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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Decision adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 40/2017*, **

Communication submitted by:	F.O.F. (not represented by counsel)
Alleged victim:	The author
State party:	Brazil
Date of communication:	21 December 2016 (initial submission)
Document references:	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 16 March 2017 (not issued in document form)
Date of adoption of decision:	2 September 2020
Subject matter:	Discrimination in providing reasonable accommodation and equal remuneration for work of equal value
Procedural issues:	Exhaustion of domestic remedies; lack of substantiation
Substantive issues:	Discrimination on the grounds of disability; access to court; protection of the integrity of the person; right to health services; work and employment
Articles of the Convention:	2, 5, 13, 17, 25 and 27 (1) (a), (b) and (i)
Article of the Optional Protocol:	2 (d) and (e)

1.1 The author of the communication is F.O.F., a national of Brazil, born on 27 July 1968. He claims to be a victim of violations by the State party of articles 2, 5, 13, 17, 25 and 27 (1) (a), (b) and (i) of the Convention. The author is not represented by counsel. The Optional Protocol entered into force for the State party on 1 September 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, Amalia Eva Gamio Ríos, Ishikawa Jun, Samuel Njuguna Kabue, Rosemary Kayess, Kim Mi Yeon, László Gábor Lovászy, Robert George Martin, Dmitry Rebrov, Jonas Ruskus, Markus Schefer and Risnawati Utami. Pursuant to rule 60 (1) (c) of the Committee's rules of procedure, Mara Cristina Gabrilli did not participate in the examination of the present communication.

1.2 On 16 March 2017, the Special Rapporteur on new communications, acting on behalf of the Committee, requested that the State party adopt interim measures consisting in the provision of reasonable accommodation to the author by adjusting his working hours, to enable him to commute and to receive the physical therapy that he required. On 3 April 2018, the Special Rapporteur reiterated the request for interim measures.

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

The facts as submitted by the author

2.1 Since 1992, the author has had knee stiffness resulting from chronic osteomyelitis in his left leg.[1] He also has thrombosis in his left leg and a herniated disc, as a consequence of lack of adaptation of the furniture in his workplace. Since 9 June 2008, he has been working for the São Paulo Regional Council of Engineering and Agronomy, known as Crea-SP. He commutes by bus every day, as he lives 74 km away from his workplace.

2.2 On 1 September 2009, the author requested reasonable accommodation at work to prevent his health deterioration, including flexible working hours, tolerance of commuting time and tolerance of a total of 3 hours and 20 minutes for physical therapy,[2] without deductions from his salary. On 30 July 2010, Crea-SP denied his request.

2.3 On 9 May 2012, the author suffered an accident on his way to work,[3] but Crea-SP determined that there had been no "accident at work". The author complained to the São Paulo State Ministry of Labour (henceforth, "Ministry of Labour"), which, on 23 February 2016, decided to close the case against Crea-SP on the grounds that the pain suffered by the author on 9 May 2012 in his left knee could not be considered an accident at work or be derived from the exercise of his profession, especially since a medical report from 26 September 2011 certified that the author had been suffering from rigidity in his left knee joint since 1992.

Labour proceedings for equal remuneration for work of equal value

2.4 On 30 July 2013, the author started labour proceedings for equal remuneration for work of equal value, taking as a reference the higher salary of his colleague, B.C., allegedly performing the same function with the same productivity and the same quality standard. On 28 November 2013, the first-instance labour judge dismissed his complaint on the grounds that B.C. was better qualified, and ordered the author to pay the procedural fees. On 16 September 2014, the regional labour court dismissed his appeal. On 1 October 2014, the author complained to the federal Ministry of Labour and Employment that the two witnesses in the trial had given false testimonies as to the professional path of B.C. Although administrative proceedings were initiated, the author received no response as to the result of those proceedings. On 22 September 2015, the Superior Labour Court maintained the first-instance decision that the author was not entitled to the same salary as B.C., who was more experienced. On 11 October 2017, with assistance from lawyers in the juridical department of the relevant union – the *Sindicato dos Trabalhadores das Autarquias de Fiscalização do Exercício Profissional e Entidades Coligadas no Estado de São Paulo*, known as SINSEXPRO – the author lodged extraordinary proceedings to declare null and void the decision delivered at first instance and in appeal. On 22 March 2018, the regional labour court declared inadmissible the author's request and ordered him to pay the procedural fees. The author's appeal was dismissed on 27 August 2018 by the regional labour court. The author's further appeal on points of law was dismissed on 21 September 2018.[4]

[1] He cannot flex his left knee and has regular pain crises in the affected limb.

[2] The time period comprised 1 hour to travel to the physiotherapist's office, 1 hour for the physiotherapy, 1 hour to travel back, and tolerance of 20 minutes as agreed in the collective contract with the trade union.

[3] He broke his left knee joint while walking from the metro station towards his workplace.

[4] It is unclear by which court this appeal was dismissed.

2.5 On an unknown date in 2018, the author lodged a complaint with the Office of the Regional Labour Prosecutor of the Second Region about errors committed by the SINSEXPRO lawyers in the extraordinary proceedings. On 16 October 2019, the Regional Labour Prosecutor held that it was not for that Office to investigate the quality of legal assistance provided by the trade union or the legal knowledge of its lawyers. The Prosecutor directed the author either to seek reparation in civil liability proceedings,[5] or to bring disciplinary proceedings before the Brazilian Bar Association.[6] Moreover, the Prosecutor noted that the author was invoking an individual right, whereas only an alleged violation of collective rights would trigger the competence of the Office.[7] The prosecutor therefore dismissed the author's request to initiate civil proceedings.

Administrative proceedings for failure to provide reasonable accommodation

2.6 On 27 September 2013, the author requested assistance from the national Secretariat for Human Rights,[8] complaining of discrimination because he was not allowed to undergo physiotherapy during his working hours without a deduction from his salary, despite other employees being allowed to do so. The author, who lives in Santos Municipality, claims that a tolerance period of 3 hours and 20 minutes is granted to employees without disabilities who live in São Paulo Municipality. The Secretariat for Human Rights transmitted the author's request to the Ministry of Labour, in São Paulo State, which then transmitted it to the federal Ministry of Labour and Employment.[9]

2.7 On 3 March 2014, the author initiated proceedings with the Ministry of Labour alleging refusal by Crea-SP to grant him reasonable accommodation. On 10 March 2015, the Regional Labour Prosecutor's Office of the Second Region dismissed the author's request, for lack of evidence demonstrating the existence of discrimination.[10] It took into account the fact that the author had been hired following a competitive process, which implied that Crea-SP had the obligation to provide him with special support only, not to adopt special procedures: the company had a legal duty to grant differentiated working hours only to persons with disabilities who entered the labour market through selective placement under a special procedure, in which case there was a proportional adjustment in salary.[11] According to the decision, in the absence of a situation that would generate positive discrimination in the author's favour, the same rules imposed on other employees should apply to him, in accordance with the principle of equality. As to physiotherapy, the Labour Prosecutor Office considered that the author had the option of submitting his medical certificates to his employer in order to request allocation of time for his treatment and, if denied, the right way for the author to proceed would be to lodge an individual complaint before the labour courts, not an administrative complaint with the Ministry of Labour.

2.8 As to the possibility of bringing his case before the labour courts, the author declares that he has neither the necessary knowledge of labour law, nor the financial resources to hire a private lawyer. He was therefore relying on assistance from the prosecutor attached to the Ministry of Labour and from trade unions to submit his case before the labour courts. The author mentions that on 4 October 2016, he again initiated proceedings with the Ministry of Labour for discrimination by Crea-SP because it was refusing reasonable accommodation, but that that request was set aside by the Ministry on 4 November 2016.[12] The author also submitted requests for assistance to the Attorney General of the Republic

[5] Under articles 186 and 927 of the Civil Code.

[6] Under article 72 of the Statute on the Practice of Law.

[7] Articles 127 and 129 (III) of the federal Constitution.

[8] Later became the Ministry of Women, Family and Human Rights.

[9] According to the State party's observations of 25 January 2018, the progress of the measures adopted is being monitored by the Ministry of Women, Family and Human Rights (para. 4.9).

[10] The author disagrees that it is he who should have produced the proof of discrimination, when he had already produced medical evidence for the progressive degeneration of his health.

[11] According to article 35 of Decree No. 3298/99, persons with disabilities may enter the labour market either under equal conditions with all the other people (through competitive placement) or under special conditions (through selective placement).

[12] No further details provided.

and to the Commission on the Rights of Persons with Disabilities of the Brazilian Bar Association in São Paulo, to no avail.

2.9 On 3 April 2014, the author lodged a complaint with the Ministry of Labour to seek assistance for preventing his health deterioration. On 13 October 2014, a labour prosecutor from the Ministry of Labour requested the following from Crea-SP: medical records indicating the evolution of the author's health condition since joining Crea-SP; studies carried out since he had been hired aimed at determining the daily commute to the workplace as a contributory factor to the worsening of his injuries; studies carried out since he was hired aimed at determining the use of workstation furniture (such as chairs and available tables) as a contributory factor to the worsening of his injuries; the address of the nearest physiotherapy clinic to Crea-SP that was covered by the health plan, the distance in metres to that clinic and an indication of which means of transport should be used; and a report from the physiotherapy professional who had recommended treatment for lumbar spine disease during working hours and the subsequent use of a chartered bus at 5.50 p.m., on which the author remained seated for more than an hour and 20 minutes to get to Santos Municipality. However, according to the author, Crea-SP never responded to those requests.

2.10 On 4 May 2015, the labour prosecutor summoned the two trade unions to which the author was affiliated – the *Sindicato dos Engenheiros no Estado de São Paulo*, known as SEESP, and SINSEXPRO – to seek their views as to the facts denounced by the author on 3 April 2014. The prosecutor also summoned Crea-SP to send information on the working regime legally fixed for its employees. According to the author, neither SEESP nor SINSEXPRO have responded to the official notification. The author contends that no action was taken because of their lack of response, as provided by the law.[13] Eventually, the Ministry of Labour terminated the proceedings on 29 April 2016.[14] The author sought assistance from the two trade unions, on 6 May 2015 and 18 June 2015 from SEESP, and on 24 February 2016 and 8 August 2016 from SINSEXPRO.[15] However, the two trade unions allegedly did not show any interest in defending him.[16]

2.11 On 11 July 2015, the author submitted to the Ministry of Labour a medical report from 8 July 2015, which reported signs of a chronic post-thrombotic syndrome in the femoral and popliteal veins of the author's left leg and recommended the use of medication and daily lifelong compression. The author submitted that the report indicated another condition that he had developed owing to the failure by Crea-SP to adopt any programme to avoid worsening the health of employees with physical disabilities. He therefore claimed that Crea-SP should pay for his compresses.[17]

Court accessibility proceedings

2.12 On 7 August 2015, the author and his wife brought court proceedings against a company by the name of Tenda in order that it be required to comply with accessibility norms for persons with disabilities at their place of residence by providing allocated parking for persons with disabilities. They sought a waiver of the court fees for lack of financial resources, invoking article 13 of the Convention. On 2 September 2015, São Paulo Court of Justice denied the benefits of free justice on the grounds that the author's wife was an associate in two companies and the author had an income well above the average of the population, so neither of them fit the concept of poverty defined by the law. The São Paulo

[13] However, a decision issued on 23 February 2016 by the Office of the Regional Labour Prosecutor of the Second Region mentions that SINSEXPRO replied on 22 June 2015 and 13 July 2015, and SEESP on 25 June 2015.

[14] No further details provided.

[15] In his request to SINSEXPRO, the author requested legal assistance for obtaining physical therapy for treatment of epicondylitis in his right elbow (see para. 2.15); complained about discrimination performed by Crea-SP against employees with disability; and complained about violation of his right to equal pay for work of equal value (making reference to his colleague B.C.).

[16] The author provides copies of several email exchanges in June 2015 with a lawyer working for SEESP, in which the author receives judicial advice. In particular, given the notification received by SEESP from the Ministry of Labour, the lawyer asked for clarifications regarding his case.

[17] Unlike the daily medicines for thrombosis, which are reimbursed by Crea-SP, the compresses that he also needs to use daily are not reimbursed.

Court therefore requested payment of the court fees. On 6 October 2015, the São Paulo Court dismissed the appeal by the author and his wife. On 29 March 2016, their appeal on points of law was dismissed by the Federal Supreme Court. The author and his wife filed a special and extraordinary appeal. On 16 February 2018, the Federal Supreme Court again dismissed their request to waive the court fees. The author and his wife appealed, but on 23 March 2018, the Superior Court of Justice concluded, on the basis of their income tax declarations, that their income was above the average. The fact that the author had a physical disability was not enough to justify the waiver. On 14 April 2018, the author and his wife contested that decision, invoking their right to access to courts under article 13 of the Convention and their right to privacy regarding publication of their incomes. On 20 April 2020, the Federal Supreme Court dismissed their appeal on points of law.

Further administrative proceedings

2.13 On 2 January 2016, a new law on the inclusion of persons with disability entered into force in Brazil (Act No. 13,146 of 6 July 2015). According to the author, although the law punishes discrimination based on disability when reasonable accommodation is not provided, the Ministry of Labour has not determined all the procedures to protect persons with disabilities. As a consequence, the author no longer has the strength to keep fighting for his rights guaranteed by the Convention. He submits that the procedure for breach of the fundamental principle of reasonable accommodation should be initiated by the Attorney General or by the Federal Council of the Brazilian Bar Association.

2.14 On 26 January 2016, the author complained to the Office of the Regional Labour Prosecutor of the Second Region, raising, among other points, the fact that Crea-SP had not to date issued any document that would allow him, as a resident of Santos, to undergo physiotherapy and receive a salary allowance corresponding to the time granted to employees who lived in São Paulo (3 hours and 20 minutes). The author requested the Regional Labour Prosecutor's intervention in order to eliminate that discrimination in treatment. He complained that Crea-SP had not presented any studies on the suitability of the furniture to the author's disability or on the suitability of the working hours to the author's needs. He also invoked his right to equal pay for work of equal value, making reference to his colleague, B.C.

2.15 On 17 February 2016, following constant pain in his right elbow, the author was diagnosed by a doctor with medial epicondylitis in his right elbow, and was prescribed physiotherapy. On 18 February 2016, the author presented himself to the clinic located in the Crea-SP facility, where he was examined by an occupational doctor. According to the medical report issued by the occupational doctor after having visited the author's two working areas, the author's workstation was inappropriate for his body: the desk was too low for him (he was 1.91 m tall), and it was not possible to adjust the armrests of his chair to his elbows, which prevented his elbows from resting on the armrests.

2.16 On 21 February 2016, the author requested the intervention of the Office of the Regional Labour Prosecutor of the Second Region to instruct Crea-SP to indicate in which clinic he could undergo physiotherapy without being penalized in terms of his salary. On 26 February 2016, the author informed Crea-SP about his new condition caused by the inadequacy of his workspace, and reiterated his request to be allowed to undergo physiotherapy in the municipality in which he resided by granting him the tolerance period of 3 hours and 20 minutes that was normally granted to employees who resided in São Paulo.

2.17 On an unknown date in 2016, the author complained about administrative misconduct, but his request to open a civil investigation under the federal Ministry of Labour and Employment and of the Attorney General's Office has been denied on the basis of a lack of elements to justify such an investigation.[18]

2.18 Also on an unknown date in 2016, the author complained to the Ministry of Labour against the President of Crea-SP for discriminatory practices based on disability, because disciplinary proceedings for breach of the Crea-SP code of conduct had been initiated

[18] No further details provided.

against the author. The Ministry of Labour determined that there was no evidence of discrimination based on disability against the author because he had not suffered any specific prejudice as a consequence of the initiation of those administrative proceedings.[19]

The complaint

3.1 The author submits that the State party has violated his rights under articles 2, 5, 13, 17, 25 and 27 (1) (a), (b) and (i) of the Convention, because it denied him the reasonable accommodation at his workplace necessary for preventing the deterioration of his health. The adjustments that the author requires do not imply high costs for the working environment, but guarantee the personal necessities of persons with disabilities like himself, such as tolerance of the time needed for physiotherapy in the municipality in which he resides and for his commute, and accessibility of his workplace. Owing to the lack of ergonomic furniture at his workplace, he now has thrombosis in his left leg, a herniated disc and medial epicondylitis in his right elbow.

3.2 The author submits that denial of reasonable accommodation in the workplace for persons with disabilities represents discrimination based on disability. He alleges that the Ministry of Labour, in São Paulo State, has terminated various administrative proceedings on the grounds that there was no need to provide an accessible work environment in places where there were no disabled employees. It has thus allowed Crea-SP to maintain all its employees with disabilities in the limited number of places – a few municipalities in the State of São Paulo – that are supposedly accessible and has therefore prevented employees with disabilities from having the opportunity to request transfers to other municipalities, as any other employee, without disabilities, would have. He also contests the different treatment of persons with disabilities depending on whether they enter the labour market through competition or through selection.

3.3 The author also alleges a violation of his right to equal pay for work of equal value, as guaranteed under article 27 (1) (b) of the Convention. When the domestic authorities declared that he was not entitled to equal remuneration, they used the explanation that more time spent on the job amounted to work experience, despite the fact that such a restrictive requirement is not mentioned in article 27 (1) (b) of the Convention. Therefore, all domestic decisions delivered in the proceedings for equal pay (para. 2.4) are in violation of the Convention. The courts did not correctly examine the professional path of his colleague B.C. Moreover, the author alleges a violation of his right to access to justice, guaranteed under article 13 of the Convention, on the grounds that when the regional labour court declared inadmissible his extraordinary remedy on 22 March 2018, it applied the provisions of the Code of Civil Procedure, which is hierarchically inferior to the federal Constitution, and did not examine the merits of his complaint. He also complains, under article 13, that he was unable to obtain protection from the courts of his Convention rights and that he was ordered to pay the procedural fees.

3.4 The author declares that, although there might be other domestic remedies available, these remedies might be unreasonably prolonged or might be unlikely to result in an effective remedy that would prevent deterioration of his health.

State party's observations on admissibility and the merits

4.1 On 25 January 2018, the State party submitted observations on admissibility and the merits. As to the facts, the State party admits that owing to his disability, the author is covered by national laws and regulations applicable to persons with disabilities, which recognize, inter alia, the right to reasonable accommodation in the workplace.

4.2 The State party mentions that, when hired by Crea-SP, the author underwent a medical examination that had certified his classification as a person with disability. However, the examination report contains no recommendations on any need for adjustments in his working environment, workload or other working conditions. The State party explains that the author was hired following a competitive process, which means that

[19] Although the penalty for the alleged conduct – on which no further details were provided – was dismissal, the disciplinary commission decided to issue the author with a written warning only.

Crea-SP was obliged to provide special support only, not to adopt special selection procedures: the employer had the obligation to grant differentiated hours only to persons with disabilities who entered the labour market through a selective placement – which entailed special procedures – and, in that case, there was a proportional adjustment in salary.

4.3 Crea-SP has declared that it has offered, depending on the case, all adaptations, modifications and adjustments that are necessary and appropriate, and that do not impose a disproportionate and undue burden, with the aim of ensuring that persons with disabilities can enjoy or exercise all the fundamental rights and freedoms on an equal footing and with equality of opportunity to others. It is also making architectural changes in all its regional offices in order to ensure accessibility, in accordance with the current legislation. Crea-SP agrees to reduce the author's daily work charges as long as there is a corresponding reduction in his salary, in accordance with the law. According to the decisions issued by the organs to which the author has complained, none of his claims amounts to any irregularity. In particular, the author's claim for 3 hours and 20 minutes from his working day to undergo physiotherapy exceeds the standard two-hour limit. The two hours would be enough if the author chose a specialized clinic of good quality near his workplace, as suggested by Crea-SP. Lastly, Crea-SP allowed the author to telecommute for a few days, especially when he was recuperating after his osteomyelitis surgery.[20]

4.4 The State party submits that, following the accident suffered by the author on 9 May 2012, when he arrived at work and asked for assistance at the infirmary, the duty nurse advised him to consult a doctor, but the author refused to do so and accepted treatment with ice and analgesics only, staying at work until the end of the working hours. According to the State party, this event has contributed to the aggravation of the author's health.

4.5 The State party refers to the author's complaints transmitted to the Ministry of Labour in which he alleged that Crea-SP had denied his request for reasonable accommodation and for equal pay for work of equal value, as well as the author's claim that Crea-SP guarantees the architectural accessibility of the facilities of its 176 units. It notes that the Ministry of Labour did not find a causal link between the responsibility of Crea-SP and the alleged "accident at work" suffered by the author on 9 May 2012, which derived from his pre-existing physical condition.

4.6 As to architectural accessibility of Crea-SP facilities to persons with disabilities, the State party informs the Committee that on 2 May 2017, the Ministry of Labour adopted a plan on adaptation of conduct, according to which Crea-SP – on the basis of an expert report – needed to adapt its facilities. The progress of the necessary works for the 176 units belonging to Crea-SP was being monitored at the time of providing this information.

4.7 As to the author's allegation that the two trade unions that he contacted showed no interest in his case, the State party submits that, during the 2016 proceedings for the alleged discrimination on the basis of disability, the author was represented by a private lawyer assigned by SINSEXPRO. During the proceedings initiated by the Ministry of Labour, SINSEXPRO declared that the issue of a salary bonus was under discussion with Crea-SP. The second trade union, SEESP, while having explained to the author that it could not help him because he had not formally exercised the role of engineer at Crea-SP, still defended his labour and legal disputes.[21] As to the Brazilian Bar Association, the State party admits that the author has received no response from it.

4.8 As to the author's claim for equal remuneration for work of equal value, the State party explains that article 461 of the Consolidated Labour Laws establishes that, if the function is identical and the work is delivered with the same productivity and the same "technical perfection" to the same employer and in the same place, the same salary will be awarded, without distinction of gender, nationality or age between persons whose period of service does not differ in length by more than two years. The State party mentions that the author's colleague, B.C., was one of the most experienced professionals at Crea-SP, who had already held the position immediately below that of president of the institution. Thus, B.C.'s experience and knowledge were different from the author's, who does not deal with

[20] 26–30 December 2016, 20 January 2017, 12–14 June 2017 and 19–22 June 2017.

[21] No further details provided.

some of the issues dealt with by B.C. Moreover, the difference in service between B.C. and the author is 29 years, that is, more than two years.[22]

4.9 The State party notes that the author's complaint of 27 September 2013 to the former Secretariat for Human Rights was transmitted to the Ministry of Labour, in São Paulo State, which, after analysis, then sent it to the federal Ministry of Labour and Employment. The progress of the measures taken is being monitored by the national Ministry of Women, Family and Human Rights. Then on 22 July 2014, the author reiterated his 2013 complaint, insisting on the Secretariat's intervention so that Crea-SP would allow him to undergo the physiotherapy. In response, the Ministry of Women, Family and Human Rights clarified the limitations of its capacity to act, owing to the absence of a legal provision, and informed him about the interpretive aspects of the Convention and of other applicable legal documents, eventually advising him to use the judicial channels. Still not satisfied, the author continued to present other requests, which resulted in new indications from the Ministry of Women, Family and Human Rights on its lack of competence *ratione materiae* to propose measures that are under the competence of other institutions and authorities.

4.10 Having analysed the large volume of documentation produced by the author, the State party argues that the institutions involved have demonstrated a practice of correct action as to the measures taken. In several cases – such as the case of the two trade unions, which supported and defended the author – assistance was provided to the author despite there being no formal requirement to do so.

4.11 The Ministry of Labour – which is a custodian of the law, with constitutional powers – has acted and continues to act for the clarification of the facts denounced by the author, in particular regarding the architectural accessibility of the Crea-SP facilities, and has issued interpretations of the action taken by the author's employer. The State party acknowledges the essential disagreement between Crea-SP and the author as to the effectiveness of the solutions adopted. The national judicial system questions the limits and compatibility between what is necessary in the working environment from a biopsychosocial perspective and what is possible from the employer's and from the legal perspective. In this sense, it seems that the definition of what constitutes reasonable accommodation according to the national legal regime leaves room for conflicts of interpretation.

4.12 For the employer, there is a wide conceptual scope of what represents reasonable accommodation. This employee's right should be weighed against both costs and possible disproportionality in the general treatment of employees, which would be against the law. Reasonable adjustments and modifications that do not impose a disproportionate or undue burden, where needed in a particular case, may be made only after hearing the perspectives of all the parties in conflict. It is not possible for an organ of the executive power – such as the National Secretariat for the Rights of Persons with Disabilities, under the Ministry of Women, Family and Human Rights – to issue a conclusive statement because it does not have the necessary coercive instruments to make informed decisions about a given situation.

4.13 In the author's case, there is a divergence of views on the effectiveness of the measures taken by the author's employer, Crea-SP. However, even the judicial power – which has the last word on the dispute – has accepted the allegations submitted by Crea-SP. The obligation established under article 27 (i) of the Convention applies to all national entities, be they public or private. Crea-SP has demonstrated before the administrative and judicial authorities that it acted in accordance with the law. The present conflict revolves around an interpretation with which the author disagrees, mainly regarding the measures adopted by his employer and the refusal of his request to reduce his working hours without reducing his salary. These issues have already been examined in administrative and judicial proceedings.

4.14 The State party therefore considers that there is no violation of article 27 (i) of the Convention. In disagreement with the negative decisions delivered by administrative and

[22] When the State party submitted its observations, the proceedings in question were still pending because the author had lodged extraordinary proceedings to declare the previous decisions null and void.

judicial bodies, the author seeks alternatives to confirm his own interpretation of what constitutes reasonable accommodation to be provided by his employer. However, the Committee should not act as an appeal body. Through its National Secretariat for the Rights of Disabled Persons, the State party will continue monitoring the conclusion of the case at the domestic level.

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

5.1 On 26 March 2018, 15 April 2018 and 7 May 2018, the author submitted comments on the State party's observations. He insists that the State party has violated his right to equal pay for work of equal value, as guaranteed under article 27 (1) (b) of the Convention. In that sense, he informs the Committee that he used an extraordinary remedy to have the previous judgments delivered in the proceedings for equal pay declared null and void, but the regional labour court dismissed his request on 22 March 2018 (para. 2.4). He contests the reasoning of the regional labour court, alleging that the judges did not take into account the fact that he is a person with disabilities, whereas his colleague, B.C., is not. He also complains that the lawyers affiliated with the SINSEXPRO trade union who assisted him during the extraordinary proceedings committed procedural errors.[23]

5.2 The author reiterates his complaint of violation of his right to access to courts under article 13 of the Convention on the basis of the courts' refusal to waive his court fees in the proceedings against the company Tenda regarding accessibility for persons with disabilities at their place of residence (para. 2.12). He further complains that in dismissing his request for a waiver, the courts revealed his and his wife's incomes in their public decisions.

5.3 The author indicates that the State party has not complied with the interim measures ordered by the Committee, and requests the Committee to inform the Inter-American Commission on Human Rights about the present communication, so that the Commission may request the State party to adopt interim measures to protect the author's right to reasonable accommodation and to equal pay for work of equal value.

State party's additional observations

6.1 On 27 December 2018, the State party reiterated its previous observations, recalling that the author's claim for equal pay for equal work had already been considered by the domestic judicial bodies, hence the Committee should not interfere with matters already decided by the judiciary.

6.2 The State party submits that, in order to avoid a situation in which social protection for persons with disabilities results in some sort of disincentive to job search, a policy option is to separate the issue of income support from the issue of compensation for the extra costs of persons with disabilities. These and other elements of merit are being properly analysed by the competent judicial and administrative authorities, as attested by the author himself.

6.3 In this context, the State party invokes article 2 of the Optional Protocol with regard to the inadmissibility of complaints that are still under consideration by the competent domestic organs. Therefore, official observations on the present case by the State party should be made only after the outcome of domestic proceedings.[24]

Author's additional comments

7.1 On 26 May 2019 and 8 July 2020, the author submitted additional comments. In particular, as to the allegation by the State party that he has not exhausted all domestic remedies, the author confirms that he has no other remedies to exhaust in order to defend his Convention rights and that all the facts that he has denounced have been examined by the courts. As for those who acted towards the degradation of his health, it is only the public Ministry that has the power to act, so the State party cannot hold him responsible because that Ministry has not acted in that regard. He therefore requests the Committee to

[23] No further details provided.

[24] The State party does not mention to what proceedings it is referring.

request clarifications from the State party as to the alleged available domestic remedies for his case.

7.2 The author alleges that no verifications were made by the State party as to the degradation of his health owing to the lack of ergonomic furniture adapted to his needs in his workplace.

B. Committee's consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee and nor has it been or is it being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's argument that the communication should be found inadmissible under article 2 (d) of the Optional Protocol on the grounds of non-exhaustion of all available domestic remedies, although it does not refer to any specific remedies that would be available and effective. The Committee notes the author's statement that, although there might be other domestic remedies available, these remedies might be unreasonably prolonged or unlikely to result in an effective remedy that would prevent deterioration of his health (para. 3.4).

8.4 The Committee recalls its jurisprudence, according to which, although there is no obligation to exhaust domestic remedies if they have no reasonable prospect of success, authors of communications must exercise due diligence in the pursuit of available remedies, and that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve the authors from the obligation to exhaust them.[25] In the present case, the Committee notes that, in response to the author's claim about the absence of reasonable accommodation to allow him to undergo physiotherapy, the Ministry of Labour clearly indicated to him that the adequate avenue was to lodge a complaint before labour courts instead of an administrative complaint before the Ministry of Labour (para. 2.7). The Committee notes that the author complained to the Regional Labour Prosecutor about lack of suitable furniture in his workplace, but did not bring the matter before the labour courts. It notes in this regard the author's claim that he lacks both the knowledge of labour law and the financial means to hire a lawyer, and was therefore relying on assistance from the prosecutor attached to the Ministry of Labour and from trade unions to submit his case before the labour courts (para. 2.8). The Committee further notes that the author and his wife initiated a different set of proceedings in August 2015 and that the waiver of legal fees was rejected on the basis of their financial situation, which was considered to be well above the national average. As to the duration of such proceedings, the Committee notes that the author has provided no information to justify that they would be unduly prolonged or otherwise ineffective.

8.5 In the light of all the above, the Committee considers that, by failing to lodge an individual complaint before the labour courts related to his complaints about an absence of reasonable accommodation to allow him to undergo physiotherapy or to obtain suitable furniture in his workplace, the author failed to exhaust available domestic remedies. The Committee therefore considers that the author's complaint under articles 17, 25 and 27 (1) (i) in conjunction with article 2 of the Convention in respect of reasonable accommodation to prevent his health degradation is inadmissible pursuant to article 2 (d) of the Optional Protocol.

[25] *D.L. v. Sweden* (CRPD/C/17/D/31/2015), para. 7.3, and *E.O.J. et al. v. Sweden* (CRPD/C/18/D/28/2015), para. 10.6. See also *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3; and *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3.

8.6 As regards the author's claim that he was discriminated against on the basis of his disability because he was not granted reasonable accommodation to the extent allegedly granted to persons without disabilities, the Committee notes that his claim was dismissed on 10 March 2015 by the Office of the Regional Labour Prosecutor in the absence of any evidence demonstrating the existence of discrimination. The Committee also notes that these allegations are presented in general terms and that the author does not provide any arguments to explain how he has personally been affected in a discriminatory manner by the existence and application of a legal provision according to which a person with disabilities may enter the labour market either through competition or through selection. The Committee therefore considers that this part of the complaint under articles 5 and 27 (1) (a), (b) and (i) in conjunction with article 2 of the Convention is inadmissible for lack of substantiation, and inadmissible under article 2 (e) of the Optional Protocol.

8.7 The Committee notes the author's complaints that he was refused equal remuneration for work of equal value (article 27 (1) (b) of the Convention), and that he was denied access to courts because when the domestic courts dismissed his request for a waiver of procedural fees, they applied the provisions of the Code of Civil Procedure, which is hierarchically inferior to the federal Constitution (article 13 of the Convention). In this respect, the Committee notes that domestic courts have examined these two complaints in both ordinary and extraordinary proceedings (paras. 2.4 and 2.12). The Committee recalls that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[26] The Committee is not in a position, on the basis of the material at its disposal, to conclude that, in deciding the author's case, the domestic courts acted arbitrarily or that their decision amounted to a denial of justice. Accordingly, the Committee considers that this part of the communication submitted under articles 13 and 27 (1) (b) of the Convention is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 (e) of the Optional Protocol.

8.8 Lastly, the Committee notes the author's complaints, without invoking any Convention article, that the lawyers affiliated with the trade union who assisted him in extraordinary proceedings for equal pay committed procedural errors, and that in dismissing his request for a waiver in the proceedings against the company Tenda, the courts revealed his and his wife's incomes in their public decisions. The Committee first notes that the lawyers affiliated with the trade union assisted the author in an extraordinary remedy. The Committee also notes that the author does not clarify whether he has used the remedies indicated by the Regional Labour Prosecutor to complain against those lawyers (para. 2.5) or the reasons for not doing so. The Committee further notes that the author provides no arguments to explain the extent to which disclosure of his income has had any specific impact on the violations of his rights under the Convention, nor does he specify whether he complained before the domestic courts against such an alleged violation. The Committee therefore considers that the author has not sufficiently substantiated this claim for the purposes of admissibility and declares it inadmissible under article 2 (e) of the Optional Protocol.

C. Conclusion

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 (d) and (e) of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.

[26] *Jungelin v. Sweden* (CRPD/C/12/D/5/2011), para. 10.5; *A.F. v. Italy* (CRPD/C/13/D/9/2012), para. 8.4; and *Bacher v. Austria* (CRPD/C/19/D/26/2014), para. 9.7.