



The Relevance of Labour Law to Sheltered Employment

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The CRPD and Sheltered Employment

- The CRPD makes no reference to sheltered employment.
- But previous international instruments did recognise a role for sheltered employment:
 - UN Standard Rules on the Equalisation of Opportunities of Persons with Disabilities of 1993
 - European Social Charter 1961 and 1996
 - ILO Recommendation No 168 of 1983

The CRPD and Sheltered Employment

- Article 27 CRPD (Work and Employment) emphasises equality and promoting employment in the open labour market.
- Sheltered employment must meet the conditions of Article 27 in order to be compatible with the Convention:
 - Must contribute to the transition to the open labour market.

United Nations High Commissioner for Human Rights, Thematic Study on the Work and Employment of People with Disabilities (2012)

“It is imperative that sheltered employment be regarded as a transitional arrangement as people move to more open forms of employment that enable them to work alongside persons without disabilities, but also one that provides ongoing support to those who, for a variety of reasons, may be unable to assume employment in the open labour market”.

United Nations High Commissioner for Human Rights

- “the right of everyone to the opportunity to gain a living by work which he or she freely chooses or accepts is not realized when the only real opportunity open to persons with disabilities is to work in sheltered facilities, often under substandard conditions”.
- “It is imperative that States parties move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market”.

Sheltered Employment and Labour Law

- As part of that transition process, and in order to combat discrimination, standard labour law must apply to workers in sheltered employment as far as possible (Article 27 (1) (a), (b) and (c) CRPD).

Sheltered Employment and Labour Law

- United Nations High Commissioner for Human Rights, Thematic Study on the Work and Employment of People with Disabilities (2012)
- “Protection from discrimination covers all forms of employment: in the open labour market as well as in sheltered or supported employment schemes. Prohibition of de jure and de facto discrimination should cover all aspects of employment, including, but not limited to, the following:

Sheltered Employment and Labour Law

- (a) Recruitment processes such as advertising, interviewing and other selection processes;
- (b) Review of hiring standards to remove indirect discrimination that places persons with disabilities at a disadvantage;
- (c) Recruitment decisions;
- (d) Terms and conditions of employment such as remuneration rates, work hours and leave;
- (e) Promotion, transfer, training or other benefits associated with employment, or dismissal or any other detriment, such as demotion or retrenchment;
- (f) Benefits related to the (non-discriminatory) termination of employment;
- (g) Victimization and harassment;
- (h) Safe and healthy working conditions”.

What does that mean in practice?

- The following rights / legislation should apply in sheltered workshops:
 - Minimum wage
 - Protection from discrimination on all grounds
 - Right to join a trade union, negotiate with employer, and take collective action
 - Right to be consulted and receive information from employer
 - Protection from unfair dismissal and right to receive redundancy payments
 - Protection under health and safety legislation
 - Right to paid leave and rest time during working week

What does that mean in practice?

- However, not all activities carried out by disabled people amount to employment, e.g. medical rehabilitation or education.
- It is important to distinguish between employment activities in sheltered workshops, where labour law should apply as far as possible, and other non-employment activities, which should be subject to other legal standards.

Distinguishing Sheltered Employment from Other Activities

- How to distinguish employment in sheltered workshops, which should be subject to labour law, from other activities?
- Judgment of the Court of Justice of the European Union: Case C-316/13 *Fenoll* (2015).
- Question: Was a person who worked in a sheltered workshop (a work rehabilitation centre) a worker and therefore protected by EU labour law (Working Time Directive)?

Case C-316/13 *Fenoll* (2015)

- Work rehabilitation centres in France provide activities for disabled people who cannot, temporarily or permanently, work in the open labour market, a sheltered work environment, work from home or be self-employed.
- The centres offer various work activities, medico-social and educational support and living arrangements which encourage personal development and social integration.

- Court: “any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”.

- The activities of the centre were intended “to ensure the personal fulfilment of a seriously disabled person by the enhancement of his capabilities and, as far as possible, to ensure that the activities entrusted to that person are of some economic benefit to the body concerned”.
- The following were not relevant in the assessment: level of productivity of the individual, origin of funds from which he was paid, or the limited amount of money he was paid (can be below minimum wage).
- However, there had to be “real and genuine economic” activity. Even though the activities at the centre had been adapted to the persons concerned, they did have a certain economic value too.

- “This is all the more true because those activities made it possible to give value to the productivity of severely disabled persons, however reduced it may be, while at the same time ensuring the social protection they are entitled to”.
- Court held: Person who worked at a rehabilitation centre could be regarded as a worker for the purposes of EU law.

Summary of Court's view

- Activity must have some economic value – low value is enough;
- Activities must be performed under direction of another;
- Wage must be received – but can be below minimum wage;
- Productivity of individual and source of funding for wage are not relevant to assessment;
- Element of social protection and non-employment activities do not mean a person cannot be a worker.