Gelijke toegang tot de arbeid voor gehandicapten; een grondrechtelijke en rechtsvergelijkende analyse
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SUMMARY

Equal access to employment for people with disabilities. An analysis from a human rights and comparative law perspective.

1 Introduction

In the Netherlands, as in many other countries, people with disabilities are most commonly dependent on benefits, instead of an income generated themselves through paid employment. This raises the question of the extent to which the State is obliged to take measures to ensure equal job opportunities for disabled persons. This question was, at the beginning of this study (Chapter I), subdivided into the following research questions:

1 To what extent do fundamental rights, as laid down in the Dutch Constitution and international treaties, require the State to ensure equal access to employment for people with disabilities?
2 To what extent does Dutch law guarantee equal job opportunities for disabled persons?
3 Can foreign law – notably US law – serve as a source of inspiration for Dutch law with respect to the rights of disabled job applicants in the private labour market?

The present study focuses on these three research questions. Before commencing the analytical part of the inquiry, the meaning of the term ‘disability’ will be elucidated (Chapter II), followed by a description of the position of people with disabilities in the Dutch labour market (Chapter III). The latter two Chapters constitute Section I of the present dissertation, which is confined to providing the reader with some background information.

The structure of the remaining part of this summary is tripartite and analogous to Sections II-IV of the dissertation. First I will try to answer the three research questions posed above (§ 2). On the basis of an abridged appraisal of these answers, I will formulate some recommendations, directed to the Dutch State, which aim at improvement of the legal position of people with disabilities in the pre-employment stage (§ 3). The summary will conclude with some final observations (§ 4).
Fundamental rights,\(^1\) as described in Chapter IV of the present book, seek to regulate the relationship between the State and individuals (vertical relationship). They set norms for each form of State action in order to ensure that people can lead a dignified life in conditions which are necessary for prosperity and beneficial to a person’s well-being. Human dignity can not only be threatened by the State, but also be infringed by private individuals and bodies, particularly in situations in which a private person or institution possesses powers comparable to those of the State. Under the latter circumstances, protection of the fundamental rights of the weaker party is required. The similarities between vertical and horizontal relationships do not imply that the distinction between State and private action becomes, from a legal perspective, irrelevant. To the extent that fundamental rights have a bearing on the relationships between private parties (*Drittwirkung* or ‘horizontal effect’), they commonly only apply indirectly. This means that these rights are not directly applicable to the relationships between private parties, but that they can influence the interpretation of private law norms. It is for the judge, confronted with a conflict between two individuals, to weigh a fundamental right and subsequently to decide whether, and if so, to what extent, a fundamental right prevails over other private interests.

It cannot be maintained that offering protection to fundamental rights in horizontal relationships is the exclusive domain of the judiciary. Notwithstanding the importance – sometimes even vital importance – of the role of judges in protecting fundamental rights in horizontal relationships, it should be recalled that in a social constitutional state, founded on the principle of the rule of law, it is primarily the task of the legislature and executive branch of government to ensure compliance with fundamental rights. This task is certainly not confined to the vertical relationships, although the particular characteristics of private law should be taken into account when regulating relationships between private parties.

The right to work (Chapter V) and the right to be treated as an equal (Chapter VI) are firmly embedded in international human rights law and Dutch constitutional law. In conjunction these rights comprise the right which will be referred to hereafter as: the right to equal access to employment. That right requires the State to respect, protect and fulfil equal job opportunities. Ensuring

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1 In this study, the terms ‘fundamental rights’ and ‘human rights’ are used as if they were synonymous with each other.
compliance with this right is of particular importance to members of groups disproportionately affected by unemployment, such as people with disabilities.

In the Netherlands, the low participation of people with disabilities in the labour market was, at least until recently, only rarely associated with a failure to observe fundamental rights. People with disabilities were almost by definition perceived to be unfit for work. Dutch society was generally very proud of its generous social security system, entitling people with disabilities and others unable to generate an income by performing paid employment to a wage-replacement benefit. This system was considered a highly sophisticated solution which provided compensation to disabled persons for their inability to participate in the labour market.

Since the 1970s, a worldwide revaluation of the fundamental rights of people with disabilities has taken place (Chapter VII). According to the 'new approach' to the rights of people with disabilities, which, albeit with some delay, gradually gained recognition in the Netherlands, the right to equal access to employment requires the State to take appropriate steps to guarantee equal opportunities for disabled people in the labour market. State action programmes to further the aim of equal job opportunities for disabled people should include measures to:

- offer adequate protection against discrimination on the basis of disability in the labour market; and
- remove physical, social and legal obstacles which deter people with disability from participating in the labour market on an equal footing.

In conclusion, and in response to the first research question, it is submitted that fundamental rights impose a duty on the State to take appropriate measures to guarantee equal opportunities for people with disabilities in the labour market (Chapter VIII). The legislation which regulates the pre-employment stage should be in accordance with the requirements of fundamental rights, notably the right to work and the right to equal treatment. These two rights, when interpreted in conjunction, establish sufficiently concrete criteria to serve as a yardstick against which the domestic provisions may be measured.

2.2 Dutch law

Chapter IX contains an examination of the Dutch legislation governing the relationships between parties in the pre-employment stage. The aim of this chapter is to gain an improved understanding of the extent to which this legislation is in conformity with the requirements enshrined in the right to equal access to employment guaranteed to disabled job applicants.
This chapter reveals that the pre-employment stage is hardly regulated in the Netherlands. Parties are nevertheless bound by the principles of reasonableness and equity (Article 6:2 and Article 6:248 of the Civil Code (CC)) and societal carefulness, non-compliance with which may constitute a tort (Article 6:162 CC). Fundamental rights, including the right to work and the right to equal treatment, can influence the interpretation of these private law norms.

It was submitted that the rules of reasonableness and equity applicable in the pre-contractual stage offer insufficient protection to guarantee equal job opportunities for disabled people. There are a number of reasons for this shortcoming. First of all, at least according to accepted case-law, these rules scarcely have normative meaning in the initial phases of the pre-employment stage (recruitment and selection). It is only when parties start negotiating about an employment contract, notably during the final phases of their negotiations, that they enjoy legal protection under these rules. In the second place, these rules do not impose a duty upon employers to provide reasonable accommodation – that is to say a modification or adaptation of the work environment – to a disabled job applicant if such were necessary to enable the person concerned to carry out essential job duties. In this respect, there is an essential distinction between the rules of pre-contractual reasonableness and equity (Article 6:248 CC) and the duties of the good employer (Article 7:611 CC). The latter standard, laid down in the Employment Contract Act and fairly typical for the Dutch legal system, constitutes an elaboration of the principles of reasonableness and equity as applied to employers. The provisions only apply, however, from the moment of conclusion of an employment contract. According to this standard, a good employer is required to re-admit an employee with a partial labour disability with whom the employer has a contractual relationship and, if needed, to cater his or her particular needs in order to facilitate re-integration.

The principle of non-discrimination occupies a central position in the Dutch legal system, including in particular the rules regulating the pre-employment stage. According to Dutch non-discrimination law, employers should refrain from directly or indirectly differentiating between job applicants (and employees) on irrelevant grounds. Most of the statutes and regulations contain an exhaustive list of forbidden grounds of discrimination (‘closed model’). Only Article 1 of the Dutch Constitution (DC) and Article 26 of the International Covenant of Civil and Political Rights (ICCPR) potentially offer protection against disability discrimination in the pre-contractual stage. Both provisions refer to both listed and unlisted grounds. It is conceivable that the unlisted grounds ‘other ground’ (DC) and ‘other status’ (ICCPR) extend legal protection to people with disabilities.
It was maintained that the protection these general provisions offer to people with disabilities in the private labour market does not meet the requirements laid down in fundamental rights. In this respect, it should be recalled that these two provisions are primarily geared up to regulating relationships between the State and individuals. It is for judges to determine to what extent the provisions have horizontal effect. In addition, one should take into account the fact that Dutch and international courts, when interpreting non-discrimination provisions, tend to make a sharp distinction between listed and non-listed grounds. Listed grounds – such as sex and race – are usually assumed to correspond with 'suspect classifications', meaning that parties who differentiate on such ground are immediately suspected of being guilty of discrimination. This implies that it commonly suffices to deliver prima facie proof of discrimination after which the onus of proof will shift to the defendant. If a discrimination complaint is based on a non-listed ground, such as disability, courts usually require the plaintiff to deliver all proof and tend to apply a less strict standard of review than applied in suspect cases. In these cases the plaintiff has to prove that the distinction made by the defendant did not serve a legitimate goal, that the relationship between the goal and the means was disproportionate or that the differentiation was otherwise unreasonable. It is only in exceptional cases that these discrimination complaints succeed in court.

The facilities for employers, meant to promote and support the employment of people with disabilities, do not in every respect meet the standards set by the 'new approach' to the rights of people with disabilities. According to the Act on the (Re)-integration of Employees with a Labour Disability (REA) and, indirectly, the Act on Works Councils (WOR), employers are required to pursue a policy of equal job opportunities for disabled people. This aspirational duty is not complemented by the imposition of a legal duty to remove physical and social barriers which impede the employment of disabled people. Employers who refuse to remove these obstacles are not legally accountable for obstructing the employment of disabled people.

The Act on Medical Examinations (WMK) deserves special attention, since this statute, unlike most others, confers enforceable rights on job applicants. An assessment of this statute reveals that it fails to adequately protect job applicants against risk selection. In addition, the statute inhibits employers from effectively using the integration facilities established by the REA and some other regulations. The WMK moreover does not abrogate the job applicant's duty to disclose relevant information to the employer prior to concluding an employment contract, even if the latter did not make any inquiries. Job applicants are, as a consequence, in some situations even more exposed to risk selection than before the entering into force of this statute.

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The answer to the second research question therefore is that Dutch law offers insufficient guarantees of equal job opportunities for disabled persons. Despite all the State measures aimed at promoting the job opportunities of disabled persons, the State has failed to introduce adequate non-discrimination measures. The measures which seek to facilitate the integration of disabled people in the labour market are generally non-committal and marked by a number of shortcomings.

2.3 US law

In an effort to derive inspiration for the improvement of the Dutch law regarding the rights of disabled job applicants, US federal law is explored in Chapter X. The choice of the US as comparator was rather obvious, since this country has ample experience with the promotion of equal job opportunities for people with disabilities through non-discrimination legislation. US law, and notably the Americans with Disabilities Act (ADA), has served as a role model for legislatures around the world when articulating the rights of disabled people.

The Civil Rights Act (CRA, 1964), which outlaws discrimination on the grounds of an individual’s race, colour, religion, sex or national origin, is in many respects a groundbreaking piece of non-discrimination legislation. It also forms the conceptual framework for the rest of US non-discrimination law.

Title VII of this statute, which is considered the centrepiece of employment discrimination law, outlaws a large number of employment practices. These practices correspond with direct and indirect forms of discrimination ('disparate treatment' and 'disparate impact'). Besides these two modalities, which also gained recognition outside the US, Title VII forbids a third form of discrimination. According to this title, employers are required to cater for religious practices, unless the employer can demonstrate that s/he is unable to reasonably accommodate the job applicant’s or employee’s religious observance or practice without undue hardship to the employer’s business. Non-compliance with this affirmative duty constitutes discrimination under Title VII CRA.

The prohibition of discrimination on the grounds of disability was, for the first time, laid down in section 504 of the Rehabilitation Act (1973). This section provides that no individual with a disability who is otherwise qualified shall, solely by reason of his or her disability, be excluded from participation in, denied the benefits of, or subjected to discrimination under, any programme or activity receiving financial assistance. In addition, section 503 RA stipulates that any contract in excess of US$ 10.000 entered into with any federal department or agency shall contain a provision requiring that the contracting party
take affirmative action to employ and promote qualified persons with a disability ('contract compliance').

Since each of these two clauses covers only part of the private labour market, it is important that the RA was, in 1990, complemented by the ADA. This statute, a comprehensive federal non-discrimination law for people with disabilities, has one title, Title I, specifically dealing with discrimination in employment. This Title covers almost the entire private labour market. Title I ADA has largely been modelled on Title VII CRA, although it builds on concepts and case-law developed under section 504 RA. Title I ADA forbids, as a result, three forms of discrimination:

- direct discrimination ('disparate treatment');
- indirect discrimination ('disparate impact'); and
- accommodation discrimination ('failure to provide effective (or: reasonable) accommodation').

Deviation from these standards is only permissible provided that the employer can demonstrate that:

- the job applicant or employee with a disability poses a direct threat to him/herself or others;
- the criteria used which screen out or tend to screen out job applicants or employees with a disability are job-related and consistent with business necessity; or
- the accommodation needed for the job applicant or employee with a disability would impose undue hardship on the operation of the business.

No other justifications for deviation from the equal opportunities norm are recognised under the ADA.

Besides the contract compliance provision under section 503 RA, under the ADA courts are entitled to require an employer to undertake affirmative action in hiring and promotion in order to remedy past discrimination of disabled people ('affirmative remedial order' or 'court ordered affirmative action'). In addition to these State powers the federal government has taken various measures to enhance and facilitate the employment of disabled people, including the introduction of tax credits and benefits, and the establishment of the Secondary Injury Funds to counterbalance financial risks incurred by employers by employing a disabled person in relation to premiums levied by workers’ compensation programmes. These measures pale in comparison with the array of (re)-integration measures introduced in the Netherlands. This difference reflects the non-recognition of social rights in the US, which inhibits the federal government from taking social policy measures.
In conclusion, and in response to the third question, it is submitted that US law offers a high level of protection against discrimination on grounds of disability in the private labour market. The law protects job applicants and employees alike. Title I ADA and section 504 RA also regulate the performance of pre-employment medical examinations and restrict the employer’s right to ask health and disability-related questions.

In the US, the removal of physical and social barriers which obstruct the job opportunities of people with disabilities is primarily perceived as the responsibility of private parties. This idea is not fully compatible with the ‘new approach’ to the rights of people with disabilities which also builds on social human rights. According to this approach, the State has its own responsibility, which entails the duty to support private parties when removing obstacles which impede the societal integration and participation of people with disabilities. Despite this shortcoming, US law offers a fairly adequate level of protection of the job opportunities of disabled people. Employers who incur expenses when employing or promoting people with disabilities are entitled to financial compensation in the form of tax incentives and have to pay lower premiums to workers’ compensation programmes.

3 Recommendations

Inspired by US law and practice, the following recommendations are made to enhance the compliance of Dutch law with the requirements enshrined in the right to work and the right to equal treatment, with the ultimate objective of guaranteeing equal access to employment for people with disabilities in the Netherlands (Chapter xi).

3.1 A prohibition of discrimination on grounds of disability

A legal prohibition of discrimination on grounds of disability in the labour market seems indispensable. The following factors may be taken into account when preparing such legislation.

a Standard

It is recommended that the prohibition of discrimination on grounds of discrimination be included in a statute which forbids both direct and indirect unequal treatment, with the exception of cases in which there is an objective justification for such treatment. This act should cover all stages of the pre-employment stage, from recruitment and selection to the conclusion of an employment contract. It seems, in view of the various disabilities which can
be distinguished and the wide-ranging justifications for employers for differentiating on grounds of disability, unfeasible to exhaustively describe what constitutes permissible forms of unequal treatment (‘closed model’). Instead, it is recommended that the same standard of review be applied as applies in cases of alleged indirect discrimination on grounds of sex. The explanatory memorandum, if not a special regulation, should explain how the concept of objective justification should be interpreted and applied with respect to disability.

b Accommodation discrimination

Contrary to the practice in the US legal system, in the Dutch system it seems inappropriate to categorise the denial of effective accommodation to a job applicant or employee with a disability as a third and separate entity of the non-discrimination principle. Were this US practice to be adopted, the Dutch prohibition of discrimination on grounds of disability would from the outset be out of harmony with the rest of Dutch non-discrimination law. There is furthermore no reason to do so. It can be maintained, notably from the perspective of the substantive equality theory, that failure to provide equal opportunities for people with disabilities constitutes direct discrimination, analogous to discrimination on the ground of pregnancy.

c The definition of disability

In Chapter II it was argued that none of the current Dutch statutory definitions of disability is sufficiently broad to cover all those persons who are (potentially) exposed to or the victim of disability discrimination in the labour market. For this reason a new definition of disability was formulated. This working definition reads as follows:

Disability means a restriction or restrictions which a person may encounter when seeking employment. The restriction or restrictions are the result of disease or impairment, and include restrictions which are caused by presently existing, imputed or assumed diseases or impairments, as well as related restrictions as a corollary of physical, social or legal barriers.

An examination of the ADA definition of disability does not reveal any reason to alter the above working definition. At the same time, it must be conceded that the question of what precisely constitutes a disability and which persons are covered by a non-discrimination statute containing such a definition will probably always be open to debate. It was therefore recommended that the
explanatory memorandum of a non-discrimination statute should explain, as precisely as possible, how the term discrimination should be interpreted and applied in legal practice.

d Type of regulation

The prohibition of discrimination on grounds of disability in the labour market can be guaranteed by two types of regulations:
- this norm could be laid down in the forthcoming Equal Treatment Act for People with Disabilities or Chronic Diseases (WGBH) or a similar non-discrimination act; or
- this norm could be incorporated into the Employment Contract Act, which is part of the Civil Code. This statute already contains provisions prohibiting discrimination on grounds of sex and working hours, also covering the pre-contractual phase.

Nothing precludes the legislature from choosing a combination of both options. Additionally, an amendment to Article 1 of the DC and/or the non-discrimination provisions in the Criminal Code could be considered. However, such amendments only indirectly strengthen the legal position of job applicants with a disability in the private labour market.

3.2 Legislation to promote the employment of disabled people

The conclusion that, for various reasons, the legal instruments which seek to promote the employment of disabled people fail to achieve their goal, leads to the question what changes could be made which may pave the way for the necessary improvement of job opportunities of people with disabilities. The following suggestions were made.

a Duty to accommodate

One possibility is that employers could be obliged by law to accommodate a job applicant or employee with a disability, analogous to the duty of the good employer to facilitate the re-integration of an employee with a partial labour disability (Article 7.611 CC). Such an obligation, which extends to the pre-contractual stage, can be
- laid down, by way of a general or disability-specific provision, in the Employment Contract Act; or
- incorporated into the REA, a statute which seeks to promote the (re)-integration of people with a labour disability. This act already contains a pro-
vision (Article 8), which obliges employers to re-integrate employees with a labour disability. A similar provision could be formulated with respect to job applicants with a disability.

Although both options complement each other, the second is not a complete alternative for the first. Unlike the Employment Contract Act, the REA does not confer enforceable rights upon individuals with a labour disability. As a result, the first option is, at least from the perspective of job applicants with a disability, preferable to the second.

b  Greater consistency

It was submitted that conflicting regulations deter, rather than enhance, the removal of barriers inhibiting the participation of disabled people in the labour market. More consistency between these regulations is urgently needed, particularly between the REA and the WMK.

In an effort to enhance the cohesion, it was suggested that the definition of the term ‘examination’ in Article 1 of the WMK should be altered so as to allow the employer to ask health and disability-related questions and require a medical examination of a job applicant, however, only with a view to providing effective accommodation and/or applying for a REA provision.

Furthermore, greater clarity about the job applicant’s duty to inform should be provided. It was submitted that this duty only exists during the negotiations stage. It was proposed that this duty imposed on a job applicant should correspond with a duty imposed on the employer to use the revealed information in order to explore whether the job applicant’s needs can be catered for.

c  Affirmative action

The present author is not in favour of a quota system, according to which employers are obliged to employ a certain percentage of disabled people. Instead, it is argued that there are good reasons to adopt the system of contract compliance, according to which those who conclude a contract with the State or receive financial assistance of the latter assume, in return, the obligation to take positive measures to enhance the employment of people with disabilities. In the Dutch context, such condition can easily be imposed on those in receipt of State-aid, notably grants-in-aid, although such a requirement should have a basis in the law and be made explicit to the applicants beforehand.
4 Final observations

The general conclusion of this study is that the Dutch State is expected to take the necessary steps to ensure that the law is in full compliance with the right to equal access to employment with respect to job applicants with disability. It is not the intention of the present author to suggest that equal access to employment for people with disabilities can only be achieved by taking legal measures. It is beyond question that non-legal measures, such as public information campaigns, are indispensable to the realisation of this goal. This study focused, however, on the legal position of job applicants with a disability and the recommendations are aimed primarily at improving this position.