



Convention on the Rights of Persons with Disabilities

Distr.: General
29 September 2020
English
Original: Spanish

Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 37/2016* **

<i>Communication submitted by:</i>	J.M. (represented by counsel, Victoria Prada Pérez)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	18 March 2016 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 2 November 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	21 August 2020
<i>Subject matter:</i>	Right to non-discrimination in the maintenance or continuance of employment (assignment to modified duty)
<i>Procedural issue:</i>	Substantiation of claims
<i>Substantive issues:</i>	General obligations under the Convention; equality and non-discrimination; work and employment; reasonable accommodation
<i>Articles of the Convention:</i>	3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); 13 (2); 27 (1) (a), (b), (e), (g), (i) and (k)
<i>Article of the Optional Protocol:</i>	2 (c) and (d)

1. The author of the communication is J.M., a national of Spain born on 13 March 1968. He claims to be a victim of a violation by the State party of his rights under article 27 (1) (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); and 13 (2) of the Convention. The author is represented by counsel. The Optional Protocol entered into force for the State party on 3 May 2008.

* Adopted by the Committee at its twenty-third session (17 August–4 September 2020).

** The following members of the Committee participated in the examination of the communication: Ahmad Alsaif, Danlami Umaru Basharu, Monthian Buntan, Imed Eddine Chaker, Gertrude Oforiwa Fefoame, Mara Cristina Gabrilli, Amalia Gamio Ríos, Jun Ishikawa, Samuel Njuguna Kabue, Kim Mi Yeon, László Gábor Lovász, Robert George Martin, Dmitry Rebrov, Jonas Ruskus, Markus Schefer and Risnawati Utami.



A. Summary of the information and arguments submitted by the parties

The facts as submitted by the author

2.1 On 13 February 2008, the author suffered a traffic accident that left him with a permanent disability.¹

2.2 On 2 July 2009, the Ministry of Labour and Immigration declared that the author's status was one of permanent total disability for the performance of his occupation. Accordingly, he was granted a pension equivalent to 55 per cent of the salary he received while employed.²

2.3 On 27 July 2009, the author submitted an application to Figueras Municipal Council requesting it to assign him to "modified duty".³ The author based his application on the autonomous-community legislation of Catalonia, namely Act No. 16/1991 of 10 July (Local Police Act).⁴

2.4 On 6 August 2009, Figueras Municipal Council, by a mayoral decree, rejected the author's request to be assigned to modified duty and his claim for unpaid salary and dismissed him from his post as a public official, effective from 2 July 2009. The Council justified its decision on the grounds that the applicable law in the author's case was Act No. 7/2007 of 12 April, the Public Service Regulations Act, and that he was required to take mandatory retirement.

2.5 On 3 September 2009, the autonomous regional government of Catalonia recognized the author as having a degree of disability of 65 per cent.

2.6 On 17 September 2009, the author submitted an application for a review of the Council's decision, stating that the legislation cited referred to cases involving retirement, and thus did not apply to his case, and that in 2006 the Council had undertaken to draft modified-duty regulations for the municipal police within a year, but that it failed to do so. The author contends that the absence of regulations should not be to his detriment, particularly when other councils had introduced regulations.

2.7 On 30 September 2009, Figueras Municipal Council rejected the author's application for a review, arguing that under the Public Service Regulations Act a declaration of "permanent total disability" was a ground for mandatory retirement. The Council also stated that assignment to modified duty was not an option as it had enacted no regulations to that effect, despite an undertaking to do so.

2.8 On 26 March 2010, the author initiated judicial proceedings by filing an administrative appeal, arguing that Act No. 16/1991 of 10 July provides for modified duty and states that its implementing regulations, but not its application, are a matter for the local authorities.

2.9 On 21 July 2011, in Decision No. 251/2011, Girona Administrative Court No. 1 dismissed the author's administrative appeal, finding that the Public Service Regulations Act was the legislation applicable to the author's situation and that permanent total disability status necessarily resulted in mandatory retirement.

2.10 On 23 September 2011, the author lodged an appeal against Decision No. 251/2011. In his appeal, he first noted that Figueras Municipal Council had failed to enact modified-

¹ The author does not give details of the exact consequences of his accident.

² The author states that the pension is calculated in accordance with Royal Legislative Decree No. 1/1994, of 20 June, on the basis of the salary he received while employed and the duration of contributions.

³ The author states that modified activity is intended for workers with reduced ability to perform regular duties, i.e. those who are unable to perform the duties of the post because of age or because they have total disability status.

⁴ Autonomous-community laws are enacted at the level of the autonomous communities, while regulations are lower-ranking provisions issued by local authorities for the purpose of implementing autonomous-community laws. Article 43 (1) of Act No. 16/1991 provides: "Local police officers ... with reduced ability to perform regular duties are assigned to modified duty in accordance with the relevant municipal regulations."

duty regulations. He argued that the lack of regulations cannot result in a limitation of the right to be assigned to modified duty provided for in articles 43 and 44 of Act No. 16/1991. The author referred to a decision of the *Sindic de Greuges of Catalonia*,⁵ recommending that Figueras Municipal Council should rescind the Mayoral Decree of 6 August 2009 and that his application for assignment to modified duty should be decided on the basis of a medical report issued by a duly constituted tribunal. The author then pointed out that he had received discriminatory treatment as compared to members of other professional groups covered by regulations on assignment to modified duty such as officials of the national police and the *Mossos d'Esquadra* (Catalan autonomous police force) and employees of councils that had introduced modified-duty regulations.

2.11 On 13 February 2013, the High Court of Justice of Catalonia issued Decision No. 183/2013 dismissing the author's appeal. In its ruling, the High Court upheld the findings of the first instance court. According to the Court, as Figueras Municipal Council had issued no regulations, the situation envisaged in article 43 (1) of Act No. 16/1991 did not arise; accordingly, no modified duty posts had been created or budgetary allocation made to that end. The Court concluded that the author had "failed to provide sufficient legal support for his claim". In the view of the Court, since the author had been recognized as having permanent total disability status, he had, under the Public Service Regulations Act, lost his status as a public official and was thus required to take mandatory retirement.

2.12 On 3 April 2013, the author filed an application for annulment of the proceedings on the grounds that his fundamental rights had been violated. He claimed, first, a violation of his right to effective legal protection under article 24 of the Constitution. He also claimed a violation of article 24 of the Constitution, in conjunction with article 10 (2) thereof, on the grounds that the fundamental rights and freedoms recognized by the Constitution are to be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements ratified by Spain.

2.13 On 13 February 2013, the High Court of Justice of Catalonia issued an order finding that there were no grounds for the annulment of the proceedings.

2.14 On 10 September 2013, the author filed an application for *amparo* before the Constitutional Court on the grounds that his right to effective judicial protection under article 24 of the Constitution, in conjunction with articles 9 (2), 9 (3), 10, 23, 35 and 40 thereof, had been violated.

2.15 On 29 January 2014, the Constitutional Court dismissed the author's application for *amparo* on the grounds that he had failed to demonstrate its particular constitutional significance.

2.16 On 21 July 2014, the author submitted his case to the European Court of Human Rights. His application was not examined because of formal defects; as the application could not be remedied within six months of the final court decision, the case was not examined.

2.17. In the light of the foregoing, the author contends that he has exhausted domestic remedies.

The complaint

3.1 The author claims a violation of his rights under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); 5 (1), (2) and (3); and 13 (2) of the Convention, as the State party, in the absence of regulations at the local level, discriminated against him by depriving him of the possibility of continuing to work under modified duty, on the grounds of his "permanent total disability for usual occupation".

3.2 The author considers that article 27 establishes two obligations for the State party: (a) the duty to respect equality and non-discrimination; and (b) the requirement to develop and guarantee access to and maintenance in employment. The author claims that he was

⁵ The author explains that the *Sindic de Greuges of Catalonia* is the regional ombudsman, the Catalan Ombudsman.

discriminated against when he was denied the possibility of being assigned to modified duty on the grounds that the corresponding regulations had not been enacted. The author also considers that the failure to recognize his right to work violates the principle of accessibility.

3.3 The author claims that the obligation to safeguard and promote the right to work of those who acquire a disability during the course of employment has been entirely violated. He considers that Figueras Municipal Council has failed to protect him; indeed, it has discriminated against him, with the approval of the judiciary. The author contends that his right to equal conditions has not been protected, since he was denied the possibility of being assigned to modified duty owing to a lack of diligence on the part of Figueras Municipal Council in developing regulations and a disregard of higher-ranking rules, such as autonomous laws, that provide for this right. In the present case, the author was not given the opportunity for an assessment to be made of his capacity. The possibility of his undertaking modified duty as a measure of reasonable accommodation has not even been raised; he has been deprived of his status as a public official on grounds of disability, which constitutes discrimination. He lost his status as an official on taking retirement. The author further contends that the inequality and discrimination he has experienced are accentuated by a disparity in regulations, since in other territorial areas with different regulations, assignment to modified duty is recognized.

3.4 The author also claims a violation of article 4 of the Convention. In this connection, he submits that autonomous-community legislation, specifically the Local Police Act (No. 16/1991), is favourable to his claims. However, the decision of Figueras Municipal Council, made on the grounds of a lack of regulations, violates the Convention. The author points out that he originally requested that alternative employment arrangements adapted to his situation should be sought, pending the drafting of regulations by the Council. However, regulations were not introduced until 2015, and no effort was made to find alternatives. The author was expelled from the police force, and when regulations were introduced, they could not be applied retroactively. He submits that, under article 4 of the Convention, Figueras Municipal Council was required to redeploy him temporarily and provide some form of adjustment. The discrimination he has suffered is aggravated by the fact that in other similar cases of permanent total disability the individuals concerned have been assigned to modified duty, for example municipal police officers employed by other councils, members of the Mossos d'Esquadra and firefighters employed by the autonomous regional government of Catalonia.

3.5 The author also claims that the facts of the case constitute a violation of article 5 (1), (2) and (3) of the Convention. He considers that he has suffered double discrimination. Firstly, he has been discriminated against on grounds of disability – the real reason for his expulsion from the local police force of Figueras Municipal Council – without any effort on the part of the administration or the State, which bears ultimate responsibility, to seek alternatives or take appropriate accommodation measures. Second, he points to the fact that, had he been a member of another force, such as the Mossos d'Esquadra, the Catalan fire brigade or the local police force of another council, he would have had the option of modified duty.

3.6 With regard to the violation of article 13 (2), read in conjunction with article 27, the author, referring to the Committee's jurisprudence, contends that the State party's judiciary has not been given appropriate training on the Convention. The legal provisions that were applied to the author in the administrative and judicial proceedings that led to his mandatory retirement were interpreted without due regard for the content and implications of the international obligations arising from the status of Spain as a State party to the Convention.

3.7 With respect to article 27 (1) (e) and (g), read in conjunction with articles 3 (a), (b), (c), (d) and (e), 4 (1) (a), (b) and (d), and 5 (1), (2) and (3), the author submits that the State party fails to promote the employment of persons with disabilities in the public sector as, unlike in the private sector, it does not allow such persons to remain employed while performing duties that are different from those they can no longer perform. It also fails to promote their reintegration; instead, it requires their expulsion from the public service and their mandatory retirement.

3.8 With respect to article 27 (1) (k), read in conjunction with articles 3 (a), (b), (c), (d) and (e), 4 (1) (a), (b) and (d), and 5 (1), (2) and (3), the author claims that his right to retain his post and to return to work was not protected because he was removed from his post

because of the lack of regulations and the interpretation thereof by the administrative and judicial authorities.

3.9 Lastly, the author requests the Committee to recommend that the State party grant him appropriate reparation and comprehensive compensation commensurate with the seriousness of the infringement of his rights, the most appropriate reparation being his readmission to the local police force of Figueras Municipal Council, an assessment of his capacity from the perspective of equality and non-discrimination, his subsequent assignment to modified duty, the payment of outstanding remuneration plus the corresponding legal interest and the social security contributions not collected, and comprehensive compensation that recognizes and appraises the moral harm suffered.

State party's observations on admissibility and the merits

4.1 On 21 October 2016, the State party submitted its observations on the merits of the communication. The State party submits that the complaint should be dismissed in its entirety.

4.2 The State party also maintains that there was no violation of the right to due process, which is guaranteed to all persons with disabilities under article 13 of the Convention and enshrined in article 24 of the Constitution. The author had every opportunity, under domestic law, to challenge administrative and judicial decisions rejecting his claims, which he did.

4.3 The State party also maintains that there are no grounds for finding that the country's domestic regulations are discriminatory, since when the administrative and judicial authorities decided on the author's application for assignment to modified duty, the modified-duty regulations of the Figueras municipal police had not yet been promulgated – they were published in the Official Gazette of the Province of Girona on 26 March 2015; furthermore, the regulations are not favourable to the author's case, since under the regulations, assignment to modified duty is incompatible with disability status. The absence of local regulations gave rise to a legal vacuum at both the autonomous-community and local levels, since Catalan Act No. 16/1991 was not, by itself, sufficient to address the author's claim. Article 43 of the Act provides that local police officers may be assigned to modified duty "in accordance with the relevant municipal regulations". Article 44 provides that a decision on the extent of the loss of capacity will be made only after a mandatory medical report has been issued. In the present case, in order to decide on the author's request, it was necessary to refer to the applicable rules. Under the State party's domestic regulations, the body that is competent to take administrative decisions on disability status is the National Social Security Institute, which, in the present case, defined the author's status as "permanent total disability for usual occupation". This resulted in the author's mandatory retirement, thereby disqualifying him from assignment to modified duty or any other work. This is further supported by the Public Service Regulations Act, which provides that public officials lose their status as such when they enter full retirement, which may result from a finding of "permanent total disability".⁶ In the State party's view, the point at issue is not whether there are grounds for retirement under domestic law but whether the author has been discriminated against on the basis of allegedly unreasonable unequal treatment under the law, bearing in mind the discretionary authority of legislative bodies afforded by the law. Under Spanish law, persons who are no longer public officials cannot be assigned to modified duty.

4.4 The State party acknowledges the long period which elapsed between the coming into force of the Local Police Act (No. 16/1991) and the adoption of the municipal regulations in 2015 and that, as the author submits, such a situation should not be to the detriment of citizens. It was not, however, detrimental in the current case. The situation would have been otherwise if the municipal regulations had established, even belatedly, the option of modified duty and its compatibility with permanent total disability. The State party points out that it is not possible for officials in either the national police force or the autonomous police force to be assigned to modified duty on grounds of permanent total disability. Accordingly, there is no evidence of unequal treatment at the regulatory level.

⁶ Article 63 of Royal Legislative Decree No. 5/2015 of 30 October approving the consolidated text of the Public Service Regulations Act.

4.5 Article 27, meanwhile, establishes the right of persons with disabilities to work and employment on an equal basis with others. As stated above, the author has been treated in accordance with the legal system in force. He has not been treated any differently to any other official in the same situation and belonging to the same force or of the same rank. There has therefore been no arbitrary or discriminatory application of the rule in the present case.

4.6 In the State party's view, no discrimination has occurred as a result of there being different regulations governing different situations since there are two distinct levels of autonomous territorial legislation within the composite State established by the Constitution,⁷ with distinct autonomous territorial entities vested with formal legislative authority over those specific areas for which competence has been attributed to them by law. On that basis, each legislative body has discretionary power as the competent authority in its territory, granted directly by citizens, as long as it remains within the material scope of the competence ascribed to it by the Constitution or other laws. To assert that all legislative bodies are required to issue the same rules would be tantamount to restricting the territorial competence of legislators. The different treatment accorded to the fire brigade reflects the different degrees of territorial autonomy granted to the various autonomous communities under the Spanish constitutional system, or the differences between the duties performed by police and those performed by firefighters, which warrant different regulations. In the present case, the regulations were applied to the author no differently from how they would have been applied to any other person in exactly the same factual and legal situation, with the same type of injury. In the State party's view, the regulations of themselves do not entail a discriminatory or unfair difference in treatment, nor are they incompatible with the State party's obligations under the Convention.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 20 December 2016, the author submitted comments on the State party's observations on the merits of the communication. The author reiterates the requests made in his initial submission.

5.2 The author challenges the State party's arguments purporting to show that it has not violated article 13 of the Convention. He reiterates that the communication does not concern formal access to a procedure, but the failure to apply the rights set forth in the Convention in the context of domestic judicial proceedings. The author refers to a provision of the Constitution (art. 10 (2)) under which domestic provisions relating to fundamental rights and civil liberties must be interpreted in accordance with treaties and international agreements ratified by the State party that concern the same matters. Lastly, he refers to Constitutional Court judgments finding that the application of this article must also take into account the jurisprudence of international bodies responsible for monitoring compliance with such international treaties.

5.3 The author reiterates that there are grounds for finding that the application of the State party's domestic laws is discriminatory. The author states that the absence of implementing regulations gave rise to a legal vacuum at the autonomous-community and local levels and that it is in complete contradiction with the Convention and cases considered by the Committee. The author considers that it is unjustifiable for the State party to argue that no regulations were in place and, that, when they were introduced, they were not favourable to the author's case, this latter point being questionable in part since the regulations would be favourable if they could be applied retroactively.

5.4 The author reiterates that he has been discriminated against because other regulations exist that govern situations such as his. With respect to article 27 of the Convention, the State party asserts that, in accordance with article 43 of Act No. 16/1991, municipal councils are free to decide whether or not assignment to modified duty is compatible with a declaration of permanent total disability. The author insists that, under Act No. 16/1991, the introduction of regulations on assignment to modified duty is not a matter of choice. In the author's view,

⁷ Article 137 of the Spanish Constitution provides: "The State is organized territorially into municipalities, provinces and such autonomous communities as may be constituted. All these entities enjoy autonomy for the management of their respective interests."

the law must be interpreted in accordance with the Convention, which invalidates the State party's argument that each municipality in Catalonia has discretionary powers in this matter, since responsibility for compliance with the Convention ultimately lies with the State party. The author reiterates that it is not his intention to interfere with the territorial law-making capacity established under the Constitution, but it is his intention to ensure compliance with applicable international law and specifically, in the present case, the Convention.

5.5 Lastly, the author attaches three administrative decisions issued by the National Social Security Institute whereby assignment to modified duty is found to be compatible with disability status in the case of firefighters in Catalonia. The author questions the State party's contention that a finding of permanent total disability results in mandatory retirement, thereby disqualifying a person who is no longer in active service from performing modified duties.⁸

State party's additional observations

6.1 On 9 March 2017, the State party submitted observations on the author's comments. The State party reiterates the comments made in its observations of 21 October 2016.

6.2 Firstly, the State party recalls that the Universal Declaration of Human Rights and other international instruments, such as international treaties in the field of the protection of fundamental rights, are clearly covered by the generic list contained in article 10 (2) of the Constitution. In accordance with the principle of *iura novit curia*, it is understood that any decision reached by a domestic judicial body has taken into account the provisions of article 10 (2) of the Constitution. The State party recalls that, once they have been ratified and published, international treaties become part of the domestic legal order in accordance with article 96 of the Constitution, as "rules of domestic law", but that they are in all cases subject to the Constitution. Article 93 of the Constitution establishes the primacy of the Constitution. Ultimately, whether or not to award disability pensions, as provided for under the Convention, is a matter for the domestic courts, which are required to take account of article 10 of the Constitution in conjunction with the rest of the legal system as a whole.

6.3 The State party then refers to regulations not previously invoked, namely European Union Council Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. The preamble of the Directive (para. 17) states that "this Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not ... capable ... to perform the essential functions of the post concerned". The Directive has primacy over national law, since membership of the European Union presupposes the integration of legal systems and supranationality, and not only collaboration, as is the case with the United Nations conventions.

6.4 Consequently, the State party submits that it is not discriminatory for a person who has been declared as being in a situation of permanent total disability for his or her usual occupation, in accordance with the State party's amended Social Security Act, to be denied assignment to modified duty by Figueras Municipal Council pursuant to the Mayoral Decree of 6 August 2009.

Author's additional observations

7.1 On 9 May 2017, the author submitted his additional observations on the supplementary submissions made by the State party on 9 March 2017.

7.2 The author insists that the purpose of the communication is to highlight the fact that the State party failed to uphold the provisions of the Convention and disregarded articles 10 and 96 of the Constitution when deciding on the author's claim that he had been discriminated against.

7.3 With regard to European Union Council Directive 2000/78/EC, referred to by the State party, the author submits that, under article 2 (a) thereof, direct discrimination is taken to occur where one person is treated less favourably than another is, has been or would be

⁸ National Social Security Institute (Lleida), decisions, Rev. 2013/50060, 50061 and 50062.

treated in a comparable situation. The author points out that the outcome of his case might have been different if it had been considered by a council that had introduced modified-duty regulations.

7.4 In conclusion, and in the light of the foregoing, the author reiterates the requests made in his initial submission.

B. Committee's consideration of admissibility and the merits

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

8.2 The Committee notes that the author submitted a complaint to the European Court of Human Rights based on the same facts presented to the Committee. The case was not considered by the European Court of Human Rights because of a lack of documentation and the author's failure to remedy the situation in time. The Committee thus finds that article 2 (c) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.

8.3 The Committee notes that the State party has not raised any issues in relation to the admissibility of the communication. The Committee finds that, for the purposes of admissibility, the author has exhausted the remedies available under domestic law with regard to the fundamental rights to equality and non-discrimination and to access to public employment.

8.4 The Committee nonetheless notes that the author, in the claims filed with the ordinary courts, does not present any arguments concerning the right to effective judicial protection and its relationship to possible violations of the right of persons with disabilities to have access to justice. It therefore finds that the author has not exhausted domestic remedies with regard to his claims under article 13 (2) of the Convention and declares this part of the communication inadmissible under article 2 (d) of the Optional Protocol.

8.5 Accordingly, and in the absence of other obstacles to admissibility, the Committee declares the communication admissible with regard to the author's claims under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention. The Committee therefore proceeds to the consideration of these allegations on the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information that it has received, in accordance with article 5 (1) of the Optional Protocol and rule 73 (1) of the Committee's rules of procedure.

9.2 As to the author's claims under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and 5 (1), (2) and (3) of the Convention, the issue before the Committee is whether the State party violated his rights by not applying Act No. 16/1991, on grounds of the absence at the local level of the implementing regulations provided for in the Act, articles 43 and 44 of which allow for municipal police officers to be assigned to modified duty, and by applying the Public Service Regulations Act, whereby persons who have taken mandatory retirement as a result of "permanent total disability" for the purposes of performing their usual duties as local police officers are not allowed to undertake a modified-duty assignment.

9.3 The Committee notes the author's arguments in relation to articles 5 and 27 of the Convention, to the effect that he has been directly discriminated against on the grounds of disability with respect to the retention of his post as a local police officer, given that he was forced to retire as a result of a declaration of "permanent total disability", which, in turn, disqualified him from requesting assignment to modified duty because of the failure of Figueras Municipal Council to implement regulations governing assignment to modified duty,

as provided for under Act No. 16/1991. The author submits that this declaration or administrative classification of his disability, issued by the National Social Security Institute, did not take account of his ability to perform modified duties or other complementary activities, as provided for in article 43 of Act No. 16/1991 of 10 July (Local Police Act), under which a specific “medical report” must be sought in order to assess the ability of the person concerned to carry out alternative activities. The author also notes the existence of other autonomous-community legislation expressly providing that a declaration of “permanent total disability” is compatible with assignment to modified duty, as well as the Catalan law governing the eligibility of firefighters for modified-duty assignments, under which such a declaration is likewise compatible with modified duty. He further notes the existence of administrative decisions of the National Social Security Institute and court judgments finding that the receipt of a pension for “permanent total disability” is compatible with assignment to modified duty. The Committee also takes note of the State party’s contention that the author has not been discriminated against because the domestic provisions governing the different degrees of disability and their compatibility with the receipt of a disability pension or with employment in the public sector are within the discretionary authority of legislative bodies. The State party reiterates, in this connection, that the distinction between different degrees of disability is made for legitimate purposes and that the relevant regulations thus cannot be said to be discriminatory on the grounds of disability. It also maintains that these regulations have been applied consistently, on an equal basis, to the author and to all other persons who have been placed in the administrative category of “permanent total disability”. For the State party, the point at issue is not whether there are grounds for retirement under domestic law, but whether the author has been discriminated against on the basis of allegedly unreasonable unequal treatment under the law, bearing in mind the discretionary authority of legislative bodies. The Committee also notes that the State party argues that the municipal regulations on assignment to modified duty of the Figueras municipal police, published on 26 March 2015, do not support the author’s case, since under the regulations assignment to modified duty is incompatible with a declaration of incapacity.

9.4 The Committee recalls that, under article 4 (1) (a) of the Convention, States parties have a general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention, including those related to work and employment. The Committee further recalls that article 27 (1) of the Convention requires States parties to recognize the right of persons with disabilities to retain their employment, on an equal basis with others; to take all appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to the continuance of employment; and to ensure that reasonable accommodation is provided to persons who acquire a disability during the course of employment. It also recalls its general comment No. 6 (2018) on equality and non-discrimination, in which it states that in order to achieve *de facto* equality in terms of the Convention, States parties must ensure that there is no discrimination on the grounds of disability in connection with work and employment, and in which it refers to the relevant International Labour Organization (ILO) conventions, namely the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), both of which have been signed and ratified by Spain.⁹ Under article 7 of ILO Convention No. 159, the competent authorities of States parties must take measures with a view to providing and evaluating vocational guidance and vocational training to enable persons with disabilities to retain their employment.

9.5 The Committee likewise recalls that the Convention prohibits all forms of discrimination against persons with disabilities, including the denial of reasonable accommodation as a prohibited form of discrimination. This means that all forms of discrimination are equally contrary to the Convention, and it is inappropriate to differentiate among contraventions of the right to equality and non-discrimination in terms of their so-called degree of seriousness. The Committee also recalls that reasonable accommodation is an *ex nunc* duty, meaning that accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants

⁹ General comment No. 6, para. 67.

to exercise his or her rights.¹⁰ To that end, the duty bearer must enter into dialogue with the individual with a disability, for the purpose of including him or her in the process of finding solutions for better realizing his or her rights and building his or her capacities.¹¹ In addition, the Committee recalls that the preamble to the Convention highlights the necessity of recognizing the diversity of persons with disabilities, meaning that any institutional mechanism for dialogue in relation to reasonable accommodation must take each person's specific situation into account.

9.6 The Committee observes as well that the State party enacted the General Act on the Rights and Social Inclusion of Persons with Disabilities in order to update its legislation in accordance with the standards laid down in the Convention.¹² This law provides that, in order to safeguard the right of persons with disabilities to equal opportunities, the public authorities must take anti-discrimination measures and affirmative action measures (art. 64 (1)). The Committee is of the view that such anti-discrimination measures should include capacity management strategies, including reasonable accommodation, through which public authorities can build the capacities of their employees who have acquired a disability. While reasonable accommodation is an *ex nunc* duty, i.e. one that arises when the person with a disability requires it, States parties must take all necessary preventive measures to enable public authorities to manage capacities so as to optimize the exercise of the rights of persons with disabilities. In order to assess the relevance, suitability and effectiveness of reasonable accommodation, factors such as financial costs, available resources, size of the accommodating party (in its entirety), the effect of the modification on the institution and the overall assets, rather than just the resources of a unit or department within an organizational structure, must be taken into consideration.¹³ The Committee notes that, in the present case, the possibility of holding a dialogue for the purpose of evaluating and building the author's capacities within the police force was completely ruled out because he was deprived of his status as a public official upon his mandatory retirement, and he had no opportunity whatsoever to request reasonable accommodation that would have enabled him to perform modified duties. The Committee further notes that the State party has failed to show that other types of duties that the author might have been able to perform were not available within the police force in which he was employed.

9.7 The Committee recalls that the process of seeking reasonable accommodation should be cooperative and interactive and aim to strike the best possible balance between the needs of the employee and the employer. The Committee has consulted the domestic legislation of various national jurisdictions as well as academic studies to gain a thorough understanding of the concept of reasonable accommodation. In determining which reasonable accommodation measures to adopt, the State party must ensure that the public authorities identify the effective adjustments that can be made to enable the employee to carry out his or her key duties.¹⁴ If such effective measures (which do not impose an undue burden) cannot be identified and implemented, assignment of the employee to modified duty should be considered a reasonable accommodation measure of last resort. In this context, the authorities of the State party have a responsibility to take all necessary reasonable accommodation measures to adapt existing posts to the specific requirements of the employee.

9.8 In the present case, the Committee notes that the possibility of evaluating the barriers to the author's retention within the police force was ruled out because he was deprived of his status as a public official upon his mandatory retirement and had no opportunity to request reasonable accommodation that would have enabled him to perform modified duties. The Committee also notes that the State party has failed to demonstrate that other types of duties that the author might have been able to perform did not exist within the police force in which he served.

¹⁰ Ibid., para. 24 (b).

¹¹ Ibid., paras. 26 (a) and 67 (h).

¹² Royal Legislative Decree No. 1/2013 of 29 November, approving the consolidated text of the General Act on the Rights and Social Inclusion of Persons with Disabilities.

¹³ See general comment No. 6, para. 26 (e).

¹⁴ *V.F.C. v. Spain* (CRPD/C/21/D/34/2015), para. 8.7.

9.9 The Committee is of the view that assignment to modified duty, which is governed by a variety of regulations under Spanish law, is the institutional arrangement or mechanism whereby the State party seeks to reconcile its duties in relation to the right to work (continuance of employment) with its duties in relation to the right to equality and non-discrimination.¹⁵ The Committee observes that, under article 43 of General Act No. 16/1991, all persons with “reduced ability” are allowed to undertake modified-duty assignments. The Committee notes that, by failing to enact local regulations, as it was required to do under Act No. 16/1991, and by applying Public Service Regulations Act (No. 7/2007) rather than modified-duty regulations, Figueras Municipal Council prevented the author from being able to request assignment to modified duty, as provided for by the Act. In addition, the Committee observes that, in the author’s case, the administrative disability ratings determined by the National Social Security Institute did not include an analysis of the author’s potential to carry out modified duties or other complementary activities. Moreover, the Committee notes that article 43 of General Act No. 16/1991 calls for the conduct of a special medical assessment of the alternative capacities of persons whose abilities are reduced, yet this was not done in the author’s case. The Committee observes that the author’s ability to perform the usual duties of police work has been reduced, but this has no bearing on his potential ability to perform modified duties or other complementary activities within the same police force.

9.10 In the present case, the Committee finds that, because of the failure to enact local modified-duty regulations, the author’s rights under the Convention have not been safeguarded, especially the possibility of having his particular disability evaluated with a view to building any capacities he may have to perform modified duties or other complementary activities. The Committee notes that the absence of regulations at the local level renders all those with “permanent total disability” status ineligible for assignment to modified duty. This, in turn, undermines such persons’ right to work, as occurred in the author’s case.¹⁶

9.11 The Committee therefore finds that the rules under which the author was prevented from undertaking a modified-duty assignment or entering into a dialogue aimed at enabling him to carry out activities complementary to the usual tasks of police work contravene the rights enshrined in articles 5 and 27 of the Convention. The author was discriminated against with respect to “continuance” of his public employment, in violation of article 5, which protects the right of persons with disabilities to equality and non-discrimination, and article 27, which protects such persons’ right to work and employment. With respect to article 5 of the Convention, the Committee finds that the facts of the present case disclose one of the forms of discrimination prohibited by the Convention, whether it is viewed as direct discrimination or as a denial of reasonable accommodation. In addition, with regard to article 27 of the Convention, the Committee finds that the present case discloses discrimination in relation to continuance of employment, stemming from the denial of any dialogue or opportunity for an assessment of fitness for alternative duties for persons who, like the author, have “permanent total disability” status. The Committee further holds that, although the State party’s institutional rules governing the assignment of its employees or public officials to modified duty pursue a legitimate aim, the law that was applied to the author in the absence of modified-duty regulations governing the Figueras municipal police resulted in a violation of his rights under articles 5 and 27 of the Convention.

9.12 The Committee further notes that the State party has a wide variety of regulations in the different autonomous communities and even within the same municipality and that this variety of approaches to similar situations gives rise to discrimination on the grounds of disability. The Committee is of the view, therefore, that the State party must comply with its general obligations, under article 4 of the Convention, to modify and harmonize all local, autonomous-community and national provisions that bar individuals from being assigned to modified duty without providing for an assessment of the challenges and opportunities that persons with disabilities may have, and that thereby violate the right to work.¹⁷

¹⁵ *Ibid.*, para. 8.9.

¹⁶ *Ibid.*, para. 8.10.

¹⁷ *Ibid.*, para. 8.12.

9.13 Accordingly, the Committee finds that the author's mandatory retirement as a result of a traffic accident that left him with a permanent disability constituted a violation of article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and article 5 (1), (2) and (3) of the Convention.

C. Conclusions and recommendations

10. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 27 (a), (b), (e), (g), (i) and (k), read alone and in conjunction with articles 3 (a), (b), (c), (d) and (e); 4 (1) (a), (b) and (d) and (5); and 5 (1), (2) and (3) of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the author, the State party is under an obligation to:

(i) Afford him the right to adequate compensation, including any legal costs incurred in filing the present communication;

(ii) Take appropriate measures to ensure that the author is given the opportunity to undergo an assessment of fitness for alternative duties for the purpose of evaluating his potential to undertake modified duties or other complementary activities, including any reasonable accommodation that may be required.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future, including by:

(i) Taking all necessary measures to align the modified-duty regulations of the Figueras municipal police (ordinance) and their application with the principles enshrined in the Convention and the recommendations contained in the present Views, ensuring that assignment to modified duty is not restricted only to persons with a partial disability;

(ii) Similarly harmonizing the variety of local and regional regulations governing the assignment of public officials to modified duty in accordance with the principles enshrined in the Convention and the recommendations contained in the present Views.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee within six months a written response, including information on any action taken in the light of the present Views and recommendations of the Committee. The State party is also requested to publish the Committee's Views, have them translated into the official languages of the State party and to circulate them widely, in accessible formats, in order to reach all sectors of the population.
