a lawful implementation of article 4(1) of the Employment Directive but that it must be construed strictly as a derogation from the principle of non-discrimination and would not be available for the employment for work in a church as a cleaner, gardener or secretary.

In Britain and Norway both answers indicated that the role of a social worker in a Church would arguably legitimately require a person to be either heterosexual or celibate in order to comply with the ethos of the church although in the case of Britain the Equality and Human Rights Commission stated Mr Reaney met the criteria for celibacy so the GOR exception could not apply. In Norway the conclusion was that the GOR exception may apply.

Conclusion:

Member States and Equality Bodies should construe the GOR exception under article 4(1) of the Directive narrowly. Where it is relied on by religious organisations in relation to requirements as to the sexual orientation or sexual practices of an applicant, the requirement will generally only be justified where the nature of the role is closely linked to the inner core work of the Church (for example the appointment of Priests or Bishops).

6. Would an exception of a genuine occupational requirement based on being of a religion or belief apply?

In particular, in your country do you have a GOR exception based on article 4(2) of the Employment Directive 2000/78/EC such that being of a religion or belief is a GOR and would it apply in this case?

All of the Equality Bodies answers indicated that although there are equivalent national laws to article 4(2), none of them believed that the GOR exception based on article 4(2) could be relied on in this case as there was no question that Mr Reaney was a committed Christian.
A number of answers also emphasized that article 4(2) specifically provides that the exception cannot be used to justify discrimination on another ground. As a result the exception could not be relied upon to justify discrimination based on sexual orientation.

Conclusion:

Article 4(2) cannot be relied on in a case where there is evidence indicating that the person applying for a position practices the particular religion which is a stated as being a Genuine Occupational Requirement, or where it is used to justify discrimination on grounds of sexual orientation.

7. Would the facts establish harassment based on sexual orientation?

In most of the Member States the definition of harassment on grounds of sexual orientation is similar or identical to the definition under the Employment Directive. It is relevant to note that the Directive does not specifically require repeated acts to constitute harassment however in Belgium the Wellbeing at Work Act requires “repeated” harassing conduct. This may not be compliant with the Directive.

It was also emphasized by several Equality Bodies, including the Danish and German ones, that the test does not necessarily require an intention to harass and that the effect of the conduct on the individual will be relevant in deciding whether harassment was established.

In the present case most of the Equality Bodies (apart from those in Britain and Belgium) stated that harassment might be established in this case given the long questioning that Mr. Reaney was subjected to and the effect it had on him subsequently. However given there is very limited case law on harassment based on sexual orientation it is difficult to form a decisive conclusion. In Belgium it was thought harassment could not be established as repeated acts are required. In Britain, weight was given to the fact that the Bishop engaged in a debate about sexuality without aggression or abuse of each other and that it was reasonable to debate the role of sexuality in the Church.

Lessons learnt:

It was pointed out by the Working Group that Belgium may want to review whether their national harassment provisions in the Wellbeing at Work Act, in particular the requirement that there be repeated acts, is compliant with the Employment Directive.

8. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

The Equality Bodies emphasised that binding sanctions and remedies could only be imposed by courts or tribunals but that they would be a range of sanctions including damages for loss of earnings or for injury to feelings. Generally the amount payable is discretionary since it will depend on the facts of the particular case. However some countries have tried to resolve the often difficult problem of proving the actual material and moral dames by providing a requirement of a prefixed amount of compensation. In Belgium this sum is three or six months' salary, in Austria the sum would be a minimum of two months' salary (for discrimination in access to employment) and a minimum of 720 Euros for harassment.

In Belgium other possible sanctions (although rarely used where there is a concern of repeated discrimination) would be measures to publicise the result, an order to cease the discriminatory conduct and further criminal sanctions if there was a failure to comply.

Chapter 3
Case study on age discrimination

Case

Due to economical difficulties, a large company (5.000 employees) based in an EU Member State country was forced to drastically reduce the number of its personnel: 1.500 workers and 200 general clerks had to be collectively dismissed. After weeks of collective bargaining, the company's management and trade unions agreed on a social plan.

In exceptional circumstances, the national law permits a company in economical difficulties to introduce a partly state funded pre-pension programme, already accessible at the age of 50 This company obtained the necessary recognition to do so.

(Please note: the legal state pension age in the country is 65 years, but when certain conditions are met a person is entitled to pre-pension at 60. Some specific legal provisions and CTA's contain lower ages).

With regard to the general clerks in the company, there were sufficient candidates for the pre-pension scheme in order to realise the restructuring within this group. With regards to the much larger group of workers however, a particular plan needed to be developed:

- pre-pension scheme: voluntary access for employees, at minimum age of 50, to an attractive pre-pension programme, including several financial and other benefits.

- buy-out scheme: workers under the age of 50 were offered a buy-out fee if they voluntarily left the company; the amount of this fee was based on the monthly salary, age and seniority of the worker (max. 140.000 euro gross, at seniority of 25 years).

The principal aims of the company and trade unions were (a) to avoid obligatory dismissals, and (b) to compensate as much as possible the loss of income for departing employees. In order to achieve these aims within the budgetary limits, the social partners first proposed the pre-pension programme. When the total number of workers aged 50 and over accepting this offer was known, they then developed the additional buy-out scheme for a maximum of 750 workers under that age (either way, the social plan allowed for the departure of no more than 1.500 workers). From a general perspective, the company and trade unions felt that there was a fair balance between the pre-pension and buy-out scheme.

However, a 51-year-old worker with 26 years of seniority addressed the national Equality Body, stating that he was treated less favourably on the ground of age because he could not benefit from the buy-out programme. He argued that from his personal perspective, the substantial buy-out fee would have been financially far more interesting than the pre-pension scheme.

Questions

Consider the case in the context of your national legislation and jurisprudence, or describe how the case would be considered by the competent authority in your country. In particular, consider the following specific questions:

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

2. Which court, tribunal, equality body or organisation would be competent?

3. Is there direct or indirect discrimination on the ground of age?

Which are determining elements to assess whether the 51-year old worker
- is treated less favourably than another in a comparable situation (…) on the ground of age (direct discrimination), or
- (…) is put at a particular disadvantage compared with other persons by an apparently neutral provision, criterion or practice (indirect discrimination)?

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Please elaborate on art. 6.1 of the 2000/78/EC and how this article has been implemented in your national legislation and how it would be applied to the facts of this case. Please also specifically consider what is the effect of social plan having been agreed by collective bargaining on whether or not the discrimination is justified.

Is the age discrimination in this case objectively and reasonably justified by a legitimate aim?

Are the means of achieving this (legitimate) aim proportionate and necessary?

Do you find helpful arguments in the existing ECJ case law (Mangold, Palacios? …) ?

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

Legislation

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article 2
Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

Article 3

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;...
(c) employment and working conditions, including dismissals and pay;

Article 4

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.(...).

Article 6

Justification of differences of treatment on grounds of age
1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation ,including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Summary of findings

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

In all of the Member States where answers were provided by the Equality Bodies, the case was within the scope of Employment Directive, and in particular Article 3(1)(c) which refers to the scope of the Directive covering private sector employment, working conditions, dismissals and pay.

In relation to the implementation of the Directive and the relevant national anti-discrimination legislation, all Member States have implemented relevant legislation covering discrimination in employment on the ground of age, except Sweden (however their new anti-discrimination law covering age discrimination in employment will enter into force on 1st January 2009).

The answer from the Swedish Office of the Ombudsman against Ethnic discrimination indicated that there is currently a case in the Labour court between a private sector employer and employee, arguing a claim of age discrimination in employment and that the Directive with respect to age discrimination should have direct horizontal effect to the extent that a national court should set aside any national law incompatible with the Directive. The case is still pending.

It is also important to point out the effect of the decision of Mangold Case C-144/04. That was a case of age discrimination in Germany and significantly was brought at a time when the

Employment Directive had been passed but the period by which it should have been implemented had not yet expired. In that case, national German legislation which was introduced in 2002 reduced the maximum age at which fixed term contracts could be concluded from 58 to 52, without the need for an objective justification. The European Court of Justice Grand Chamber held that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law and that:

"It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired"

It is important to point out however that the case of Mangold involved legislation by the Member State and not the relationship between a private employer and an employee as is the case here. It has been recognised in ECJ case law that as Directives are only enforceable against a Member State they do not have direct horizontal effect against a private individual or company. As a result in this case it is unlikely that the Directive would have direct effect in Sweden between the private employer and employee.

Conclusion:

In relation to the actions of Member States, Equality Bodies and national courts and tribunals can apply the Equality Directives directly once they have been passed, even though the period in which Member States need to transpose the Directives may not have yet expired or a Member State has failed to transpose a Directive within time. However in relation to the actions of private companies or individuals the Equality Directives will not have direct effect.

2. Which court, organisation would be competent?

Which court or organisation would be competent depends on the structure of the way in which Equality Bodies can provide legal assistance to individuals and their discrimination claims.

Assistance for individuals in age discrimination claims

Unlike the Race Directive and the Recast Gender Directive, there are no provisions in the Employment Directive that require the establishment of Equality Bodies with powers relating to discrimination on grounds of age, disability, religion and belief or sexual orientation. Despite this most of the answers indicated that the Equality Bodies do have the power to provide some form of assistance in cases of age discrimination, except in Denmark and Sweden.

The answer of the Danish Institute for Human Rights indicated that there is no administrative complaint body that currently covers the ground of age but that such body will be established from 1st January 2009. There is also no equality body in Sweden covering age discrimination either; however this will also be corrected once the Swedish Equality Ombudsman commences operating on 1st January 2009.

It is clear that there is a gap in the Employment Directive in not requiring Equality Bodies to be established with responsibility for promoting equal treatment on grounds of age, disability, religion or belief, or sexual orientation. This may also affect people's ability to access justice in relation to discrimination claims on those grounds.

It is to be noted that the current draft Directive relating to discrimination in provision of Goods, Facilities and Services on grounds of age, disability, religion or belief and sexual orientation does include a specific requirement for Equality Bodies to be established on all those grounds and to provide assistance to individuals in relation to claims of such discrimination. It does not however make it clear that the Equality Bodies must have powers in relation to employment discrimination claims.

The type of assistance that can be provided

There is a wide range of assistance that can be provided by Equality Bodies. In some of the Member States where answers were provided, the Equality Bodies are able to provide non-binding legal opinions, mediation and conciliation relating to discrimination cases but only courts or tribunals are able to provide binding decisions and award damages. That applied to the answers from the Netherlands, Norway, Germany, Belgium and Austria (in Austria the Equal Treatment Commission is responsible for issuing non-binding decisions whereas the Ombud for Equal Treatment can only file complaints and support claimants within these proceedings).

If an individual is not satisfied with the non-binding legal opinion of the Equality Bodies, he or she can bring a claim in a court of tribunal. In some Member States such as the Netherlands, an individual can bring a claim in a court directly; he or she needs not wait for any decision by the Dutch Equal Treatment Commission. However in Norway, the Equality Tribunal can only hear appeals from the Equality and Anti- discrimination Ombud where the Ombud has made a recommendation to the Equality Tribunal.

In Denmark it is worth noting that from 1st January 2009 a new Equal Treatment Body/ Committee will commence operating which will have jurisdiction over the six grounds of equality under EU anti-discrimination law. Its decisions will be binding and if they are not followed the committee will be able to, on request from the complainant, bring a case before court. Furthermore the committee will be able to award damages.

In Belgium, Britain and Sweden from 1st January 2009, the Equality Bodies can represent individuals in age discrimination claims before courts or tribunals.

Some of the Equality Bodies have specific informal or formal arrangements with Trade Unions in their countries regarding discrimination claims in employment. In Belgium the Centre for Equal Opportunities and Opposition to Racism has an informal protocol of cooperation with trade unions providing that the latter should take the lead in defending the rights of their members in employment discrimination claims. However, here there may be a conflict of interest as a trade union was involved in negotiating the collective agreement. In Sweden and Denmark there are law requirements that if an individual is a member of a Trade Union, he or she must first have his/her employment discrimination claim considered by the Trade Union he or she belongs to. Depending on the trade union's assessment of the case it may then be dealt with by the trade union itself or transferred to the Equality Body to consider.

Lessons learnt:

It was pointed out by the Working Group that in order to fill a gap in the scope of powers of Equality Bodies, the new Directive relating to Goods, Facilities and Services should include provisions requiring Equality Bodies to provide individuals with assistance on grounds on age, disability, religion or belief or sexual orientation and ensure that this covers the sectors of providing goods, facilities and services. The Working Group also pointed out that Employment Directive should be amended in the same respect to guarantee assistance to individuals provided by Equality Bodies in the field of employment.

Conclusion:

Several of the Equality Bodies have informal or formal arrangements with Trade Unions whereby, if the claimant is a member of a Trade Union, it initially considers whether to support the claimant and only after their consideration of the case will it possibly be transferred to the Equality Bodies.

3. Is there direct or indirect discrimination on the ground of age?

Which are determining elements to assess whether the 51-year old worker
- is treated less favourably than another in a comparable situation (…) on the ground of age (direct discrimination), or

- (…) is put at a particular disadvantage compared with other persons by an apparently neutral provision, criterion or practice (indirect discrimination)?

All of the Equality Bodies considered that this was a case of direct age discrimination as it involves the person being treated less favourably (not being entitled to the buy out scheme) purely on the grounds of his age (being over 50 years old). Some Equality Bodies thought that there would need to be a more detailed analysis of whether not being entitled to the buy out scheme was in fact a less favourable treatment, while other Equality Bodies believed that on its face not being entitled to the scheme was a less favourable treatment. The Swedish Office of the Ombudsman against Ethnic Discrimination indicated that this could also be a case of indirect discrimination.

Conclusion:

All of the Equality Bodies thought that the refusal of the buy out scheme for the person being over 50 years old was a case of direct age discrimination and the question would be whether or not that treatment could be justified.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Please elaborate on art. 6.1 of the 2000/78/EC and how this article has been implemented in your national legislation and how it would be applied to the facts of this case ? Please also specifically consider what is the effect of social plan having been agreed by collective bargaining on whether or not the discrimination is justified.
Is the age discrimination in this case objectively and reasonably justified by a legitimate aim?
Are the means of achieving this (legitimate) aim proportionate and necessary?
Do you find helpful arguments in the existing ECJ case law (Mangold, Palacios? …) ?

All of the Member States have national laws (apart from Sweden) which implement or are equivalent to (in the case of Norway which is not an EU Member State) Article 6(1) of the Employment Directive which permits justification of direct age discrimination where it is objectively and reasonably justified by a legitimate aim.
The recent ECJ opinion of the Advocate General in Age Concern v Secretary of State for Business Enterprise and Regulatory Reform Case C-388/07 which relates to retirement ages held that in order to implement article 6.1 into Member States domestic law it is not necessary to include a list of what may be legitimate aims. It also held that there is no material difference concerning the test for justification of age discrimination by article 6.1 requiring differences of treatment to be both "objectively and reasonably justified" as opposed to article 2.2(b)(i) which only requires treatment to be "objectively justified".
The crucial issue in this case is whether the system established by the social plan was justified, which requires an analysis of both the stated aims and whether the means used to achieve those aims were proportionate.

<u>Legitimate aim?</u>
The stated aims of the company were to:
(i) avoid compulsory dismissals and
(ii) compensate as much as possible the loss of income for departing employees.

The answer from the British Equality and Human Rights Commission indicated that the Mangold case C-144/04 and the Palacios case C-411/05 would be relevant as it held that Member States enjoy a "broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy" but that there was still a requirement for any difference in treatment to be objectively necessary and proportionate.

The answer of the Belgium Centre for Equal Opportunities and Opposition to Racism emphasised that this is a case of an individual company and not laws by national governments. In the case of individual companies, it was stated that the case law of the ECJ in relation to indirect discrimination on grounds of gender indicated that the test of justification in relation to individual companies is applied more strictly than for laws by Member States. It is not clear whether the same approach would be taken in relation to the ground of age.

All the Equality Bodies thought that the stated aims of the company were likely to be considered legitimate in order to cope with a difficult financial situation and to avoid the company closing down.

Proportionate means of achieving the aim?

On balance, almost all the Equality Bodies thought that it was likely that the social plan was proportionate and did not unlawfully discriminate against the 51 year old on grounds of age.
One of the relevant factors in this case was that the social plan was agreed between the company and the relevant trade unions and therefore there had been a balancing exercise undertaken between the interests of the company and the employees as represented by these trade unions. The fact that a collective agreement was reached with the involvement of trade unions was held to be a relevant factor in the Palacios case although the court also emphasised that the agreement by a trade union would not render lawful a decision that would otherwise be unlawful. These points were also emphasised by a number of the Equality Bodies although the German Federal Anti-Discrimination Agency stated that this would not be a relevant consideration.

Interesting developments have occurred in the Netherlands, Denmark and Britain in relation to collective agreements. In the Netherlands, since it published advice in 2007 on age discrimination in social plans, the Dutch Equal Treatment Commission has attached weight to the fact that social plans are a compromise between different interests and seek to accommodate the needs of a large number of employees. Of relevance will be whether there is a clear and unfair balance between two groups of employees or if the social partners give no clear indication of why a difference in treatment is based on age.

In Denmark, the exception to age discrimination specifically refers to collective agreements being relevant grounds for justification; however their provision only applies to collective agreements that were existing on or prior to 28th December 2004 and not to subsequent agreements. This would mean that a collective agreement in this case could not be relied upon in Denmark to justify the discrimination unless it referred back to an existing collective agreement that was entered into prior to 28th December 2004.

In Britain there are specific provisions under the national age discrimination laws that provide that any term of a collective agreement which is unlawfully discriminatory is null and void. This makes clear that provisions in collective agreements that are discriminatory on grounds of age will have no effect.

Conclusions:

On balance, all of the Equality Bodies thought that it was likely that the social plan was proportionate and did not unlawfully discriminate against the 51 year old on grounds of age.

In most Member States the fact that social plans have been agreed by both an employer and trade unions is an important factor in deciding whether discrimination

on grounds of age is justified, although a careful analysis of the individual facts of the case is still required.

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

All Equality Bodies thought that it is likely that the discrimination was justified so answers to this question were hypothetical.

All Equality Bodies stated that remedies can only be imposed by courts or tribunals and not the Equality Bodies. There are a range of remedies available to courts and tribunals. Most can award damages for loss of earnings or injury to feelings as a result of the discrimination. In Belgium discriminatory clauses are held to be null and void (with the possibility of obtaining compensation by a "levelling up" mechanism), in the Netherlands and Austria the court or a specific arbitration board could order an amendment to the social plan and it can propose or impose a settlement (in Austria a social plan can be examined and amended by a specific arbitration board established by the competent Labour Court).

Annex 1
Country responses to the case study on disability discrimination

Austria

Answers provided by Birgit Lanner from the Ombudsman for Equal Treatment of persons with disabilities

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

In Austrian law discrimination in the world of work on the ground of disability is forbidden pursuant to the provisions of the Act on the Employment of Persons with Disabilities. Such protection against discrimination applies, among other things, to all employment relationships based on private-law contracts.
According to this ban on discrimination, a person must not be subject to direct or indirect discrimination in the context of his/her employment, particularly (= inter alia) in the establishment of an employment relationship.
As a matter of principle, the case in question would therefore have to be dealt with from the viewpoint of the Act on the Employment of Persons with Disabilities and, consequently, in the wider context of Austrian anti-discrimination legislation.

2. Which court, organisation would be competent?

If a person considers himself/herself subject to discrimination, he/she has to initiate arbitration proceedings with the competent administrative authority, i.e. the Federal Office for Social Affairs, to state his/her claims. This is a form of out-of-court dispute settlement aimed at finding a solution acceptable to both parties, possibly through the offices of a mediator. For the conduct of arbitration proceedings, a maximum period of three months – or one month in a case of termination of employment or dismissal – is considered reasonable by the legislator. If no amicable solution can be found by the parties concerned, the arbitration proceedings end with the issue of a statement by the Federal Office for Social Affairs confirming the failure of arbitration proceedings.

The person subject to discrimination can then press charges with a court of law. In the case in question, the competent court would be the tribunal for labour and social affairs.

3. Is there direct or indirect discrimination on the ground of disability?

Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling?

Would you consider general provisions on occupation health and safety to be “an apparently neutral provision, criterion or practice” in this case?

The terms “direct” and “indirect” discrimination are used in the Act on the Employment of Persons with Disabilities; the legal ban refers to both forms of discrimination.

According to the definition of the law, a person being treated less favourably than another person in a comparable situation on account of his/her disability is deemed to be subject to direct discrimination. The other person need not necessarily be disabled, but the situation must be truly comparable. As a rule, discrimination is the result of the actions or omissions of another person. Direct discrimination can never be materially justified (although the Act on the

Employment of Persons with Disabilities provides for an exception due to the requirement of a "specified attribute", see Question 4).

A person is deemed to be subject to indirect discrimination if apparently neutral provisions, criteria or procedures as well as features of the man-made environment (=barriers) are likely to result in the discrimination of persons with disabilities in a particular manner, unless such provisions, criteria or procedures are materially justified by a legitimate objective, and the means employed to reach this objective are appropriate and necessary.
The issue of material justification is to be interpreted in a narrow sense. For example, a fire protection door that is difficult to open would be justified, if required for reasons of safety.
Provisions, criteria or procedures as well as features of the man-made environment are deemed to be apparently neutral, if they do not provide for specific regulations regarding persons with disabilities, but may in substance have discriminatory effects on persons with disabilities. For reasons of constitutional law, the content of existing laws, regulations or statutes is not regarded as discriminating according to the definition of the Act on the Employment of Persons with Disabilities. Hence, apparently neutral provisions regarding the world of work are to be found, above all, in collective-bargaining or plant agreements.

There is no uniform definition of disability in Austrian law. Protection under the ban on discrimination is primarily provided for persons with disabilities as defined in the Act on the Employment of Persons with Disabilities.

Pursuant to the Act on the Employment of Persons with Disabilities, disability is defined as "the effect of a non-temporary (= expected to last for more than six months) impairment of physical, intellectual or mental functions or an impairment of sensory functions, likely to make participation in the world of work more difficult for the persons concerned". Thus, disability is deemed to arise not from the functional impairment itself, but from its effect, i.e. the extent to which is makes the person's participation in the world of work more difficult.

Discrimination on the ground of disability is deemed to exist if there is a causal relationship between less favourable treatment and disability. Establishing the degree of disability (through an administrative procedure to be conducted by a public authority) is not required, as the degree of disability is immaterial for the fact of discrimination. The decisive element is whether the impairment may result in discrimination. For example, discrimination on the ground of a diagnosis of multiple sclerosis of HIV infection prior to the occurrence of symptoms of the disease would already be considered to be a disability (and would therefore constitute a case of discrimination). In case of doubt, however, the person concerned must provide evidence of his/her disability.

Regardless of the above, it needs to be underlined that according to Austrian law a person's suffering from insulin-dependent diabetes type 1 is usually considered to be more than 40% disabled.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

The Act on the Employment of Persons with Disabilities explicitly provides for an exception from the general ban on discrimination (direct/indirect), according to which there is no discrimination if a certain attribute constitutes a substantial and decisive prerequisite for the exercise of the vocational activity or for fulfilment of the conditions under which such activity is exercised. As a matter of course, this exception only applies if it serves a lawful purpose and the conditions imposed are appropriate. However, the underlying assumption is that this only refers to the core tasks specified in the employment contract. For example, excluding people in wheelchairs from employment as salespersons for sports articles for mere image reasons is not justified, whereas is would not make sense to employ a person unable to climb up a ladder for independent assembly work.

5. What could be the role of ‘reasonable accommodation’ in this case?

The Austrian law (discrimination in the world of work on the ground of disability) does not use the term „reasonable accommodation“. However this term can be found in general protection provisions on occupation for persons with disabilities. That means there has to be an employment relationship first. In other words, although there are provisions in the labour legislation, according to the anti-discrimination law there is no direct sanction if an employer doesn't provide reasonable accommodation for his/her employee..
In this particular case, "Reasonable accommodation" is not required, because no employment relationship exists.

6. Would the court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so how would it be applied to the facts of this case?

Until July 2008 Austria had not ratified the United Nations Convention on the Rights of Disabled Persons. It is an international treaty; the Austrian law must be implemented (transformation).
Given the fact that this is within the competence of the legislative body and the judicial system, currently no further information can be provided on this item.

7. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

If an employment contract fails to be concluded on account of disability, the applicant is entitled to material and immaterial compensation from the potential employer. The amount of compensation depends on whether the applicant would have got the job if the selection had been made on a non-discriminatory basis. In such a case, the law provides for compensation to the tune of at least two months salaries. However, if the employer is able to prove that even in the absence of discrimination the applicant would not have got the job, the compensation payable is limited to a maximum amount of € 500.

Belgium

Answers provided by the Centre for Equal Opportunities and Opposition to Racism

Preliminary remarks

Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, the federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and -racism legislation. However, today cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR’s legal mandate to non-federal discrimination cases.

In 2007, the Belgian federal Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

- 10 May 2007 Anti-discrimination Act
This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC directive (religion or belief, disability, age and

sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language (which will be assigned to a yet to be designated autonomous agency).

- 10 May 2007 Anti-racism Act
This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

- 10 May 2007 Gender act
This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Women and Men.

The scope of this new legislation – which is identical for all three acts – is broader than demanded by the EC directives, as the following domains are enclosed (in short):
- access to and offering of goods and services accessible to the public;
- social protection (including social security and health care), social advantages and additional schemes to social security;
- employment (access to employment, working conditions, dismissal, etc.), including membership of and participation in trade unions and professional organisations;
- statements in official documents and minutes;
- access to and participation in economic, social, cultural and political activities accessible to the public.

Question 1 - Scope

While the diabetes guideline seems essentially related to (harbour) employment access (cf. art. 3.1 (a) of the 2000/78/EC directive and art. 5, §2 of the Belgian Anti-discrimination Act), this is in fact a dismissal case (cf. art. 3.1 (c) 2000/78/EC directive and art. 5, §3 Belgian Anti-discrimination Act).

Question 2 - Competence

In case of (civil) legal action: Labour Tribunal (first instance) and Labour Court (appeal).

The CEOOR's broad legal mandate as independent non-judicial equality body includes to inform, advise, mediate and litigate in matters regarding discrimination (within the scope of the Anti-discrimination and Anti-Racism Acts). Victim consent is a necessary condition for the CEOOR's legal action to be admissible. Note however that CEOOR represents a general interest, which needs to be distinguished from the individual victim's damage claim.

There exists a protocol of cooperation between the CEOOR and the trade unions, providing that these last organisations should take the lead in defending the rights of their members in employment discrimination cases. In this case however, there may be conflicting interests for the trade unions (which seem to have agreed upon the diabetes guideline).

Question 3 - Direct or indirect discrimination (disability)

According to the CEOOR, a chronic illness – such as diabetes mellitus – may be qualified as a disability within the context of the 2000/78/EC directive and Belgian Anti-discrimination Act, when it affects the person's participation in society (cf. social model). This seems in line with the ECJ ruling in case C-13/05 (Chacón Navas), where it is held that

"(…) the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" (43) and "(…). In order for the

limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time" (45).

Note that the Belgian Anti-discrimination Act also covers 'future or present health condition'.

As to the question whether the case of Ms. Y implies direct or indirect discrimination on the ground of disability, and bearing in mind that the harbour authorities essentially refer to (pre-supposed) insuperable health and safety risks, two points of view may be distinguished.
A less favourable treatment based on disability related prejudice, stereotyping or statistical generalisation, implies direct discrimination. From this perspective, exclusion of candidate harbour workers with insulin-dependent diabetes based on a general – and possibly outdated – risk analysis, could fall under the notion of art. 2.2 a) of the 2000/78/EC directive.
Or, one could argue that the diabetes guideline is part of the health and safety policy at the harbour (cf. aggravated hypoglaecemia risk in insulin-dependent diabetes), as an 'apparently neutral provision, criterion or practice', and can therefore only lead to indirect discrimination as defined under art. 2.2. b) of the directive.
Note that although art. 7.2 of the 2000/78/EC directive states that with regard to disabled persons the principle of equal treatment shall be with no prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work (…), this interpretative issue is currently unsolved within the Belgian legal atmosphere (cf. question 4).

Either way, it is clear that the exclusion of harbour work implies less favourable treatment or a particular disadvantage, in causal link with the candidate's disability (health condition). As to the element of comparability, it may be debatable whether reference should be made to a person that doesn't suffer from diabetes, or a person with a non-insulin-dependent form of this chronic illness. Even in the latter approach, the question remains if there is 'sufficient' comparability, because the actual risk of severe hypoglaecemia depends on many individual factors. Since a rigid approach of the test of comparability at this point may de facto lead to a complete erosion of the principle of equal treatment, the CEOOR feels that the relevance of distinguishing between the person's diabetes type and treatment should be examined in the light of the justification test and – if applicable – the duty of reasonable accommodation.

Question 4 - Objective justification or exception

First of all, it follows from the facts of the case that Ms. Y's condition as an insulin-dependent diabetic did not imply her being incapable to perform the essential tasks of the function: she was an occupational worker / marker during four weeks preceding the medical examination, and was allowed to continue in this function during the two-week notice period.

As the Belgian law does not contain a specific provision which coordinates the prohibition of discrimination on the ground of disability with the existing regulations on health and safety at work (cf. art. 7.2 of directive 2000/78/EC), the CEOOR examined the issue in the light of the general objective justification test.

Employers are held by a legal duty and responsibility to ensure the occupational health and safety of their employees, by taking adequate preventive measures in this respect. Although this may imply that a person with a particular health condition is refused access to a certain function and/or working environment, such refusal requires an objective risk assessment. If the health condition implies a disability, reasonable accommodation needs to be taken into consideration (see question 6).

Diabetes mellitus and the related risk of acute hypoglycaemia in particular have been the object of extensive medical research, and today there seems to be a consensus that people with diabetes cannot be considered as a homogenous risk group. In 2004, the American Diabetes Association reconfirmed its position that people with diabetes should be individually considered for employment based on the requirements of the specific job. Factors to be weighed in this decision include the individuals medical condition, treatment regimen (MNT,

oral glucose-lowering agent and/or insulin), and medical history, particularly with regard to the occurrence of incapacitating hypoglycaemic episodes[3].

Another example is a 2005 research report of the Scottish Institute of Occupational Medicine and the Department of Diabetes on the frequency and severity of hypoglycaemia on the work floor, where it is held that restriction of employment opportunities for most people with insulin-treated diabetes may be difficult to justify. A careful evaluation of the hazards in the workplace, with an assessment of the risks should an episode of severe hypoglycaemia be experienced, in conjunction with the evaluation of risk of severe hypoglycaemia, may allow people with insulin-treated diabetes to be employed in areas that have previously been restricted[4].

In Belgium, a consensus text "Diabetes and social discrimination" (available on the website of the Federal Public Agency of Health, Food Chain Safety and Environment), acknowledges that most employers have very poor knowledge of diabetes and unjustly avoid hiring diabetic employees out of fear for higher absenteeism and hypoglycaemic reactions. It is held that the medical fitness of these persons should not be determined by a general rule, but always be assessed individually by the occupational medicine physician, based on up-to-date insights and in consultation with the attending specialist.

From a comparative perspective, reference can also be made to the medical requirements for obtaining a drivers licence in Belgium, as set out by Royal Decree. An insulin-dependent diabetic may even be granted a 3-year license for person or heavy freight transport when he is free from severe eye, nerve, heart or blood vessel complications, has a stabile diabetes, represents no particular elevated risk of hypoglycaemia, is under regular medical supervision, has complete insight in his medical condition, has received proper diabetes education, performs regular auto control of glycaemia, shows strict therapeutic fidelity and has a good traffic record (plus a report from the attending endocrinologist).

In the light of this information, it seems fair to conclude that the harbour authorities' diabetes guideline is based on a over generalised and obsolete perception of this chronic illness and associated risks. Moreover, the argument that insulin treatment should be considered as an absolute contra-indication for harbour work is undermined by the fact that Ms. Y was allowed to exercise the function of marker during the 4 weeks preceding her medical examination, and the following 2 weeks of the notice period. Furthermore, it appears that in practice the diabetes guideline is applied even less strictly towards persons that develop diabetes after having obtained the official status of harbour worker.

As to the dismissal of Ms. Y (based on the diabetes guideline), the CEOOR would therefore argue that this measure seems a priori neither appropriate nor necessary to achieve the (legitimate) aim of occupational health and safety objective.

Question 5 - Genuine occupational requirement

The Belgian 10 May 2007 Anti-discrimination Act provides a possibility to adopt by Royal Decree an exemplatory list of situations where a certain characteristic constitutes a genuine occupational requirement. Such list has not (yet) been adopted.

Given the interpretative issue of direct and indirect discrimination in this case (cf. question 3), as well as the absence of a provision in Belgian law coordinating the prohibition of disability discrimination with the existing regulations on the protection of health and safety at work (cf. questions 3 and 4), the CEOOR chose to limit its analysis to the objective justification test.

[3] A.D.A, 'Hypoglycemia and Employment / Licensure', in Diabetes Care, 2004 (care.diabetesjournals.org/cgi/reprint/27/suppl_1/s134).
[4] A.M. LECKIE, M.K. GRAHAM, J.B. GRANT, P.J. RITCHIE and B.M FRIER, "Frequency, Severity, and Morbidity of Hypoglycemia Occurring in the Workplace in People With Insulin-Treated Diabetes", in *Diabetes Care*, 2005 (care.diabetesjournals.org/cgi/reprint/28/6/1333)

Question 6 - Reasonable accommodation

The duty of reasonable accommodation towards a disabled person exists in all areas which fall within the scope of the Belgian Anti-discrimination Act. (Unjustified) refusal of reasonable accommodation is considered to be (indirect) discrimination on the ground of disability.

Although today there remain issues of legal harmonisation between this specific aspect of antidiscrimination law and general labour law (including intersections between occupational health and safety, work incapacity and dismissal regulations), the CEOOR would argue that the possibility of reasonable accommodation is most certainly an important element of consideration when a person is refused access to employment or dismissed on grounds which are directly or indirectly related to his/her disability.

Strict and punctual treatment fidelity (e.g. periodical insulin injections, blood sugar control, in-between snacks,…) is a necessary condition for the successful management of diabetes, including the prevention of hypoglycaemia. When reasonable accommodation is demanded, the employer, the employee and the occupational medicine physician (industrial doctor) – in consultation with the attending endocrinologist – should try and find a way to coordinate the daily job requirements with the personal treatment schedule. This could, but not necessarily, have a certain impact on the company's organisation (e.g. in terms of adapting working hours or allowing occasional breaks). Another example of reasonable accommodation could be to inform and train the colleagues to respond correctly if an acute hypoglaecemia attack would occur. The 'reasonableness' of these or other measures need to be examined in concreto.

By providing reasonable accommodation, some objections regarding occupational health and safety may be refuted.

Question 7 - UN Convention Rights Disabled Persons

Belgium has signed but (October 2008) not yet ratified the UN Convention on the Rights of Disabled Persons. Although reference could be made to the principles of equality and non-discrimination (art. 5) and the rights of disabled persons in work and employment (art. 27) are, the CEOOR believes that these provisions are of little practical legal value to this case.

Question 8 - Sanctions and remedies

If Ms. Y chooses to initiate legal action against her dismissal, she could try and obtain a ceasing order as well as prefixed damages (6 or 3 months gross salary) trough specific summary proceedings before the president of the competent Labour Tribunal (compensation for actual damage can only be obtained through common proceedings). Such ceasing order may be combined with a penalty payment, as well as measures of publicity. If an employer persists in disrespecting a (civil) ceasing order, he even risks criminal punishment (prison penalty and criminal fine). Discriminatory clauses are sanctioned with nullity.

Unless Ms. Y had already filed some kind of formal complaint before her dismissal (in which case the protection against adverse treatment could apply), a claim for job restitution is rather unlikely to be successful under Belgian law. However, Ms. Y could try and apply again for a harbour worker position after having obtained a ceasing order.

Denmark

Answers provided by the Danish Institute for Human Rights

1. The case falls within the scope of the Danish anti-discrimination law only if insulin-dependent diabetes (type 1) is covered by the term "disability" in the act on prohibition against differential treatment in the labour market. The act covers the following discrimination grounds: race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Cf. section 2, subsection 1 of the act an employer is not

allowed to treat employees or applicants to vacant positions differently when it comes to, dismissals, transfers, promotions or in regard to salary and working conditions.

The act is a minimum implementation of 2000/78/EC Directive and the Danish courts are quite restrictive in their interpretations of "disability".

Danish legislation does not contain a definition of "disability" and the preparatory works are relatively vague in their definition of disability. The wording used in the Danish act on prohibition against differential treatment in the labour market is "handicap" and not "disability". According to the preparatory works, a 'handicap' occurs where a person with a 'physical, psychological or intellectual impairment must be compensated in order for that person to function on an equal level with other citizens in a similar situation [,…,] it is not a requirement for protection against differential treatment on the grounds of disability that there is a specific need for compensation [my italics].' . It should be noted that the Danish version of the EC Directive 2000/78 also uses the term 'handicap' and not 'disability'.

In a recently passed judgment from the Western High Court - U.2008.306V, the Western High Court confirmed that a handicap in the sense of the act on prohibition against differential treatment in the labour market requires "a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life".

The Western High Court established that A who suffered from Multiple Sclerosis and who as a result hereof suffered from tiredness, reduced concentration and memory capacity as well as sensory disturbances "did have a disability, but the High Court did not find grounds to establish that the disability - as it was at the time of dismissal, and which only needed to be compensated for with an additional reduction in working time – constituted a handicap in the sense of the act against prohibition against differential treatment in the labour market.

It is unclear what is needed in order to be encompassed by the concept of 'handicap' under Danish law. The reference to "situation in life" could indicate that the disability in question must cause limitations in everyday life and not merely in working life. Also the reference to a need for compensation indicates that the limitation must be closely linked to the individual's disability. It seems that a limitation which occurs as a result of e.g. negative attitudes towards disability cannot qualify as leading to a need for compensation.

According to the Chacón Navas' judgement, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"

It is unclear whether the Danish definition of disability is broad enough to live up to Danish obligations under the 2000/78/EC Directive. The use of the term 'handicap' indicates perhaps a narrow definition of the protected group and the Danish Courts operate with a narrow definition requiring "a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life". (Western High Court - U.2008.306V).

Whereas the EC Court required a limitation in professional life, Danish courts require a need for compensation in order to function on an equal level in similar situations in life. In the High Court Judgment, the employee suffered from a limitation in professional life in that she could only work reduced hours. This was not sufficient to qualify as a 'handicap' as she was not considered to have a 'need for compensation in order to function on an equal level in similar situations in life'. As mentioned above, the reference to "situation in life" could indicate that the disability in question must cause limitations in everyday life and not merely in professional life. Also the reference to a need for compensation indicates that the limitation must be closely linked to the individual's disability. It seems that a limitation which occurs as a result of e.g. negative attitudes towards disability cannot qualify as leading to a need for compensation. On these grounds it could be argued that the Danish concept of 'handicap' is

narrower than the definition of the concept given by the EC Court in its Chacón Navas judgment.

In the case at hand Ms Y does not have a reduced functional capacity and she would therefore most likely not be covered by the act on prohibition against differential treatment in the labour market.

2. The ordinary courts are competent to handle such a case. There is no administrative complaint body that covers disability. Such a body will however be established from 1 January 2009.

3. This question and the following questions are answered under the assumption that the case is covered by the Danish act on prohibition against differential treatment in the labour market.

The harbour authorities refer to medical guidelines which apply to all (candidate) harbour workers and occasional workers. With this in mind the case would have to lead to indirect discrimination.

See question 1 for why insulin-dependent diabetes type 1 would most likely not be considered as a disability in Denmark and how this would relate to the ECJ Chacón Navas ruling.

4. It is highly likely that there would be an objective justification. Health and safety would surely be regarded as a legitimate aim by the Danish courts and medical guidelines as a mean to the aim would probably be regarded as appropriate and necessary. Ms. Y's arguments that she already worked at the harbour for a month and that she was allowed to work there during her two-week notice period is however arguments that hold some weight. Whether they would hold up in court is however difficult to say.

There exists a case from the Danish Ombudsman concerning an application for a drivers licence for commercial driving from a person with insulin-dependent diabetes. The Ombudsman found it open to criticism that the Ministry of Traffic always rejected applications for a drivers licence for commercial driving when the applicant suffered from insulin-dependent diabetics when it was stated in The Road Traffic Act that such a decision should be taken after a concrete judgment (my underlining).

The Danish Ombudsman is not a court and his opinions are not judgments. It is however an interesting opinion in the light of the case at hand.

In regard to article 7 (2) of the Directive it has partly been implemented in section 9, subsection 3 the act on prohibition against differential treatment in the labour market where it is stated that the act is no hindrance to implement measures to promote employment possibilities for elderly people and people with a disability. The part of article 7 (2) that deals with the protection of health and safety at work has not been implemented explicitly and the Danish State has uphold already existing legislation

5. The Danish implementation of Genuine Occupational Requirement in article 4 (1) cannot be applied in this case since it refers to a "certain" disability thereby excluding people without a disability. An employer can therefore not invoke genuine occupational requirement as a mean to not employ people with a disability.

6. Reasonable accommodations could be relevant in this case when looking at Ms. Y's working conditions. She states herself that while she has been working at the harbour she has not accessed ships, worked on heights or been driving special vehicles. A reasonable accommodation could then be for it to be a working condition for her that she does not access places or work with vehicles that could put her or others in a potential dangerous situation. Since she has not yet been in a situation where she needed to be in such a place or drive such a vehicle it can hardly be seen as a disproportionate burden for the employer.

7. Denmark has not yet ratified the UN Convention on the Rights of Disabled Persons but has signed it with the intention of ratifying it. Danish courts can therefore not refer to the Convention directly but can in theory refer to article 26 in the Convention on Civil and Political Rights which must be interpreted in accordance with the disability convention.

8. The sanctions would be paying damages if such were awarded by the courts. Compensation in accordance with the general law of torts rules can however also be applied.

Germany

Answers provided by the Federal Antidiscrimination Agency

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

Yes, with the Directive 2000/78/EC: Art. 3.1a: conditions for access to employment, including selection criteria and recruitment conditions.

Yes, within the General Act of Equal Treatment: Art. 2 (1) No. 1: conditions for access to employment, including selection criteria and recruitment conditions.

2. Which court, organisation would be competent?

Labour Court.

Is there direct or indirect discrimination on the ground of disability? Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling? Would you consider general provisions on occupation health and safety to be “an apparently neutral provision, criterion or practice” in this case?

3. There is direct Discrimination on the ground of disability.

There is a uniform definition of disability in German law which differs in some aspects from the definition by the ECJ in the case of Navas. Pursuant to the Social Act, disability is defined as “the effect of a non-temporary (expected to last for more than six months) impairment of physical, intellectual or mental functions or an impairment of sensory functions, likely to make participation in the world of work more difficult for the persons concerned”. A persons suffering from insulin-dependent diabetes type 1 is usually considered as disabled because of its impairment of physical functions.

Discrimination on the ground of disability is deemed to exist if there is a causal relationship between less favourable treatment and disability. Here it is the direct discrimination because of the existence of the medical guidelines mentioned that candidates with diabetes…..are unfit (for harbour work).

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Yes, see Article 7 (2) Directive 2000/78/EG.

According to the Article 8 of the General Act of Equal Treatment there is no discrimination if a certain attribute constitutes a substantial and decisive prerequisite for the exercise of the vocational activity or for fulfilment of the conditions under which such activity is exercised. As a matter of course, this exception only applies if it serves a lawful purpose and the conditions imposed are appropriate. However, the underlying assumption is that this only refers to the core tasks specified in the employment contract.

The employer has to give evidence that the discrimination is justified.

5. What could be the role of 'reasonable accommodation' in this case?

The German law does not use the term „reasonable accommodation". The sense of this term is found in general protection provisions on occupation for persons with disabilities (Article 8).

6. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

If an employment contract fails to be concluded on account of disability, the applicant is entitled to material and immaterial compensation from the potential employer (Article 15).

The Netherlands

Answers provided by the Dutch Equal Treatment Commission

1. Does this case fall within the scope of the 200/78/EC Directive and/or anti-discrimination legislation in your country?

Yes. Within the scope of the Equal Treatment (Disability and Chronic Illness) Act .

2. Which court, tribunal, equality body or organization would be competent?

The Dutch Equal Treatment Commission (ETC) would be competent to give a non-binding legal opinion on this case. Also, the worker could go to a district court for a judgment, either right away or after having obtained the opinion of the ETC.

3. Is there direct or indirect discrimination on the basis of disability?

Both diabetes and insulin-dependent diabetes are considered as a chronic illness by the ETC. In the Dutch anti-discrimination legislation, chronic illness and disability are equally protected.

According to the ETC in several opinions, a disabled person who, due to his/her disability, is incapable of fulfilling the essential tasks of a function, is not protected by the equality legislation. In that case, there is no direct or indirect discrimination. But if a disabled person is capable of fulfilling the essential duties of a function, despite his/her disability, he/she is protected by the anti-discrimination legislation.

The latter case is at hand in de present case: Ms. Y is capable of fulfilling her job, despite her diabetes, as she has worked for 6 weeks without any problems.

If the employer of Ms. Y contested that she is able to fulfil the essential duties of the job due to her diabetes, the ETC would hold the argumentation of the employer against the same stringent test as when the employer would have (only) invoked the exception for health and safety mentioned below, under 4.

As the exception of workers with insulin-dependent diabetes is based solely on their disability, there is direct discrimination.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In the Dutch legislation, there is an exception on the prohibition of discrimination on the ground of disability for health and safety risks. This includes both risks for the person involved as for persons in his/her immediate surroundings.

Any invocation of this ground for exemption must satisfy stringent requirements regarding the reasons stated to substantiate that there is a real health and safety risk. An employer or employer + trade unions must give proper reasons why they decided on an absolute contra indication. This requirement is even more stringent if the person concerned was never hampered by the disability in performing the duties of any previous jobs.
Also, the ground for exemption leaves intact the obligation of 'reasonable accommodation'. This obligation must therefore also be met, e.g. by taking additional safety measures or providing for information or instructions to colleagues and instructors etc.
The ETC furthermore attaches weight to the question whether or not there has been a pre-employment medical examination.

In the present case:

- There is an absolute contra indication for insulin dependent diabetics. Ms Y however says that she has her diabetes under control and that she can perform her job. The ETC would ask the employer and trade-unions why they have decided on an absolute contra-indication.

They would have to demonstrate that their decision is based on general studies on the fitness of diabetics for harbour work or for work with safety risks. The only listing of certain disabilities as a contra indication for harbour work is not enough; it needs to be motivated why insulin dependent diabetes is an absolute contra indication.

As a consequence, unless the employer can establish that insulin medication may give rise to great disasters and an individual approach would entail too many risks, the ETC finds that – in line with the current state of medical research – there should always be an inquiry into the individual situation of a diabetic to establish if he/she is fit for the job.

In this respect, the ETC has occasionally referred to the 'Handbook Employment and Workload Capacity', a Dutch handbook from 2003 that shows that there is no experience with diabetics in jobs with a safety risk because they are usually kept out of these jobs in advance. The conclusion in this handbook is "As long as studies of road accidents and industrial accidents have not demonstrated that insulin dependent diabetics are involved more than average, it is acceptable to let these persons work in jobs involving a safety risk."

So, the ETC would find that the respondents should have good reasons for calling this type of diabetes an absolute contra-indication and that they should have carried out a more comprehensive individual assessment of Ms Y's capacities.

- Ms Y had worked in the job for 4 weeks already before she was called for the medical examination and after it, she was allowed to work for another 2 weeks. This is in contradiction to the absolute contra-indication: apparently it is not very necessary to screen employees before they start to work.

- Ms Y has contended that harbour workers that develop diabetes after they have received the official status of harbour worker, do not lose their status, instead: they can continue working. If this is true, it is in contradiction to the absolute contra-indication.

- No efforts have been made to accommodate the disability. There is no possibility for accommodation foreseen in the guidelines. Nor have the employer and/or medical examiner investigated in the particular case of Ms. Y whether any accommodation could be made, or have they consulted Ms Y on this.

Based on the above, the ETC would probably conclude that diabetes does not prevent a person from performing the essential duties belonging to the job of marker and/or that the employer and trade unions cannot invoke the exemption of health and safety.

5. In your country, is there a Genuine Occupational Requirement exception pursuant to article 4(1) of the Directive linked to the ground of disability and if so, would it be applicable to this case?

No, there is no such GOR exception for the ground of disability in the Dutch equality legislation.

6. What could be the role of 'reasonable accommodation' in this case and would the company have failed to comply with those requirements?

See above, under 4.

7. Would the Court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so: how would it be applied to the facts of this case?

The ETC cannot apply international conventions such as the Convention on the Rights of Disabled Persons directly to cases as it only investigates whether the Dutch equality legislation is met. However, the ETC can refer to such Conventions for the interpretation of concepts such as disability and the intensity of the obligations under Dutch legislation.

The Convention on the Right of Disabled Persons is however not yet ratified by the Dutch Government, so at this moment the ETC cannot yet refer to this convention.

8. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

If a complaint is made with the ETC: no remedies available, as the ETC only gives non-binding opinions and has no power to impose sanctions or to grant remedies.

If a claim is laid before a court, the Court can assign the employer and trade unions to amend the social plan, it can propose a settlement for the plaintiff or it can impose a settlement.

Norway

Answers provided by the Equality and Anti-discrimination Ombud

1. Does this case fall within the scope of the 2000/78/EC Directive and/or antidiscrimination legislation in your country?

The case falls within the scope of the Norwegian Working Environment Act; section 13-1 states that
(1) Direct and indirect discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age is prohibited.

There is no definition of disability in the law, but diabetes, as a chronic illness, will fall under the term disability. Disability is seen as a relation between the individual's impairments and the society. The impairment can be physical, psychological or cognitive. There is no requirement that the impairment shall last for a long time, although the preparatory works make an exception for very minimal impairments and impairments that last for a very short time.

The understanding of disability in Norway seems to be less strict than in the Navas judgement. The focus in Norway will be: 1) if a certain action leads to discrimination and 2) if there is a connection between the discrimination and the impairment.

2. Which court, tribunal, equality body or organisation would be competent?

The Equality and Anti-Discrimination Ombud enforces the discrimination regulations within the Working Environment Act. The Ombud`s opinions are not legally binding. They can be appealed before the Equality Tribunal. A case can only be handled by the Tribunal after the Ombud has made a recommendation. The rulings of the tribunal are administratively binding.

Such rulings, however, may be overruled by a court of law. The Tribunal may order the payment of a daily fine until compliance with such rulings.
A case about disability discrimination can also be taken directly to the ordinary court.

3. Is there direct or indirect discrimination on the ground of disability? Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling?

In general, provisions on occupation health and safety will be considered as apparently neutral provisions, which mean it is a question of indirect discrimination.

In this case, however, diabetes mellitus is mentioned specifically, and one can argue that the exclusion of all persons with diabetes mellitus is direct discrimination.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?
In your answer please consider whether in your country you have a provision linked with article 7(2) of the Directive which justifies either direct or indirect discrimination against disabled people on grounds of health and safety, and would it be satisfied in this case?

There is a general exception in section 13-3, saying that
(1) Discrimination that has a just cause, that does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination pursuant to this Act

We don't have a provision linked with article 7 (2). However, health and safety matters will be very relevant considerations in the general justification test.

Obviously there are special conditions at a harbour, involving big machines etc, working on heights that require certain precautions. If a person collapses during work at the harbour this can be a risk not only for the person herself, but also for the colleagues.

However - in this case there has been no individual consideration, regarding the medical history of Ms Y, how she follows up her treatment and how her medical condition and risks of having hypoglycaemic episodes actually is. The lack of individual consideration could mean that the employer failed to show that their treatment of Ms Y is just, necessary and does not involve disproportionate intervention.

There could be good reasons to justify the differential treatment of Ms Y. Still the automatic exclusion of all people with diabetes without further investigation probably shouldn't be justified. I would think that the consideration from the employer has to be more specific and individual to be accepted.

To decide on this question, one also has to investigate what are the guidelines in connection with other work which also can involve a risk when working with diabetes, for instance bus drivers, fire personnel etc.

The fact that the employer allows Ms Y to continue working for another two weeks after the failure of the medical tests, and also that she was working for one month before needing to take a test, indicates that the medical issue and security risk is not crucial.

Ms Y argues that there are some examples of official harbour workers who developed diabetes after having obtained this statute, and that they are still allowed to work.

If this is right, it might be difficult for the employer to be heard with the arguments regarding health and security issues. If there are no regularly medical tests for the harbour workers, this seems like an inconsistent practice. Such a practice indicates that excluding workers with diabetes is not "just" or "necessary".

One would also have to look at the employer's alternatives. If Ms Y easily could get tasks that would not involve risks, it wouldn't be seen as "necessary" to reject her from working at all.

5. In your country is there a Genuine Occupational Requirement exception pursuant to article 4(1) of the Directive linked to the ground of disability and if so would it be applicable in this case?

We have no general Occupational Requirement other than the general exception which says that discrimination can be justified if, among other conditions, it is "necessary for the performance of work or profession", see question above.

6. What could be the role of 'reasonable accommodation' in this case and would the company have failed to comply with those requirements

Section 13.5 in the Working Environment Act says that "The employer shall as far as possible implement necessary measures to enable employees with disabilities to obtain and retain employment, perform and make progress in the work and have access to training and other forms of competence development. This shall not apply if such measures would involve an excessive burden for the employer.

- If possible the employer could give Ms Y working tasks that don't involve a great risk in case of hyperglycaemic episodes.
- The employer should make it easy for her to combine work with the medical schedule, give her the pauses that she needs etc
- Train the other staff to handle eventually episodes in the best possible way.

7. Would the court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so how would it be applied to the facts of this case?

Norway has not ratified the UN Convention yet, we are still in the process. Therefore the court would not refer to the UN Convention.

8. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

The employee may claim compensation without regard to the fault of the employer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. Compensation for financial loss as a result of discrimination may be claimed pursuant to the normal rules. This means the employer has no objective responsibility for economic loss; the court has to establish guilt (culpa) on employer's side.

Note that neither the Ombud nor the Tribunal can make decisions about compensation; the court has to do this. As long as the employer does not pay compensation voluntarily, the case has to be brought before court.

Sweden

Answers provided by the Ombudsman against Ethnic Discrimination

1. Does this case fall within the scope of the 2000/78/EC Directive and/or antidiscrimination legislation in your country?

Yes, the Act prohibiting discrimination on grounds of disability (1999:132)

2. Which court, tribunal, equality body or organisation would be competent?

The Labour Court, The Disability Ombudsman or the Trade Union that the complainant is a member of.

3. Is there direct or indirect discrimination on the ground of disability? Please elaborate on why (insulin-dependent) diabetes type 1 would (not) be considered as a disability in your country. How would you relate this question to the ECJ Chacón Navas ruling?

Could be both direct and indirect discrimination. In Sweden we have had a very similar case in the Labour Court, but it regarded a job applicant with type I diabetes. He was considered a good candidate and sent to a doctor's examination, where he told the doctor about his diabetes. He did not get the job, because of his diabetes. The job was at an Oil Refinery and involved surveillance of the process. The work was risky, because there is always a risk of fire. This job applicant, a young man, was able to prove that he had his diabetes under perfect control. The employer claimed that he could, because of his diabetes, be a risk for himself, his colleagues and the operations. After a thorough examination of the work and how it was carried out and the health condition of the applicant, the Labour Court came to the conclusion that generally, the work may not have been suitable for a person with diabetes, but in this case you had to make an individual assessment of the situation. The applicant was able to prove that his disease did not have a negative impact on his health, as he had it under full control. Thus he had been in a comparable situation and the Company had directly discriminated him by not giving him the job.

On the other hand, if general rules are applied in a discriminatory way, it could constitute indirect discrimination.

In the Swedish law prohibiting discrimination because of disability the definition of disability is wide. "A disability is a permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth arose thereafter or may be expected to arise.

In this case, if the diabetes does not affect the candidate's capability to carry out the work, the general provisions on occupational health and safety may be so general that they can be regarded as apparently neutral provisions.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In your answer please consider whether in your country you have a provision linked with article 7(2) of the Directive which justifies either direct or indirect discrimination against disabled people on grounds of health and safety, and would it be satisfied in this case?

In this case I would say no, because the regulations seem very general and the candidate has proven that she can carry out the work. Also since workers who develop diabetes are allowed to continue working, it seems that the rules are too general. This issue may require further investigation, though. There is no provision linked with article 7 (2) in the discrimination legislation. Other national authorities may have such regulations. The preparatory works of the Act (1999:132) state that if a person has a disability that affects his/her ability to perform the work he/she is not in a comparable situation and in that case it is not discrimination (for example a visually impaired taxi driver). In a case like this the capacity to perform the most relevant parts of the work should be tried.

5. In your country is there a Genuine Occupational Requirement exception pursuant to article 4(1) of the Directive linked to the ground of disability and if so would it be applicable in this case?

Yes, the prohibition against direct discrimination does not apply in connection with decisions on employment, promotion or education for promotion if a particular disability is necessary owing to the nature of the work or the context in which it is performed. This would only be

applicable in cases where disabled persons apply for jobs in disability organisations. It would not be applicable in this case.

6. What could be the role of ‘reasonable accommodation’ in this case and would the company have failed to comply with those requirements?

A reasonable accommodation in this case could be that the person only does work that is not risky for herself or anybody else. It seems that the harbour regulations are very general and thus could lead to indirect discrimination.

7. Would the court be able to refer to the United Nations Convention on the Rights of Disabled Persons, and if so how would it be applied to the facts of this case?

No, not directly.

8. If there is no justification or exception, what could be the sanctions and remedies under your national legislation?

Damages

Annex 2
Country responses to the case study on sexual orientation discrimination

Austria

Answers provided by Birgit Lanner from the Ombudsman for Equal Treatment of persons with disabilities

1. Does the case fall within the scope of anti-discrimination law in your country? Please, explain how or why not.

The answer to that question depends on the legal status of the particular church. According to Art 15 of the Austrian Constitution explicitly acknowledged religious groups have the right to regulate their internal matters autonomously, i.e. without state interference. Therefore, the state must also abstain from applying its laws to internal matters of explicitly acknowledged religious groups. In a judgement from 1974[5], the Austrian Supreme Court stated that internal matters concern the inner core of the religious activities, such as preaching and exercising these rites, which could not be exercised reasonably in the presence of state interference. (The overview over legal writings contained in the judgement by the Supreme Court suggests that matters of employment and appointment of clerical staff are always considered internal matters).

The youth worker's field of duty, like promoting the personal, educational and social development of young people, does not belong to the autonomous inner core of religious activities and therefore Mr. R. cannot be considered a "clerical employee". Therefore - and as Mr. R. is employed by a working contract - the Austrian Equal Treatment Act is applicable (see Sec 16 and 17 ETA).
- Sec 16 para 1 lit 1 ETA states that regulations concerning the prohibition of discrimination on the grounds of sexual orientation apply for all labour relations which are based on contracts under private law.
- Sec 17 para 1 lit 1 ETA bans direct and indirect discrimination on the grounds of sexual orientation in access to employment.

2. Which court, tribunal, equality body or organisation would be competent?

- Equal Treatment Commission (non-binding decision without compensation)
- Labour Court (binding judgement and compensation)

3. Is there direct and indirect discrimination on the ground of sexual orientation?

4. In relation to indirect discrimination, could applying a criteria or being married be indirect discrimination based on sexual orientation?

According to Sec 19 para 1 Equal Treatment Act (ETA) direct discrimination occurs where one person is treated less favourably on the ground of his/her sexual orientation than another person in a comparable situation. In the present case there are some indications for a general exclusion of homosexual persons and therefore for direct discrimination (e.g. the bishop's intrusive questioning, the argument of the church that heterosexuality is a genuine occupational requirement for a person working for them etc.); on the other hand, the official argument for his refusal - to live either celibate or be married (which would exclude homosexual persons in general) - indicates more an indirect discrimination.

[5] Judgement of the Supreme Court, 26 November 1976, Case Nr 4 Ob 41/74

According to Sec 19 para 2 ETA indirect discrimination occurs where an apparently neutral provision, criterion or practice puts persons belonging to a particular sexual orientation at a particular disadvantage compared with other persons, unless such provision is objectively justified by a legitimate aim and the means of achieving that aim are adequate and necessary. With regard to the prerequisite "to be married" there seems to be indirect discrimination in this case as this requirement affects in particular homosexual persons, because same-sex marriage is still not allowed in Austria (and the Church probably would only accept heterosexual marriage).

5. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

6. Would an exception of a genuine occupational requirement based on sexual orientation apply?

Sec 20 ETA (which is based on the Art 4 EU directive 2000/78/EC) provides exceptions from discrimination. Sec 20 para 1 ETA provides a general exemption clause (genuine occupational requirement, legitimate aim and proportionate means) and para 2 provides a specific exemption clause for occupational activities within Churches. It states that discrimination on the grounds of religion or belief shall not be deemed to have occurred where the religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

To apply the latter exemption clause it has to be considered whether the sexual orientation can be seen as part of Mr. R's conception of religion or belief. Although homosexuality is often seen rather critical by the Church it can only ask for certain loyalty to its ethos and doctrine, but is not allowed according to the law (Art 4 EU directive and ETA) to discriminate on the ground of sexual orientation per se.

In the present case a specific sexual orientation does not constitute a genuine occupational requirement for a youth worker. The specific exemption clause for Churches also does not apply. Even if a legitimate aim could be seen in the preservation of the ethos and values of the Church, the rejection of Mr. R would not be considered proportionate and necessary (as Mr. R does not work within the inner core of religious activities, like preaching and exercising the rites).

7. Would the facts establish harassment based on sexual orientation?

Sec 21 ETA prohibits harassment based on sexual orientation (according to Art 2 directive). Harassment is taken to have occurred where a person is exposed to conduct which
- violates or has the purpose to violate the dignity of the person concerned,
- is unwanted, inappropriate or indecent for the person concerned and
- creates or has the purpose to create an intimidating, hostile, degrading, offensive or humiliating environment for the person concerned.

In the present case it depends on how the questioning of the bishop took place in order to consider this as harassment. The intrusive and long questioning about Mr. R's sexual life, orientation and relationships could constitute such harassment. The fact that Mr. R felt very dejected and upset after the questioning and that he could not work for two days indicates that the bishop's behaviour was unwanted, violated his dignity and created a degrading environment.

8. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

- compensation for discrimination in access to employment: Sec 26 para 1 ETA: minimum 2 months salaries, if Mr. R was the best qualified person; up to 500 € if average job applicant)
- compensation for harassment: Sec 26 para 11 ETA: pecuniary damage and non-pecuniary damages (minimum 720 €)

Belgium

Answers provided by the Centre for Equal Opportunities and Opposition to Racism

Preliminary remarks
Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, the federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and -racism legislation. However, today cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases.

In 2007, the Belgian federal Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

- 10 May 2007 Anti-discrimination Act
This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC directive (religion or belief, disability, age and sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language (which will be assigned to a yet to be designated autonomous agency).

- 10 May 2007 Anti-racism Act
This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

- 10 May 2007 Gender act
This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Men and Women.

The scope of this new legislation – which is identical for all three acts – is broader than demanded by the EC directives, as the following domains are enclosed (in short):
- access to and offering of goods and services accessible to the public;
- social protection (including social security and health care), social advantages and additional schemes to social security;
- employment (access to employment, working conditions, dismissal, etc.), including membership of and participation in trade unions and professional organisations;
- statements in official documents and minutes;
- access to and participation in economic, social, cultural and political activities accessible to the public.

Question 1 - Scope

The Belgian Constitution guarantees the freedom of religious service, and prohibits the State to intervene in the internal organisation of religions (including in the appointment for clerical functions). This matter falls outside the scope of the Anti-discrimination Act.

On the other hand, in Belgium the position of a youth worker is more likely to be associated with an external organisation the ethos of which is based on religion or belief (e.g. a social welfare organisation inspired by catholic religion), rather than the internal organisation of the Church. Under this hypothesis (where the general principles of the Employment Contract Act apply), the case of Mr. Reaney could fall within the scope of the Anti-discrimination Act.

Question 2 - Competence

Under the before-mentioned hypothesis and in case of (civil) legal action: Labour Tribunal (first instance) and Labour Court (appeal).

The CEOOR's broad mandate as independent non-judicial equality body includes to inform, advise, mediate and litigate in matters regarding discrimination (within the scope of the Anti-discrimination and Anti-Racism Acts). Victim consent is a necessary condition for the CEOOR's legal action to be admissible. Note however that the CEOOR represents a general interest, which needs to be distinguished from the individual victim's damage claim.
There exists a protocol of cooperation between the CEOOR and the trade unions, providing that these last organisations should take the lead in defending the rights of their members in employment discrimination cases.

Question 3 - Direct or indirect discrimination (sexual orientation)

Apparently, the Church of England (Bishop) considers either marital status or celibacy as a necessary condition for the position of youth worker.

In Belgium, the legal status of marriage is available for same sex couples and although there is a rather rejecting attitude of the Catholic Church towards the ecclesiastical consecration of such marriages, some individual priests have been found willing to do so. Therefore, at least in theory, the required civil status in this case does not necessarily imply indirect differential treatment on the ground of sexual orientation.

However, the CEOOR is well aware of certain taboos regarding the employment of (openly) homosexual persons within the Church and organisations the ethos of which is inspired by (catholic) religion, where access to some functions will depend on the approval of the local diocese. In the case at hand, Mr. Reaney was questioned more thoroughly by the Bishop on his private life (style) than usual because in his application letter he had openly mentioned that he was homosexual. Although in the rejection letter the emphasis is on Mr. Reaney's lifestyle having "a potential impact on the spiritual, moral and ethical leadership within the diocese" rather than on his sexual orientation, it is clear from the Church's line of reasoning that the lifestyle argument should be considered as a poor attempt to cover that indeed this was the determining factor for the rejection.

Question 4-6 - Justification or exception / genuine occupational requirement

(See also question 1)
The exception of occupational requirements in organisations the ethos of which is based on religion or belief (art. 4.2 of the 2000/78/EC directive) has been implemented quite literally in the Belgian Anti-discrimination Act. By nature of the occupational activities within these organisations or of the context in which they are carried out, a person's religion or belief may constitute a genuine, legitimate and justified occupational requirement. This implies that the employer is entitled to require individual employees to act in good faith and with loyalty to the organisation's ethos. However, the exception doesn't justify discrimination on another ground covered by the directive (this last principle has been extended to all other grounds covered by the Belgian Anti-discrimination Act).

In the opinion of the CEOOR, the requirement of good faith and loyalty does not necessarily imply that the employee should be a practicing believer (or even adhere the religion or belief on which the organisation's ethos is based), as long as he/she fully respects this ethos in the

execution of the function as well as in situations where his/her private life could affect his professional life. A more personal commitment may be expected from persons who publicly represent the organisation (especially when their function implies promoting the ethos).

From this legal perspective, the CEOOR would argue that sexual orientation – as an element of a person's private life – cannot a priori be considered as a genuine, legitimate and justified occupational requirement in terms of art. 4.2 of the 2000/78/EC directive.

There is clearly an important legal aspect of privacy related to this problem, and in Belgium there is for example a specific collective agreement which states that questions regarding the private life of the applicant are only justified if relevant given the nature and the requirements of the function. In the case at hand however, there is probably less debate on whether Mr. Reaney could or should have refused to answer certain questions, because he mentioned his sexual orientation already in the application letter (which is on the other hand no justification for the Bishop to approach the interview in a different manner).

Now Mr. Reaney is said to be a committed Christian, which probably implies that – if this would be required – he could actively carry out the religious ethos in the execution of the youth worker position with the Church of England. The fact that the first interview panel of eight people unanimously recommended him for the job illustrates that, at least from their perspective, he met the requirement of good faith and loyalty.

Although the apparent concern of the clerical institution that young clients are not explicitly confronted with an aspect of sexuality of which the Church officially disapproves may justify that Mr. Reaney is asked to demonstrate a certain tact in situations where his private life could intervene with his professional tasks, the CEOOR feels that the arguments for the rejection are inadequate to justify the discrimination on the ground of sexual discrimination.

Question 7 - Harassment

The legal contentieux of (civil) harassment in employment and occupation, including when this harassment is based on one of the grounds covered by the Anti-discrimination Act, falls under the scope of the Belgian Wellbeing At Work Act.

Although the 2000/78/EC defines harassment as "unwanted conduct (…)", suggesting that a single act is sufficient; the Wellbeing at Work Act requires repeated harassing conduct. This probably implies that Mr. Reaney's harassment claim is not likely to be successful in Belgium.

Question 8 - Sanctions and remedies

The Belgian 10 May 2007 Anti-discrimination Act provides specific summary proceedings to obtain a ceasing order and ("prefixed") compensation for material and moral damages (6 or 3 months gross salary). Measures of publicity may be taken, as well as penalty payment.

If an employer persists in disrespecting a (civil) ceasing order, he risks criminal punishment (prison penalty and criminal fine).

Actual damages, if these would be considered higher than the before-mentioned prefixed compensation, can only be claimed trough common proceedings.

Denmark

Answers provided by the Danish Institute for Human Rights

1. The case falls within the scope of the Danish anti-discrimination law more specific the act on prohibition against differential treatment in the labour market. The act covers the following discrimination grounds: race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Cf. section 2, subsection 1 of the act an

employer is not allowed to treat employees or applicants to vacant positions differently when it comes, dismissals, transfers, promotions or in regard to salary and working conditions.

2. The ordinary courts are competent to handle such a case. There is no administrative complaint body that covers sexual orientation. Such a body will however be established from 1 January 2009.

3. If we presuppose that it is a condition for the position as youth worker in the church that the applicant is either celibate or married I believe that this would constitute indirect discrimination since e.g. a person in a registered partnership would not be taken into consideration for the position. In this case however Mr. Reaney is single and is therefore not - formally anyway - excluded in applying for the job as youth worker. Mr. Reaney is as such not subjected to indirect discrimination.

Based on the information given in this case I however believe that it is a matter of direct discrimination since the bishop questions whether Mr. Reaney can remain celibate. The bishop talks of “practice and lifestyle” but what he means is homosexual. It then becomes a matter of not whether Mr. Reaney is single (celibate) or married but of him being gay.

4. If we assume that we are talking about a case of direct discrimination the exception should be found within the scoop of occupational requirement. See question 5 for occupational requirement.

5. Cf. section 6, subsection 2 in the act it is not against the prohibition of differential treatment to require that a person is of for instance a certain sexual orientation as long as having this characteristic is crucial for the job at hand. Furthermore the requirement of such a characteristic must be proportional to the job as well. And finally the employer must obtain a dispensation from the relevant minister.

There is no case law in Denmark similar to the case at hand. It would therefore be a discussion on whether a church that does not believe in people being gay (practice and lifestyle) or people living in sin can get an exemption from the prohibition against differential treatment on the grounds of it being crucial to the job as youth worker that the person is heterosexual (the right practice and lifestyle so the speak in the eyes of the church).

An example from Denmark where dispensation has been given is a case of a chicken slaughterhouse that sold its products to Muslim export markets. The slaughterhouse wanted to be able to require that the butcher they hired was a Muslim otherwise they could not sell their products to all buyers in the Middle East. The relevant minister recognized that the employee’s religious conviction in this situation was crucial for the company’s possibility of selling its products.

6. An exception of genuine occupational requirement based on being of a certain religion or belief would not apply in the case of Mr. Reaney since Mr. Reaney is a committed Christian. If he was for instance an atheist genuine occupational requirement could be discussed.

7. In Mr. Reaney’s case there is not the same element of economics as in the case described above. However I do not think that a dispensation would be given anyway since it cannot be seen as crucial for the job as a youth worker to be heterosexual. I will however be crucial that the person is not doing drugs etc. but that has nothing to do with occupational requirement. Maybe it would even be crucial that the person is a Christian which of course falls within the scope of occupational requirement.

8. Mr. Reaney is being questioned for two hours about his private life, previous relationship, planned future relationships and his sexuality and the church has made it clear that a heterosexual person would not have been subjected to the same level of intrusive questioning. The following conditions must be fulfilled for harassment to be covered by the act:

- The conduct must be unwanted
- The unwanted conduct must relate to one of the protected ground
- The unwanted conduct takes place with the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment

The conduct is certainly unwanted. There could however be a question of whether Mr. Reaney should have spoken up against the conduct.

The conduct is certainly related to one of the protected grounds namely sexual orientation.

We must assume that the conduct has the effect of either violating Mr. Reaney's dignity or creating an environment as mentioned above. It is important here to keep in mind that both the intended harassment as well as the unintended harassment is covered by the act.

There is however very little case law in Denmark regarding harassment when it comes to sexual orientation. There is a recent judgement regarding the harassment of a baker's assistant where the court awarded the assistant 100.000 DKR. (13.405 Euro).

Due to the lack of precedent it is difficult to state whether a court would find the case of Mr. Reaney a case of harassment.

Cf. section 4 in the act an employer must not in connection with or during the employment of an employer request, obtain or receive or use information regarding the employees race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin. According to the information given in the case we know that Mr. Reaney himself informs the church of him being gay. This however does not justify that the bishop clearly uses the information of his sexuality in connection with a possible employment.

9. The sanctions would be paying damages if such were awarded by the courts. Compensation in accordance with the general law of torts rules can however also be applied.

Germany

Answers provided by the Federal Antidiscrimination Agency

1. Does the case fall within the scope of anti-discrimination law in your country? Please, explain how or why not.

Yes, with the Directive 2000/78/EC: Art. 3.1a: conditions for access to employment, including selection criteria and recruitment conditions.

Yes, within the General Act of Equal Treatment: Art. 2 (1) No. 1: conditions for access to employment, including selection criteria and recruitment conditions.

2. Which court, organisation would be competent?

Labour Court.

3. Is there direct and indirect discrimination on the ground of sexual orientation?
According to Section 2 of the General Act on Equal Treatment, any discrimination on the ground of sexual identity in relation to conditions of access to dependant employment is inadmissible.

Sexual identity means the preference for a certain sexual partner and implies in addition to the sexual orientation the (sexual) practice with the partner. By asking a job applicant questions about a/the sexual relationship, the employer discriminates directly on the ground of sexual orientation.

In relation to indirect discrimination, could applying a criteria or being married be indirect discrimination based on sexual orientation?

Yes, in Germany homosexual people can't marry. They can register as partnerships.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception? And 5. Would an exception of a genuine occupational requirement based on sexual orientation apply?

A difference of treatment on sexual orientation shall not constitute discrimination where such ground constitutes a genuine and determining occupational requirement (section 8 subsection1). The employer determines which requirements are necessary for the actual job. But, according to the German law, the specific ground must constitute a characteristic ground by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.

The sexual orientation and/or (not) practicing a certain sexual life do not constitute an occupational requirement by reason of the nature of the particular social worker with the consequence; the bishop was not entitled to ask questions about sexuality and partnerships and to reject the candidate from the post for the stated reasons.

Notwithstanding section 9, a difference of treatment of employees of a religious community, facilities affiliated to it or organisations which have undertaken conjointly to practice a religion shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion having regard to the ethos of the religious community in questions and by reason of their right to self-determination or by the nature of the particular activity (section 9 subsection 2). This regulation permits differences only on the ground of religion or belief but not on another ground.

According to section 9 subsection 2, the Church and its institutions have the right to require individuals working for them to act in good faith and with loyalty to the ethos of the organisation. That is valid, as long as the provision of the General Act on Equal Treatment are kept (Article 4 subsection 2 paragraph 2 of the Directive 2000/78: Provided that the provisions are otherwise complied with, churches can require employees to act in good faith and with loyalty see).

5. Would the facts establish harassment based on sexual orientation?

It is not excluded, that there is also harassment on the ground of sexual orientation. Harassment shall be deemed to be discrimination when an unwanted conduct in connection with sexual orientation takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment (section 3 subsection3). Harassment can be expressed verbally or non-verbally.

It is neither necessary that the actor acts intentionally, nor that the victim shows his refusal. It is sufficient that the behaviour is not desired or unacceptable from the view of a third (neutral) person. Harassment demands a creation of hostile environment. By asking discriminating, intrusive and intimidate questions and rejecting him for the post for the stated reason, the bishop, however, created such hostile environment.

6. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

According to German law, the applicant can claim for compensation and damages (subsection 15). This case will be decided by the labour court.

The Netherlands

Answers provided by the Dutch Equal Treatment Commission

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

It probably doesn't fall within the scope of the Equal Treatment Act, as this act contains (in article 3) an exception for Churches: the ETC cannot assess the legal relations of Churches and their employees and they cannot assess the requirements for clerical professions.

This exception is inspired by the principle of separation of Church and State and the freedom of religion and belief. In a recent advice (advice 2008-2, March 2008) following the formal notice of the European Commission of 31 January 2008, the ETC has concluded that the wording and content of this exception are not in line with the Directive. Although the ETC has also concluded that it has been the intention of the EC to grant religious organizations the freedom to organize according their religious rules, especially with regard to the appointment of reverends, imams etc. and that is what this exception allows for, it unclear, what the extent of this exception is. In the past, the ETC has been asked to decide on the scope of the exception for religious leaders (Does a pension scheme for bishops fall under the exception?) as well as on the scope of the term 'religious organization' (Does a clerical education organization that provides not only education for priests, but also for other professions, fall under the exception for religious organizations?).
Therefore, the ETC has recommended the Dutch Government to adjust the exception of article 3 of the Dutch Equal Treatment Act to bring it in line with article 4 of the Directive. Until present, no adjustments have been made.

If Mr. Reaney would have applied to an organization that is not connected to the Church itself, but only based on religious principles, e.g. a school or a social welfare organization, his case could be assessed by the ETC.

In the following, I will answer the questions as if Mr. Reaney had applied with such a religion-based organization and not with the Church itself.

2. Which court, tribunal, equality body or organization would be competent?

The Dutch Equal Treatment Commission (ETC) would be competent to give a non-binding legal opinion on this case. Also, the worker could go to a district court for a judgment, either right away or after having obtained the opinion of the ETC.

3. Is there direct or indirect discrimination on the basis of sexual orientation?

Whether there was direct or indirect discrimination depends on the exact reason for his rejection. If from the arguments given by the Church, it becomes apparent that while they say that he was rejected due to his lifestyle, but in fact they mean that he was rejected because of his sexual orientation, the ETC may conclude that there is direct discrimination.

In the present case, the fact that the Church admitted that heterosexual men would not have been questioned by the Bishop for 2 hours and that the Church argued that any person working for the Church should be heterosexual due to a genuine occupational requirement, are strong indications that the Church rejected mar Reaney because of his sexual orientation.

The application of the criterion that candidates must be celibate or married – if applied to both hetero- and homosexuals and not as an excuse to keep out gays - will not be likely to lead to indirect discrimination on the grounds of sexual orientation in the Netherlands, as the marital status is open to both heterosexuals and homosexuals.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In this case, the ETC may conclude there was direct discrimination, so there is no objective justification possible.

If the ETC would conclude that there was indirect discrimination, it would depend on the arguments of the Church whether the ETC would conclude the rejection of Mr. Reaney served a legitimate purpose and was appropriate and necessary.

No exception applies to this case. In the Dutch Equal Treatment Act there is an exemption for organizations based on religious principles: when recruiting staff, they may impose certain requirements as to their religious convictions. This means e.g. that an organization with Christian roots (that acts according to these roots as well, it may not just be a dead letter in their statutes) may reject non-Christians or Christians from a different denomination. However, these organizations may only use religion as a selection criterion when this is necessary for the function the candidates apply to. For instance, a school may not require that administrative staff that has no teaching tasks, belongs to the religion on which the school's principles are based.

And also, the exemption may not lead to the exclusion of persons on the basis of any of the other non-discrimination grounds, among which sexual orientation. An organization based on religious principles may therefore not reject someone solely on the basis of his/her sexual orientation.

5. Would an exception of a genuine occupational requirement based on sexual orientation apply?

In the Dutch Equality legislation there is no genuine occupational requirement based on sexual orientation.

6. Would an exception of a genuine occupational requirement based on being of a religion or belief apply?

See above, under 4. There is an exception in the Dutch equal treatment law that allows for the recruiting of staff on the basis of their religion of belief. You could call that a GOR, but that exception is only applicable to organizations based on religious principles – such as schools, welfare organizations etc. – that also act on these principles. Any other organization cannot select applicants on the basis of their religion or belief.

7. Would the facts establish harassment based on sexual orientation?

Harassment is discriminating behaviour that has as a purpose to affect the dignity of a person and to create a threatening, hostile, offending or humiliating environment. Whether certain behaviour can be classified as harassment is an objective decision, not dependent on the subjective feelings of the victim.

In this case, arguments can be given for the establishment of harassment, but whether the ETC would come to this conclusion depends on the reaction of the Church and on the possibility to establish what has happened exactly and whether what happens fulfils the abovementioned criteria.

8. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

If a complaint is made with the ETC: no remedies available, as the ETC only gives non-binding opinions and has no power to impose sanctions or to grant remedies.

If a claim is laid before a court, the Court can assign the employer and trade unions to amend the social plan, it can propose a settlement for the plaintiff or it can impose a settlement.

Norway

Answers provided by the Equality and Anti-discrimination Ombud

1. Does the case fall within the scope of anti-discrimination law in your country? Please, explain how or why not.

The case falls within the scope of the Norwegian Working Environment Act, section 13-1 states that
(1) Direct and indirect discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age is prohibited.

2. Which court, tribunal, equality body or organisation would be competent?

The Equality and Anti-Discrimination Ombud enforces the discrimination regulations within the Working Environment Act. The Ombud`s opinions are not legally binding. They can be appealed before the Equality Tribunal. A case can only be handled by the Tribunal after the Ombud has made a recommendation. The rulings of the tribunal are administratively binding. Such rulings, however, may be overruled by a court of law. The Tribunal may order the payment of a daily fine until compliance with such rulings.
A case about sexual orientation can also be taken directly to the ordinary court.

3. Is there direct and indirect discrimination on the ground of sexual orientation?
In relation to indirect discrimination, could applying a criteria or being married be indirect discrimination based on sexual orientation?

If the church generally excludes homosexual persons this would be a direct discrimination. On the other hand, if the reason for rejection is that the employee has to live in celibate or be married, it will be a question of indirect discrimination. A criterion of being married will not exclude homosexuals in general, but it will still establish an indirect discrimination.
In Norway a common Marriage Act for heterosexuals and homosexuals will apply from 1st of January 2009. The act will open the way for The Church of Norway and a registered religious community to have the right – though not the obligation – to solemnize same-sex marriages. Since there is not an obligation for the church to solemnize same-sex marriages, the case will probably still lead to indirect discrimination also after 1st of January.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

There is a general exception in section 13-3, saying that
(1) Discrimination that has a just cause, that does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination pursuant to this Act.

Furthermore there is a specific exception related to sexual orientation.

(3) Discrimination on the basis of homosexual form of cohabitation in connection with appointment in posts associated with religious communities, where special requirements based on the nature of the post or the purpose of the activities of the employer are specified in the advertisement of the vacant post, shall not be in contravention of the prohibition against discrimination on the basis of sexual orientation.

Section 13-4. Obtaining information on appointment of employees
(1) The employer must not when advertising for new employees or in any other manner request applicants to provide information concerning sexual orientation, their views on

political issues or whether they are members of employee organizations. Nor must the employer implement measures in order to obtain such information in any other manner.
(2) The prohibition laid down in the first paragraph shall not apply if obtaining information concerning applicants' views on political issues or membership of employee organizations is justified by the nature of the post or if the objective of the activity of the employer in question includes promotion of particular political, religious or cultural views and the post is essential for the fulfilment of the objective. This applies correspondingly to information concerning the applicant's homosexual orientation or homosexual forms of cohabitation. In cases where such information will be required, this must be stated when advertising the vacancy.

Question: what if these special requirements are not specified in the advertisement of vacant post, and the employer in spite of this
1) asks about applicant's homosexual orientation or homosexual forms of cohabitation during the interview
2) puts weight on the homosexual form of cohabitation in the decision of hiring a person or not

The question is whether this would be considered a formal breach or a substantial breach. This is not clear from the law or the preparatory works. The provision is probably substantial, meaning that the employer is not allowed to take the homosexuality into consideration when hiring a person, without notification in the advert. It will also be considered discriminatory if the employer asks about homosexual forms of cohabitation in a case without notification in the advert.

Provided that a notification is given, the occupational requirement regarding religion or belief does not apply as a blanket permission to discriminate. It only applies for special positions in the church, like priests or similar positions where preaching is a part of the work. On the other hand it will not apply when hiring a cleaner.

The question is if it applies for a youth worker. The facts says little about what a youth worker is doing, but if he/she is teaching young people Christianity as a part of the job, it can be argued that the requirement will apply. The church can also argue that the youth worker will probably be a role model for young people in the church and therefore it is very important that his/her private life is in accordance with their belief/ethos.

Exception of a genuine occupational requirement based on being of a religion or belief?
The Norwegian Anti-Discrimination Act regulates discrimination on the basis of religion or belief.

However, the prohibition of discrimination based on religion or belief, cf. section 4, first paragraph, shall not apply to actions and activities carried out under the auspices of religious and belief communities and enterprises with a religious or belief-related purpose, if the actions or activities are significant for the accomplishment of the community's or the enterprise's religious or belief-related purpose. But note that the exception in the second sentence shall not apply in working life.

This means that in working life there is no specific exception on the ground of religion or belief. However, the general exception clause will apply. (Differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination.)

5. Would an exception of a genuine occupational requirement based on sexual orientation apply?
In particular, in your country do you have a general GOR exception based on article 4(1) of the Employment Directive 2000/78/EC such that a characteristic linked to sexual orientation is a GOR and would it be applicable in this case?

6. Would an exception of a genuine occupational requirement based on being of a religion or belief apply?

In particular, in your country do you have a GOR exception based on article 4(2) of the Employment Directive 2000/78/EC such that being of a religion or belief is a GOR and would it apply in this case?

See above

7. Would the facts establish harassment based on sexual orientation?

The Working Environment Act forbids harassment on the ground of sexual orientation. Such harassment is regarded as discrimination.

The interpretation of this national provision, according to the directive, means that "unwanted conduct (…) with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment" will establish harassment.

This means that also harassment that is not repeated, like in this case, will fall under the scope of the Norwegian law.

However, the national law allows for questioning about sexual orientation in certain cases, se above.

In this case, it is not stated when advertising the vacancy that such questions will be asked, and the bishops conduct might be seem as harassment.

8. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

The employee may claim compensation without regard to the fault of the employer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. Compensation for financial loss as a result of discrimination may be claimed pursuant to the normal rules. This means the employer has no objective responsibility for economic loss; the court has to establish guilt (culpa).

Note that neither the Ombud nor the Tribunal can make decisions about compensation; the court has to do this. As long as the employer does not pay compensation voluntarily, the case has to be brought before court.

Sweden

Answers provided by the Ombudsman against Ethnic Discrimination

1. Does the case fall within the scope of anti-discrimination law in your country? Please, explain how or why not.

Yes, it is falls under the Act prohibiting discrimination on grounds of sexual orientation in working life (1999:133).

2. Which court, tribunal, equality body or organisation would be competent?

The Labour Court or The Office of the Ombudsman against discrimination on grounds of sexual orientation (HomO) or the Trade Union Mr Reaney is a member of.

3. Is there direct and indirect discrimination on the ground of sexual orientation?

Could be both in this case, it could be direct discrimination because Mr. Reaney is not given the post with a reference to his lifestyle, the bishop knowing about his sexual orientation and

having had a lengthy discussion with Mr. Reaney about it. It could also be indirect discrimination because certain requirements about lifestyle are considered more important than it probably would be if Mr. Reading had a heterosexual orientation.
A requirement to be married could constitute indirect discrimination, at the same time a requirement to be either in a registered partnership or co-habiting or married would probably not amount to indirect discrimination under the act prohibiting discrimination on grounds of sexual orientation.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

There is no objective justification in the Swedish act when it comes to direct discrimination. There is one exception as a genuine occupational requirement, though. The prohibition against direct discrimination does not apply in connection with decisions on employment, promotion or education for promotion if a particular sexual orientation is necessary owing to the nature of the work or the context in which it is performed. (5 § 2 section in the above mentioned Act). The scope of this exception is very limited. HomO has had one case regarding this exception: An NGO working with equal sexual rights was employing an information officer who was to work “with men having sex with other men”. In order to “reach” the group and be credible, the NGO chose a homosexual man for the work. A heterosexual woman who did not get the job filed a complaint. HomO applied the above mentioned exception in this case. When it comes to indirect discrimination the employer would have to argue that his requirement for the post constitutes an objective justification, which would probably be very hard in this case. There is no court practice regarding an objective justification like this yet.

5. Would an exception of a genuine occupational requirement based on sexual orientation apply?

Direct discrimination: No. (see the answer above under 4.). Indirect discrimination: it would be hard to see a genuine occupational requirement in this case from a Swedish perspective. Sweden’s general GOR exception based on Art 4 (1) is described in the previous answer.

6. Would an exception of a genuine occupational requirement based on being of religion or belief apply?

Sweden has no GOR that links religious organisation and sexual orientation. There is a GOR based on Art 4 (2) in the Act that prohibits discrimination on ethnic or religious grounds in working life. This exception is very limited and applies only if a religious belief is necessary because of the nature of the work. It could not be applicable in this case, because it is a person belonging to the church in question.

7. Would the facts establish harassment based on sexual orientation?

Conducting a two hour long interview with questioning like in this case could possibly amount to sexual harassment. The requirements in Swedish act are as follows: In this Act, harassment means behaviour in working life that violates the dignity of a job applicant or employee and which is connected with sexual orientation.

8. If there is no justification or exception, what would be the sanctions or remedies under your national legislation?

In Sweden Mr. Reaney would be given Damages (under current practice around 40000 Swedish Krona)

Annex 3
Country responses to the case study on age discrimination

Austria

Answers provided by Birgit Lanner from the Ombudsman for Equal Treatment of persons with disabilities

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

EU Directive: According to ECJ in the "Palacios case" (para 44) the case falls within the scope of the directive (as Recital 14 merely states that the directive does not affect the competence of the Member States to determine retirement age and does not preclude its application to national measures governing the conditions for termination of employment contracts where the retirement age has been reached). This principle also applies to this case where different treatment on the ground of age was established by a social plan.

Austrian Equal Treatment Act: The Equal Treatment Act (ETA) is applicable; Sec 17 prohibits discrimination in termination of employment on the ground of age; Sec 20 para 5 provides certain exemptions for age discrimination (according to Art 6 EU Directive).

2. Which court, tribunal, equality body or organisation would be competent?

The Equal Treatment Commission is responsible to decide in proceedings free of charge upon a violation of the Equal Treatment Act. The alleged victim can bring in the case by him/herself or via the Ombud for Equal Treatment or by Labour representatives. The Commission is not competent to grant damages; it only delivers a - non-binding - decision upon a violation of the prohibition of discrimination and gives recommendations on how to apply the right to equality.

The Labour Court is also competent to decide upon the case. It delivers a binding judgement and is competent to grant damages in case of a violation.

3. Is there direct or indirect discrimination on the ground of age?

As the different treatment was based on a certain age (-50/+50) there seems to be direct discrimination. Although the trade unions felt that there was a fair balance between the pre-pension and the buy-out scheme (and therefore it could be doubtful if a less favourable treatment objectively has occurred), it has to be taken into account, that the person concerned (subjectively) felt discriminated against.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Art 6.1 of the 2000/78/EC was implemented by Sec 20 para 3-5 ETA (with an almost literal translation of its text). Therefore the justification test applies in the same way like the directive provides.

Legitimate aim:

The principle aims of the company and trade unions were to avoid obligatory dismissals and to compensate as much as possible the loss of income for departing employees. This had to be achieved within the budgetary limits of the company.

These aims seem to constitute legitimate aims of social policy (in order to avoid the closing of the company), which are also objectively and reasonably justified (Sec. 20 para 5 ETC).

Proportionate and necessary means:
As the social partners developed the social plan in two steps (first elaborating the pre-pension scheme and after that the additional buy-out scheme) it seems like this approach was proportionate and necessary in order to reach the legitimate aim.

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

See also question 2: The Equal Treatment Commission cannot grant damages, but only decides in a (non-binding) decision if a violation of the ETC had occurred. The Labour Court can grant damages according to Sec 26 ETA. Questions regarding the content of a social plan could be dealt with before a specific arbitration board established at the competent Labour Court.

Belgium

Answers provided by the Centre for Equal Opportunities and Opposition to Racism

Preliminary remarks

Belgium is a federal state where – depending on the subject and locality of the matter – legislative authority is independently held by either the federal state, the Communities (3) or the Regions (3). As a general principle, the federal anti-discrimination law is not applicable in matters that fall within the competence of the Communities or Regions. On the other hand, the Communities and Regions are of course under the same obligation as the federal state to implement the relevant European legislation within their areas of competence.

The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is an autonomous federal public agency, whose authority to deal with discrimination cases, in accordance with the 15 February 1993 CEOOR Establishment Act, is limited to the federal anti-discrimination and -racism legislation. However, today cooperation agreements are being negotiated with the Communities and Regions in order to expand the CEOOR's legal mandate to non-federal discrimination cases.

In 2007, the Belgian federal Parliament adopted three new acts in order to harmonise the existing anti-discrimination legislation and to refine the implementation of the EC directives on the federal level:

- 10 May 2007 Anti-discrimination Act
This act replaces the 25 February 2003 Anti-discrimination Act and (re-)adds the following grounds to those covered by the 2000/78/EC directive (religion or belief, disability, age and sexual orientation): civil status, birth, fortune, political conviction, language, future or present health condition, physical or genetic characteristic and social origin. The CEOOR's legal mandate covers all of these grounds, except for language (which will be assigned to a yet to be designated autonomous agency).

- 10 May 2007 Anti-racism Act
This act modifies the 30 July 1981 Anti-racism Act and broadens the implementation of the 2000/43/EC directive grounds by covering not only "so-called" race and ethnic origin, but also skin colour, descent, national origin and – newly added – nationality. The CEOOR's legal mandate covers all of these grounds.

- 10 May 2007 Gender act

This act replaces the 7 May 1999 Gender Act. Please note that the issue of gender discrimination is excluded from the CEOOR's legal mandate, as it falls within the exclusive competence of the Belgian Institute for Equality between Men and Women.

The scope of this new legislation – which is identical for all three acts – is broader than demanded by the EC directives, as the following domains are enclosed (in short):
- access to and offering of goods and services accessible to the public;
- social protection (including social security and health care), social advantages and additional schemes to social security;
- employment (access to employment, working conditions, dismissal, etc.), including membership of and participation in trade unions and professional organisations;
- statements in official documents and minutes;
- access to and participation in economic, social, cultural and political activities accessible to the public.

Question 1 - Scope

The CEOOR feels it may be important to accentuate that the national provision containing an exceptional pre-pension scenario for companies in economical difficulties is not contested in this case. It is the company's social plan, and more specifically the exclusion of (pre-pension entitled) workers aged 50 and over from the buy-out scheme, which needs to be examined.

It therefore seems irrelevant to elaborate on the possible consequences of Recital 14 of the 2000/78/EC Directive, which provides that this directive shall be without prejudice to national provisions laying down retirement ages. And even so: in the Palacios ruling, the ECJ held "that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached." (par. 44).

The case falls within the scope of art. 5, §1, 5° j uncto art. 5, §3 of the Belgian 10 May 2007 Anti-discrimination Act (provisions and practices concerning the termination of employment relationships). As to the scope of the 2000/78/EC Directive, reference can be made to art. 3.1 (c) (employment and working conditions, including dismissals and pay). Note however that the case regards a 'horizontal' issue between a worker and a private company.

Question 2 - Competence

In case of (civil) legal action: Labour Tribunal (first instance) and Labour Court (appeal).

The CEOOR's broad legal mandate as independent non-judicial equality body includes to inform, advise, mediate and litigate in matters regarding discrimination (within the scope of the Anti-discrimination and Anti-racism Acts). Victim consent is a necessary condition for the CEOOR's legal action to be admissible. Note however that the CEOOR represents a general interest, which needs to be distinguished from the individual victim's damage claim.

There exists a protocol of cooperation between the CEOOR and the trade unions, providing that these last organisations should take the lead in defending the rights of their members in employment discrimination cases. In these type of cases however, there may be conflicting interests for the trade unions concerned (which have participated in the collective bargaining process for the company's restructuring operation).

Question 3 - Direct or indirect discrimination (age)

The situation of the 51-year old worker should be compared to that of a (hypothetical) colleague aged under 50 having the same professional qualifications, function and seniority within the company. Based on the (limited) facts of the case, the CEOOR would argue that the absolute impossibility for the individual concerned to benefit from the substantial buy-out fee prima facie implies a less favourable treatment based on his age (direct discrimination).

Note however that a strict application of the test of comparability requires that multiple factors are taken into consideration, including for example the dynamics of the relevant employment market. Also, when assessing whether in casu the pre-pension program actually leads to a less favourable treatment in comparison with the buy-out scheme, an objective comparison of the respective advantages and disadvantages of the different programs may be difficult (buy-out fee as a lump sum vs. a complex package of indemnifications, premiums, pre-pension benefits, health care and life insurance continuity, …).

Question 4 - Objective justification or exception

General observations

The CEOOR would examine this case in the light of art. 12.1 of the 10 May 2007 Anti-discrimination Act, which is an almost literal translation of the 2000/78/EC Directive's art. 6.1, par. 1. The examples in art. 6.1, par. 2 (a-c) of the Directive are mentioned in the explanatory introduction to the Anti-discrimination Act.

There is still legal uncertainty as to the extent of this 'open' justification scheme in so-called 'horizontal' legal matters. In this case, the question whether there is objective justification should be answered from the viewpoint of a particular company, and not the state authorities' (broad) margin of discretion in the field of social and employment policy. ECJ case law on (indirect) gender discrimination illustrates that an individual employer cannot always rely on aims which are legitimate for the state authorities. Furthermore, the Court's practice shows that the justification test is applied more strictly when discrimination at the level of a single company is at cause (in comparison to discrimination in national social or employment regulations). On the other hand, essential company economics may provide a legitimate aim to justify a certain discrimination, but they have to be more than budgetary reasons.

The case raises particular questions regarding the margin of discretion of the social partners and the balancing of collective and individual interests, in the context of a restructuring plan. For example, what weight – if any – should be given to the company's argument that a vast majority of the workers aged 50 and over was very eager to accept the pre-pension deal?

In the Palacios ruling, the ECJ seemed to attach much importance to the fact that a national regulation "allows the social partners to opt, by way of collective agreements – and therefore with considerable flexibility – [for application of a compulsory retirement mechanism] so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question". Of course, in this case the facts are quite different, and the collective bargaining process 'only' concerns a single company rather than the national level.

Objective justification test

A. Legitimate aim ?

The facts of the case suggest that the economical problems which have forced the company into restructuring need no particular questioning: the situation has been acknowledged by the social partners, and the company is granted the exceptional legal authorisation to introduce the possibility of pre-pension at the age of 50).

Within this context, the CEOOR considers the principal aims of preserving job security (i.e. no obligatory dismissals) and trying to provide maximal financial compensation for the loss of income in case of voluntary departure, as being legitimate (an easier – but certainly more controversial – alternative would have been to start the restructuring operation with obligatory pre-pension for all workers aged 50 and over).

If a certain differentiation were to be made in order to achieve this objective, the age of 50 does provide an objective standard (since it is the legal minimum age to have access to the partly state funded pre-pension programme).

Reference can be made to art. 6.1, par. 2, a) of the Directive (as repeated in the explanatory introduction to the 10 May 2007 Anti-discrimination Act), which states that a difference of treatment under this article may include the setting of special conditions on (…) dismissal and remuneration conditions for young persons, older persons (…) in order to promote their vocational integration or ensure their protection.

B. Proportionate and necessary means ?

While it seems clear how the dual age-based approach contributed to achieving the aims of avoiding obligatory dismissals and maximal compensation of income loss, the question remained whether it was 'necessary' to exclude workers aged 50 and older from possibility of obtaining a buy-out fee. Could there have been other means of achieving the above-mentioned aims, in closer respect of the individual's rights and principle of equal treatment?

An important element of consideration could be that if all workers aged 50 and over would have been offered the possibility to choose between the (partly state funded) pre-pension programme and the (100% company paid) buy-out fee, these fees would have been substantially lower (making for less or even no workers being willing to voluntarily leave the company, thus increasing the risk of the company having to resort to obligatory dismissals).

Given the scale and complexity of the restructuring operation, a judicial assessment of this question would certainly imply a careful balance of interests. On the other hand, and unless there proves to be clear a disproportion between the age related programs, sufficient weight should be given to the fact that the social plan is the result of intensive collective bargaining.

Question 5 - Sanctions and remedies

According to the Belgian Anti-discrimination Act, discriminatory clauses are sanctioned with nullity. Since the act is considered to be a law of public order, the nullity is absolute: contract parties cannot waive it, a judge has to apply it ex officio and there is retroactive effect. This means that the agreement remains valid, but the discriminatory clause is considered to have never existed. All persons which have been discriminated because of the former clause, may claim damages (with the possibility of so-called 'levelling up').

In this type of case, where a social plan (CTA) in a large company in economical difficulties is based on a system of age differentiation, the financial consequences of the sanction of nullity cannot be underestimated.

Denmark

Answers provided by the Danish Institute for Human Rights

1. The case falls within the scope of the Danish anti-discrimination law more specific the act on prohibition against differential treatment in the labour market. The act covers the following discrimination grounds: race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Cf. section 2, subsection 1 of the act an employer is not allowed to treat employees or applicants to vacant positions differently when it comes, dismissals, transfers, promotions or in regard to salary and working conditions.

2. The ordinary courts are competent to handle such a case. There is no administrative complaint body that covers age. Such a body will however be established from 1 January 2009.

3. In my view it is a case of direct discrimination since the criteria for getting the buy-out scheme is directly dependent on age.

Mr. X is treated less favourable than a person younger than him who is in the same situation – the situation being that they are both being dismissed from their work. The reason for the less favourable treatment is Mr. X's age and no other reason.

4. An exception can be found in section 5, subsection 3 on the act which implements article 6 (1) of the directive. A non official translation of section 5, subsection 3 is as follows:

"Notwithstanding the provision in subsection 1 [of section 5.] the act is not a hindrance to the upholding of existing age limits laid down in or agreed upon in collective bargaining and agreements assuming that these age limits are objectively and reasonable justified by a legitimate aim within the scope of Danish legislation and that the means of achieving this aim are appropriate and necessary."

Section 5, subsection 3 makes it possible for the labour market parties to enter into implementation agreements thus the act in relation to the prohibition against differential treatment due to age can be deviated from to the extent of the directive's level which means that the parties can choose to make use of the directive's exemption clause in article 6.

Section 5, subsection 3 however only allows for existing age limits laid down in or agreed upon in collective bargaining and agreements that were valid on 28 December 2004, where the provision entered into force.

The exemption clause in section 5, subsection 3 would therefore not apply in this case since it is highly likely that the agreement entered into by the company's management and the trade unions is made after 28 December 2004.

The problem at hand in this case would probably lead to that an employer who wishes to utilize voluntary dismissal arrangements will have to offer such arrangements to all employees or of course find another criterion than age.

A social plan agreed upon by collective bargaining may be a good way to solve an otherwise difficult situation. It must however be underlined that such plans are not exempted from any prohibition against discrimination in the legislation. A concern could be if a person feels discriminated against by an age limit in a collective bargaining or agreement it might be difficult for that person to try the case since the age limit was agreed upon by his own trade union who supposedly is looking out for his/her interests. This leads to an assumption that the age limit is objectively and reasonable justified otherwise the trade union would not have agreed to include it in a collective bargaining or agreement.

5. The sanctions would be paying damages if such were awarded by the courts. Compensation in accordance with the general law of torts rules can however also be applied.

Germany

Answers provided by the Federal Antidiscrimination Agency

1. Does this case fall within the scope of the 2000/78/EC Directive and/or anti-discrimination legislation in your country?

Yes, with the Directive 2000/78/EC: Art. 3.1c: employment and working conditions, including dismissals and pay.

Yes, within the General Act of Equal Treatment: Art. 2 (1) No. 2: employment and working conditions, including dismissals and pay.

2. Which court, organisation would be competent?

Labour Court.

FADA act by providing general and comprehensive information in connection with possible claims and possible legal actions based on the General Act of Equal Treatment (AGG). FADA does not prepare lawsuits. The Agency does not represent the petitioners before court. Furthermore, FADA is not entitled to conduct a lawsuit in its own name for the persons concerned (so-called representative action). In line with our statutory order pursuant to section 27 subsection 2 Clause 2 No. 3 AGG, FADA shows the way to possible in-company conciliation or are at disposal for mediation discussions. FADA therefore attempts to find amicable solutions or to actively provide assistance in connection with an out-of-court settlement. To achieve the latter, FADA may request statements from the parties concerned (comp. section 28 subsection 1 AGG), however, only if the persons concerned have assented. Pursuant to section 27 subsection 2 Clause 2 No. 2 AGG, FADA can arrange for counselling by other offices, too.

3. Is there direct or indirect discrimination on the ground of age?
- is treated less favourably than another in a comparable situation (…) on the ground of age (direct discrimination), or
- (…) is put at a particular disadvantage compared with other persons by an apparently neutral provision, criterion or practice (indirect discrimination)?

Yes, there is direct discrimination.

German labour courts decided that forming age groups in social plans in general is already direct discrimination but justified discrimination. It is a legitimate aim forming age groups in social plans to reach a balanced structure after the dismissals.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

Yes. (see above).
According to the German General Act on Equal Treatment differences of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim (section 10). Such differences of treatment may include differentiating between social benefits where parties have created a regulation governing compensation based on age whereby the employee's chances on the labour market have recognisable been taken into consideration by means of emphasising age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit (§ 6).

The Netherlands

Answers provided by the Dutch Equal Treatment Commission

1. Does this case fall within the scope of the 200/78/EC Directive and/or anti-discrimination legislation in your country?

Yes it does. It falls both within the scope of the Directive and of the Dutch Anti-discrimination legislation, more in specific within the scope of the Equal Treatment in Employment (Age Discrimination) Act.

2. Which court, tribunal, equality body or organization would be competent?

The Dutch Equal Treatment Commission (ETC) would be competent to give a non-binding legal opinion on this case. Also, the worker could go to a district court for a judgment, either right away or after having obtained the opinion of the ETC.

3. Is there direct or indirect discrimination on the basis of age?

The division between the two groups of workers, notwithstanding the question whether one of the two groups is treated less favourably compared to the other, is based on their age.

The Dutch ETC doesn't always explore the question of whether there is an unfavourable treatment in dept, but usually assumes there is a less favourable treatment if an employee can show that due to the decisions in the Social Plan, he/she will receive less benefits (both wages and other benefits) than a colleague who has the same seniority and wage, but who is older/younger.

In this particular case, if the statements of the worker would not be contested by the employer (or not be contested with valid arguments), the Dutch ETC would conclude this is a case of direct discrimination.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In 2007, the Dutch ETC published an advice on age discrimination in social plans in which it formulates the test the ETC applies to age discrimination in social plans. In this advice, the ETC concludes that the ground 'age' has a different character compared to the other non discrimination grounds as most people will reach different ages and will therefore at any given moment belong to either a younger or an older group of people/workers. Also, the ETC accepts as a given fact that different generations receive different chances.
Therefore, although the main principle underlying the test applied to age discrimination is that work conditions should not be based on age, the ETC does take into account, when assessing a measure constituting age discrimination, the context in which the measure was formulated and the involvement of different parties.

This means that the Dutch ETC attaches weight to the fact that a social plan is always a compromise and that it is designed to accommodate the interests of a great number of employees. There will always be employees that benefit more from the social plan than others and employees that do not benefit so much at all. But this in itself doesn't necessarily constitute a breach of the equality law. This is different if the social plan causes a clear unfair balance between the two groups of employees or if the social partners have no clear thought on why a division based on age – or on the chosen age – is necessary.

The fact that social partners were involved in the writing of a social plan, doesn't in itself have a justifying effect. It may just have an effect on the legitimacy of the goals pursued or on the weighing of the feasibility of alternatives.

Legitimate aim:
The employer has stated that the aims meant to achieve with the social plan are
a) to avoid obligatory dismissals; and
b) to compensate as much as possible the loss of income for departing employees.

These can be considered as legitimate aims.

Appropriate means:
The next question is whether the goal can actually be achieved by the measure, i.e. the age distinction and the two separate schemes.

The Dutch ETC would probably find that this is the case, unless it would be beyond doubt that e.g. the second goal cannot be reached as the pre-pension scheme doesn't ensure the elder workers an income that is above/equal to the social minimum or that the reduction of employees needed couldn't be reached with the social plan.

Necessity and proportionality:
The ETC will ask the employer and trade unions:
- why they have chosen for a division based on age and not on e.g. seniority (which may lead to indirect discrimination on the ground of age, but is less discriminating), type of function etc.
- why they have chosen for a particular age division: why 50 and not 60 for example. Usually, the chosen age is connected to tax or pension legislation. However, if the social partners cannot motivate why they have chosen a certain age and have thought of the consequences of that choice, the ETC may find that the age division itself is not proportionate or not appropriate.
- In the case that the social plan causes a particularly disadvantaged position to a particular employee or small group of employees, the ETC will ask why no special arrangement has been made for this person or group of persons to compensate, especially if it was known already at the bargaining process that this group of persons would be placed in a particularly disadvantaged position.

The ETC is of the opinion that if a free choice between the two different arrangements would have the same effect on the available budget as a combination of a division based on age and a limited choice (either to keep on working or to accept the arrangement for your age group), giving employees a free choice is preferred.
If that is not possible and the social plan foresees in a sum at once for the younger group and a monthly sum for a number of years for the elderly group, the ETC may advice to give the older group the option of obtaining the total sum they would otherwise receive over a number of years at once.

In the case at hand, the ETC may have proposed giving the older group the abovementioned option.

Also, the ETC is very strict on education facilities, assessments, outplacement programmes etc: the limitation of education to one group (usually the younger group) has a direct excluding effect and it adds to the prejudice that elderly employees have little chance on the labour market. Such a limitation will in principle be in violation of the equality legislation. This may only be different if the offering of education facilities to both groups of employees would cause serious budgetary problems or if the relation between the cost of an education and the expected results is very imbalanced.

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

If a complaint is made with the ETC: no remedies available, as the ETC only gives non-binding opinions and has no power to impose sanctions or to grant remedies.

The ETC does however actively follow up on its decisions. This means that the ETC requests the parties involved regularly what has been done to bring the social plan in line with the equality legislation.

If a claim is brought before a court, the Court can assign the employer and trade unions to amend the social plan, it can propose a settlement for the plaintiff or it can impose a settlement.

Norway

Answers provided by the Equality and Anti-discrimination Ombud

1. Does this case fall within the scope of the 2000/78/EC Directive and/or antidiscrimination legislation in your country?

The case falls within the scope of the Norwegian Working Environment Act; section 13-1 states that

(1) Direct and indirect discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age is prohibited.

2. Which court, tribunal, equality body or organisation would be competent?

The Equality and Anti-Discrimination Ombud enforces the discrimination regulations within the Working Environment Act. The Ombud`s opinions are not legally binding. They can be appealed before the Equality Tribunal. A case can only be handled by the Tribunal after the Ombud has made a recommendation. The rulings of the tribunal are administratively binding. Such rulings, however, may be overruled by a court of law. The Tribunal may order the payment of a daily fine until compliance with such rulings.
A case about disability discrimination can also be taken directly to the ordinary court.

3. Is there direct or indirect discrimination on the ground of age?
Which are determining elements to assess whether the 51-year old worker
- is treated less favourably than another in a comparable situation (…) on the ground of age (direct discrimination), or - (…) is put at a particular disadvantage compared with other persons by an apparently neutral provision, criterion or practice (indirect discrimination)?

The social plan draws a limit at the age of 50 between those who can get the buy-out scheme and those who can't. This is a question of direct discrimination on the ground of age.

The provisions in the Norwegian law shall apply to "all aspects of employment" and "termination of employment"- and will apply for a social plan.

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?
Please elaborate on art. 6.1 of the 2000/78/EC and how this article has been implemented in your national legislation and how it would be applied to the facts of this case ? Please also specifically consider what is the effect of social plan having been agreed by collective bargaining on whether or not the discrimination is justified. Is the age discrimination in this case objectively and reasonably justified by a legitimate aim?
Are the means of achieving this (legitimate) aim proportionate and necessary?
Do you find helpful arguments in the existing ECJ case law (Mangold, Palacios?

(1) Discrimination that has a just cause, that does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination pursuant to this Act

The justification test will depend on the weight of the company's interests compared with the weight of the interests of the employee.

The company has economical difficulties and it is unquestionable that the social plan has a legitimate aim. This is also recognised by the authorities.

The plan was worked out in cooperation between the company and the trade unions, and both sides feel there is a fair balance between the pre-pension and the buy out scheme. The principal aims of the company and the unions were to avoid obligatory dismissals and to compensate as much as possible the loss of income for departing employees. These are legitimate aims. The fact that the company and the unions agreed on the plan means that interests of both sides are taken into consideration, and the plan should therefore be balanced. Still the two-part cooperation is no guarantee against discrimination. (Note that the agreement is not binding for the Ombud, meaning that the Ombud can still find that the plan is discriminatory.)

Is the differential treatment necessary and propionate?

The 51 year old worker might argue that it is not fair and not in his interest if he get a second-best package from the company, maybe after working for more years then younger

colleagues entitled to the buy-out fee. He is 51, and has potential to work for many more years, and has a legitimate wish not to have to choose a pre-pension scheme.

Still the pre-pension scheme is voluntary, meaning the he can choose to remain in the job. This is pointing towards that the social plan is not disproportionate; since he has the possibility to remain in the exact same position as before the plan.

One question is whether it was necessary to exclude workers aged 50 and older from the buy-out scheme. An alternative could be to let all the employees have the opportunity to the buy out fee.

There is a risk that the buy out scheme would have turned out to expensive if all the employees, regardless of age, should have the opportunity to choose the buy out. This since the state finances the pre-pension scheme, but not the buy out fee.

The company only had limited recourses, and this alternative could lead to obligatory dismissals and less compensation for the people leaving the company.

All the moments above considered it is most likely that the social plan would pass the justification test.

Article 6.1

Article 6.1 says that Differences of treatment on grounds of age shall not constitute discrimination, if within the context of national law; they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy

This provision is not implemented in the law, but will be covered by the general exception.

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

The employee may claim compensation without regard to the fault of the employer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. Compensation for financial loss as a result of discrimination may be claimed pursuant to the normal rules. This means the employer has no objective responsibility for economic loss; the court has to establish guilt (culpa) on employer's side.

Note that neither the Ombud nor the Tribunal can make decisions about compensation; the court has to do this. As long as the employer does not pay compensation voluntarily, the case has to be brought before court.

Sweden

Answers provided by the Ombudsman against Ethnic Discrimination

1. Does this case fall within the scope of the 2000/78/EC Directive and/or antidiscrimination legislation in your country?

Not yet, Sweden is the last country in the EU to implement age-discrimination. One could argue that the directive has a direct effect, which from 1 January 2009 it will fall under the antidiscrimination legislation. Sweden has an exception in the new Act prohibiting discrimination; in working life the prohibition to discriminate does not prevent the application of age limits for right to pensions in individual or collective bargaining.

2. Which court, tribunal, equality body or organisation would be competent?

The Labour Court, The (new) Swedish Equality Ombudsman or the Trade Union that the complainant is a member of.

3. Is there direct or indirect discrimination on the ground of age?

Could be both.
Direct discrimination: Has the 51-year old been treated less favourably, is there a comparable situation, is there a connection to his age?
Indirect discrimination: Has the 51-year old been treated less favourably, has some apparently neutral criteria been applied, does this criteria disfavour persons of a certain age?
First it would have to be established if the pre-pension scheme is less favourable than the buy-out scheme, in order to know if X has been subjected to unfavourable treatment. Direct: If he is treated less favourably than a colleague who is 49 and solely because of his age. Indirect: If there is no objective justification

4. If you find the case leads to direct or indirect discrimination, is there an objective justification or exception?

In the Swedish Labour Market there is a big area of negotiation. The preparatory works for the Act has a great importance when it comes to interpreting the law. The preparatory works refer to both the Mangold and the Palacios cases. In the preparatory works objective justifications are discussed. Also, it is discussed what could constitute objective justification, it is mentioned that age criteria in collective bargaining may have a promotional or protective aim. As an example pre-pension programmes, in cases of reduced work, is mentioned. It must also be considered if the actual measure gives the relevant result. Maybe the fact that the company has obtained the necessary recognition to introduce the pre-pension programme could constitute an objective justification

5. If there is no justification or exception, what would be the sanctions and remedies under your national legislation?

Discrimination compensation, a new form of remedy.

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