# Access to Justice in Discrimination Cases in Norway

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Anti-discrimination legislation targets actions that are the result of stereotypes, biases or thought patterns we all have to some degree. Like the general population, most judges and lawyers have no training and limited awareness of these biases and thought patterns, often without being aware of the need for such awareness. This lack of insight has a tangible impact on access to justice in discrimination cases on many levels.

First, stereotypes and biases influence the legislation itself, especially when it comes to mainstreaming other legislation. While the drafting of legislation falls outside the scope of this chapter, procedures concerning the evaluation of legislation in relation to the Norwegian Act Relating to Equality and a Prohibition Against Discrimination ((GEADA)[1] will be discussed here.

Second, these thought patterns have an impact on both the shape and the effectiveness of the institutional framework. In Norway, the relevant institutions are the Anti-Discrimination Ombud (Ombud), the Equality and Anti-Discrimination Tribunal (Tribunal) and the courts.

Third, the decision-makers themselves as well as those parties concerned, both those who have been discriminated against and those who discriminate, are affected. Many who experience discrimination don't realize that it is unlawful as well as unfair. It is also difficult to realize that you may have unintentionally discriminated against someone. This chapter looks into issues concerning legal advice as well as how the institutional framework addresses, or fails to address, these challenges.

There are additional challenges with respect to discrimination concerning access to justice that are not directly related to stereotypes, such as what can or cannot be obtained by making a complaint or taking a case to court. Are the remedies effective – and to what extent can they be?

## 1 Theoretical Framework and Method of Approach

The aim of this chapter is to assess to what extent justice, or equality, may be achieved through individual complaints concerning discrimination, as well as what may be done to improve today's complaints procedures in Norway. For this purpose, we have studied decisions by the courts and by the Equality and Anti-Discrimination Tribunal (hereafter called the Tribunal) since 2018, when there was a reorganisation of the administrative complaints procedure. We have selected cases on the basis of statistics from the Tribunal and within areas we know are problematic from our work in the European Equality Law Network with monitoring the implementation of the EU's equal treatment and non-discrimination directives and the Istanbul Convention.[2] The analysis is also based on our previous experiences in various roles in the anti-discrimination

[1] Act Relating to Equality and a Prohibition Against Discrimination of 16 June 2017 No. 51 (*likestillings-og diskrimineringsloven*).

[2] See the website of the European Equality Law Network, https://www.equalitylaw.eu.

field in Norway.[3] As a theoretical framework for the analysis we will use Sandra Fredman's article *Substantive Equality Revisited*.[4]

We start by clarifying what we mean by the terms *access to justice* and *discrimination*. We then look at access to justice in concrete discrimination cases, with a view to the available procedures, how the facts of the case have been assessed, as well as how the law has been applied. We will then look at the available remedies, and how they are used in practice. Finally, we will discuss how the existing complaints procedures may be improved.

### *1.1 Access to Justice*

The right of access to justice stems from Articles 6 and 13 of the European Convention on Human Rights (ECHR), Articles 2 (3) and 14 of the UN International Convention on Civil and Political Rights (ICCPR), and the anti-discrimination conventions[5] containing articles concerning equality before the law. Access to justice contains two main parts: the right to a fair trial, including disputes concerning civil rights, and the right to an effective remedy. In discrimination cases, the right to fair trial contains two main aspects: First, it includes receiving sufficient help to present the relevant facts and evidence concerning your case. Second, it includes a fair assessment of the justification of any differential treatment to which you have been subjected. Justice within anti-discrimination law is *equality*.

### *1.2 Substantive Equality as Justice*

The interpretation of the term *equality* keeps evolving, as does the interpretation of the anti-discrimination human rights conventions. A formal interpretation is insufficient for achieving real equality. Sandra Fredman, in her article *Substantive Equality Revisited*, reviews numerous ways of interpreting the term, aiming at providing 'an analytical framework to illuminate better the multi-facetted nature of inequality and to assist in determining whether actions, practices or institutions impede or further the right to equality'.[6] Fredman focuses on the practicalities of enhancing equality and removing unfair inequality, dividing it into four different dimensions which should be seen as interconnected: recognition, redressing disadvantage, participation, and accommodating difference and structural change. Her four dimensions of equality are a useful approach to interpreting anti-discrimination human rights

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[3] Both of the present authors worked for the Equality and Anti-Discrimination Ombud when this was the first instance of the complaints mechanism. Marte Bauge has also worked as a deputy judge, while Lene Løvdal has worked with anti-discrimination law for several non-governmental organisations.

[4] Sandra Fredman, '*Substantive Equality Revisited*', (14(3) I·CON 2016) 712.

[5] International Convention on Elimination of All Forms of Racial Discrimination 1965 (ICERD); Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW); and Convention on the Rights of Persons with Disabilities 2006 (CRPD).

[6] Fredman at 713.

conventions since they systematise many of the ideas behind the conventions as well as their aims.

In individual complaints concerning discrimination, *recognition* will often take the shape of the detection of a stereotype. This may take the shape of a generalisation about a person based on one characteristic, such as ethnicity, or of a norm concerning what is 'normal' which excludes some people, such as the heterosexuality norm, whiteness norm, ability norm or gender norm, which may have led to unjustified and unreasonable treatment in the case at hand.

Equal treatment of individuals with very different constraints can replicate disadvantage. One of the functions of the right to substantive equality is therefore to *redress disadvantage*. This includes removing obstacles to genuine choice, while it also needs to be recognized that choice itself can be problematic, since people often adapt their choices to their circumstances. For example, women might prefer part-time work even at a low wage, because it allows them to combine paid work and childcare. The fact that significantly more women than men make this choice should not imply that equality is achieved. Instead, part-time work may be seen as something that discriminates women if most of those who work part time are women and this leads to disproportionate, unjustified and/or unnecessary disadvantages for women.

Fredman focuses primarily on socio-economic disadvantage, but also on structures which exclude people from determining their actions[7] or deprive them of genuine opportunities to pursue their own choices. In Norway, such self-determination is particularly contested in cases concerning the right of persons with cognitive disabilities to decide where they want to live. Self-determination is also a key issue for transgender persons, both when it comes to recognition of their identity by the law, but also when it comes to the need for health care, especially gender confirming procedures.

*Participation* is the third dimension of Fredman's substantive equality. One aspect of this is *political voice*. This includes for example representation of openly homosexual persons at the Norwegian parliament or in political parties, but also who and what perspectives are included in the process behind various types of legislation. Such perspectives are often overlooked unless it is very evident that these perspectives are relevant for persons with disabilities. For the purposes of this chapter, this aspect is particularly relevant when it comes to the power of the courts and the Tribunal to assess whether legislation or regulations are in accordance with the anti-discrimination legislation. The second aspect of participation is *social inclusion*, recognising 'the importance of community in the life of individuals.'[8] In practice, the main barrier to or provider of such participation for persons with disabilities is the municipality where they live.

The fourth aspect of Fredman's substantive equality is to *respect and accommodate difference* by 'removing the detriment but not the difference itself.'[9] This implies changing the existing social structures rather than requiring members of out-groups to conform to the dominant norm, often called 'transformative equality'. In practice, this means for example taking measures

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7 Fredman at 729.

8 Ibid., 732.

9 Ibid., 733.

to ensure that both parents can take parental leave or work full time while being parents for small children. There are several challenges to this accommodation. First, is it enough to make exceptions to the norm, or does the norm itself need to be changed? The answer will depend on both the context and the norm. Second, structural change is often costly. Third, it is often difficult to identify the person or institution at fault, making it unclear who should pay the cost.

### *1.3 The Legal Framework*

The GEADA entered into force on 1 January 2018, at the same time as the reorganisation of the equality bodies regulated in the Equality and Anti-Discrimination Ombud Act (EAOA).[10] The protected grounds in the GEADA are gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors. *Ethnicity* includes national origin, descent, skin colour and language. The Working Environment Act (WEA)[11] covers age, political views, membership in trade unions, and part-time and temporary work, but only in employment or similar situations. The Human Rights Act[12] incorporates a number of treaties on human rights into the Norwegian legal system, giving the conventions precedence over any other conflicting statutory provision. This includes the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is included in the GEADA, the legal consequence being that ICERD does not prevail over other statutory provisions in the event of conflict but must be decided through interpretation. The UN Convention on the Rights of Persons with Disabilities (CRPD) is ratified, but not incorporated into Norwegian law.[13]

The GEADA and WEA should also be interpreted in line with Chapter 98 of the Norwegian Constitution,[14] which states: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.[15]

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[10] Act Relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal of 16 June 2017 No. 50. (*Diskrimineringsombudsloven).*

[11] Act Relating to Working Environment, Working Hours and Employment Protection, etc. of 17 June 2005 No.62. (*Arbeidsmiljøloven*).

[12] Act Relating to the Status of Human Rights in Norwegian law of 21.05.1999 No. 30 (*Menneskerettsloven*).

[13] Proposition to the Parliament on Consent to Ratification of the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities Prop. 106 S (2011–2012) and Changes to the Anti-Discrimination Ombud's Act on the Supervision of Implementation of the UN Convention on the Rights of Persons with Disabilities, Prop 105 L 2011-2012 on Changes to the Anti-Discrimination Ombud's Act on the Supervision o of implementation of the UN Convention on the Rights of Persons with Disabilities.

[14] The Constitution of the Kingdom of Norway of 17 May 1814 (*Kongeriket Norges Grunnlov*).

[15] See also the preparatory works to the constitutional clause; Dok 16 (2011-2012), Report on Human Rights in the Constitution from the Constitutional Committee to the *Storting*

## 2 Two Paths to Justice

What are the procedural barriers on the path towards justice? In Norway, you may choose between two paths for having your complaint concerning discrimination assessed. You may take your case to the court system or have your complaint assessed by the Tribunal.

### *2.1 The Institutions*

Litigation is an expensive and long process where you risk paying the legal fees of the other side if you lose, as Norway applies the loser-pay rule. Some discrimination issues may only be assessed by the court, however. For example, while the Tribunal has the authority to assess whether government regulations are in accordance with the GEADA, only the courts may assess whether legislation is discriminatory. While the courts may assess all relevant legislation, they generally choose the easiest solution. This often means that courts in discrimination cases choose not to assess the question of discrimination if there is an easier basis for a decision, for example, as done in Court of Appeal case LB-2019-53935.[16]

The other possibility is to have the complaint assessed by the Tribunal, which requires no fees, no representation by a lawyer, and no risk of having to pay large sums if you lose. The Tribunal is an administrative body with limited powers to make decisions in discrimination cases. The members of the Tribunal are appointed by the Government for four years. These members have other full-time positions. They are all jurists, and the leaders of the four chambers must have the same qualifications as judges or have experience as such, unless other qualifications make such experience unnecessary. The Tribunal also has a secretariat, whose staff are civil servants, who prepares the cases. The Tribunal may only apply the GEADA and the chapters of the WEA in their assessment of complaints, as well as human rights conventions and the Constitution, which provide information on how the GEADA and the WEA should be interpreted. The Tribunal has at their disposal most of the sanctions available to the courts.

The Ombud is the second equality body in Norway. Their role is to provide advice in individual cases, monitor the United Nations' antidiscrimination conventions, and promote equality for all the protected groups in all areas of society.

(Parliament), Chapter 6, available in Norwegian at http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf.http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf.

16 Judgment of 17 July 2020.

### *2.2 The Court Procedure*

Court proceedings in civil cases are regulated in the Norwegian Dispute Act.[17] A basic principle of Norwegian law is that the parties must be aware in advance of the claims and evidence that will be presented in court. It is important that written evidence is presented at the stage of case preparation. Written evidence presented for the first time during the trial can be rejected or cause the case to be postponed.

Judicial mediation during a civil case is common in cases where the parties and the judge find this reasonable, and there is a fair chance that the case can be settled through mediation. The judge has a duty to consider if a case has the potential to be settled until the very last day of the trial. This rule applies to discrimination cases, particularly when a claim for compensation has been made. A settlement requires, however, acknowledgement of the claim by the other party. In practice, this rarely happens in discrimination cases.

Once the case preparation is concluded, the case will be considered in the trial. The judge has a duty to advise the parties during the trial. This includes help to provide the legal arguments and to formulate a claim. The parties themselves are responsible for collecting evidence and presenting their arguments. The strict rules on case preparation in the courts stated in the Dispute Act may make it easier for the parties to present evidence compared to the procedure in the Tribunal.

### *2.3 The Tribunal Procedure*

The Tribunal has a duty to investigate before making decisions, which the courts do not have. Their investigation must follow the procedural rules set forth in the Public Administration Act,[18] unless otherwise specified in the EAOA. This includes a duty to provide guidance for those making complaints.

While the 2018 reorganisation simplified the procedure and gave the Tribunal the possibility to order more sanctions, it also made the Tribunal procedure written instead of oral, as a main rule.[19]

### *2.4 Legal Aid*

There is no free legal aid in discrimination cases, by which we mean representation by a lawyer who is paid by the state. In practice, this means that a person may receive free legal aid in cases of unfair dismissal if taken to court, but not for the parts of the case that concern discrimination, and not at all if they take it to the Tribunal. One of the aims of having an administrative procedure as an alternative to the courts is to avoid the costs of legal representation including

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[17] Act Relation to Mediation and Procedures in Civil Disputes of 17 June 2005 No.90 (*Tvisteloven*).

[18] Act Relating to Procedure in Cases Concerning the Public Administration of 10 February 1967 (*Forvaltningsloven*).

[19] Section 9 EAOA.

the risk of having to pay the fees of the other party's lawyers if you lose.[20] This risk is considerable.

The court can exempt the opposing party from liability for legal costs in whole or in part if the court finds compelling grounds to justify such exemption.[21] The court may consider whether the case is important to the welfare of the party and the relative strengths of the parties justifies an exception from such liability. This is not enough in itself, though. In order to be exempted from paying the cost, the decision must have concerned matters of principle or other significant reasons for having the case tried before the courts. A case concerning the right of persons with cognitive disabilities to decide where they want to live was not considered such, and each person thus had to pay around EUR 15 000 for the procedures before the courts.[22] The financial aspects of taking a discrimination case to the courts thus constitutes a significant barrier to access to justice in cases before the courts.

The main risk for the complainant in taking the case to the Tribunal is if the Tribunal concludes that no discrimination has taken place, when in fact the only thing they have found was that there was no *proof* of discrimination. In such cases, the complainant may be left with even less equality and justice than before the complaint, depending on how the conclusion is phrased. The main challenge concerning access to justice before the Tribunal is thus not financial, but rather to have your case thoroughly assessed.

Most complainants before the Tribunal do not have legal representation. Presenting your case in writing when you do not know the law and have little experience of presenting such matters or what type of proof is needed is difficult for a complainant even before the Tribunal. The written procedure makes it more difficult for some to provide the relevant information.

However, it is possible to achieve access to justice without legal representation before the Tribunal. Of 129 cases where a breach was found by the Tribunal,[23] 16 complainants were represented by non-governmental organisations (NGO), three by lawyers and 14 by trade unions.[24] We do not know how many of the complainants received legal advice when drafting their complaints, but one of the main activities of the Ombud is to provide such advice for people who think they may have been subject to discrimination.[25] Since 2017, the Ombud has given legal advice to approximately 2 000 persons per year.[26]

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20 Sections 2-20 Dispute Act.

21 Sections 20-2 (3) Dispute Act.

22 Case no. LE-2018-145654-2. (Eidsivating Court of Appeal) of 11 November 2019.

23 From 1 January 2018 to 30 September 2021.

24 In five cases no information on this was available due to anonymisation of all of the facts.

25 In 2019 they also represented the complainant in two complaints to the Tribunal in case nos. DIN-2019-13 and DIN-2019-114.

26 The Equality and Anti-Discrimination Ombud (LDO) *Diskrimineringsretten 2020. Rettsutvikling på likestillings- og diskrimineringsfeltet, med gjennomgang av relevante lovendringer, forvaltnings-og rettspraksis* (Discrimination Law 2020, Development in the Field of Discrimination Law, Changes of Acts and Practice) (2021) 7.

NGOs and the Ombud play a vital role in access to justice in discrimination cases. Several NGOs provide information to their target groups about the GEADA, and many provide legal aid as well. NGOs may engage in both civil and administrative proceedings according to the general rules of the Public Administration Act,[27] and the Dispute Act.[28] In discrimination cases, the requirement is that the organisation must have a 'purpose, wholly or partly, to oppose discrimination' according to the grounds as prohibited by law'[29] While the trade unions most often take action in cases concerning gender or parental leave, they have assisted in two cases concerning ethnicity and one concerning disability which led to a positive result for the complainant. NGOs and the Ombud often bridge the gap between experienced injustice and taking legal action. More research is needed on the less formal parts of the assistance in discrimination cases as offered by the ombud, NGOs and trade unions.

It is noteworthy that there has been no legal representation by NGOs or others in cases before the Tribunal concerning sexual orientation and gender identity, and that no breaches of the GEADA have been found since 2018 in cases concerning these grounds. There were also very few cases with legal representation which concluded with discrimination on the basis of ethnicity or religion. The Ombud concluded that in ethnicity cases the determining factor for whether a breach was found was whether the facts were contested or not.[30] A lack of legal aid may thus create more challenges concerning access to justice for some groups than others.

Even with this access to legal advice, only 20 % of the complaints ended with a conclusion of discrimination, not counting those which were withdrawn or rejected for procedural reasons. This may indicate that there are other challenges concerning access to justice during the Tribunal procedure.

### *2.5 Which Path to Choose, Court or Tribunal?*

Should a complainant choose the court or the Tribunal? Some discrimination cases cannot be assessed by the Tribunal, for example those concerning whether an Act of parliament or a judgment is discriminatory. Other cases, like harassment outside employment, lack effective remedies from the Tribunal, as discussed below. When the only available procedure is the courts, the lack of free legal aid is a matter of concern. So is the narrow interpretation of what is a matter of principle, in order to have the matter settled without having to pay the cost of the opponent even if you lose the case.

Recognising stereotypes is also an issue at the courts: There are no rules or guidelines to ensure that the judges or lay judges are trained in discrimination issues or, in the case of lay judges, even to ensure that they are not openly and

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[27] Section 12 Public Administration Act.

[28] Sections 1-4 and chapter 3 Dispute Act.

[29] Section 40 GEADA and Sections 13-10 WEA.

[30] The Equality and Anti-Discrimination Ombud (2021); '*Diskrimineringsretten 2020*' (Discrimination Law 2020) 42.

actively racist.[31] While there is no such training for members of the Tribunal, and they are no longer recruited through recommendations from the anti-discrimination NGOs, they are at least specialized in assessing both facts and legal issues in discrimination cases.

Almost none of the complainants since 2018 chose the courts. There are no complete statistics concerning court cases, since not all are published and some end with an agreement after mediation before the court procedure has ended. From 2018 to 2021 only nine cases have been published, and most of the cases brought to the courts are about gender and pregnancy. In the following, we will therefore focus on the Tribunal.

## 3 Establishing a Presumption of Discrimination in Practice

What are the facts in a discrimination case? Recognising possible discrimination is not something that a typical lawyer is trained in, any more than the general population. While knowledge about relevant stereotypes and norms are essential for discovering the facts of the case, some legal tools for improving the assessment of the facts have been developed in EU law and are part of Norwegian anti-discrimination law. These are establishing a presumption of direct and indirect discrimination, and the shared burden of proof.

By *prejudice* we mean an attitude directed toward people because they are members of a specific social group.[32] *Attitudes* in this context are evaluations of or emotional responses to an entire social group or individual members of that group.[33] *Systemic discrimination* is 'patterns of behaviour that are part of the social and administrative structures of the workplace, and that create and perpetrate a position of relevant advantage for some groups, and privilege for other groups, or for individuals on account of their group identity.'[34]

According to the GEADA, *discrimination* means direct or indirect differential treatment that is not justifiable.[35] It is justifiable if it has a legitimate aim, is necessary and if the aim is proportionate to the disadvantages the differential treatment creates.[36] Several of the non-discrimination directives are not

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[31] Norwegian NGOs (2018) *NGO Alternative Report to CERD 2018*, paragraphs 308-311, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fNGO%2fNOR%2f32995&Lang=en.https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT %2fCERD %2fNGO %2fNOR %2f32995&Lang=en.

[32] Mary E. Kite and Bernard E. Whitley, Jr, *Psychology of Prejudice and Discrimination* (Third edition, Routledge, 2016) 15.

[33] Ibid.

[34] Carol Agoes, 'Systemic Discrimination in Employment: Mapping the Issue and the Policy Responses' in C. Agoes (ed) *Workplace Equality, International Perspectives on Legislation, Policy and Practice,* (Kluwer Law International, 2002) 3.

[35] Section 6(4) GEADA.

[36] Sections 9, 10 and 11 GEADA.

incorporated in the European Economic Agreement, but the protection of the directives has been reinforced by judgments of the Supreme Court.[37]

### *3.1 Presumption of Direct Discrimination*

*Direct differential treatment* means 'treatment of a person that is worse than the treatment that is, has been or would have been afforded to other persons in a corresponding situation' on the basis of the protected grounds.[38] Direct differential treatment will often constitute prejudice put into action.

According to the *Handbook on European non-discrimination law*,[39] 'what must be proved in a case of discrimination is simply the existence of a differential treatment based on a prohibited ground, which is not justified' cannot regulate individuals' attitudes since they are entirely internal. Rather, it can only a regulate actions through which such attitudes may manifest themselves. In the following we define stereotypes as 'beliefs and opinions about the characteristics, attributes, and behaviours of members of various groups'.[40] In practice, the causal link is often the most difficult thing to prove, and where the shared burden of proof is the most useful.

When it comes to *direct discrimination*, there are numerous ways to establish a presumption of discrimination. One is to prove a certain recurrence of unfavourable treatment towards persons sharing a protected characteristic, for example of repeated refusals of persons with a certain ethnic background to enter a pub. One may also use a comparator, for example by proving that a person with similar age, gender and clothing but with an ethnic majority background was let into the pub. A hypothetical comparator is often more practical, since it most often is difficult to provide a real comparator. In practice, this usually means finding indicators of a causal link through the actions of the one accused of discrimination.

Oral expressions of prejudice may be difficult to prove, but witness statements are allowed before the Tribunal.[41] In practice, this means that the Tribunal must be able to see the expressions as prejudiced. This is particularly relevant in cases concerning harassment, but also when oral expressions may be seen as indicators of other types of discrimination. Recognising negative stereotypes thus become part of the assessment of the facts in the case.

Written expressions of a prejudice, against for example Muslims in general or the Muslim job applicant in particular, are the easiest to assess, but often non-existent, or not witnessed by anyone but the complainant. It is therefore necessary to take a close look at the involved parties' actions. If an employer

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37 Case no. HR-2017-219-A. (Norwegian Supreme Court) of 30 January 2017.

38 Section 7 GEADA.

39 European Union Agency for Fundamental Rights and European Court of Human Rights *Handbook on European Non-discrimination Law (2018 edition)* 239.

40 Mary E. Kite and Bernard E. Whitley, Jr, *Psychology of Prejudice and Discrimination* (Third edition, Routledge, 2016) 13.

41 Section 3 of the Regulations Concerning the Organisation, Tasks and Procedures for the Equality Tribunal (*Forskrift om organisasjon, oppgaver og saksbehandling for Diskrimineringsnemnda*) of 20 December 2017 no. 2260.

deviates from normal behaviour right after an employee has revealed their disability or sexual orientation, both the changing behaviour and the time factor may be seen as indicators of a causal link between differential treatment and a protected ground.

Even a change in the behaviour of the complainant may be of relevance. In Tribunal case no. DIN-2018-96, the complainant had been physically searched after being accused of theft in a shop. The manager of the shop had encouraged the employees to involve the security personnel too often rather than too seldom. The complaint was made the evening after the occurrence, and the events described in the complaint were most likely a differential treatment based on the person's visible ethnic background. This was enough for the Tribunal to consider that a presumption of discrimination was established.

Sometimes the actions speak for themselves. In a French case, the employers took advantage of the fact that their domestic employee was a foreign national and in an irregular situation. Their disregard of her contractual legal rights was seen as enough to establish a presumption of discrimination.[42]

### *3.2 Presumption of Indirect Discrimination*

*Indirect differential treatment* means any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others based on the protected characteristics.[43] Some stereotypes constitute norms about what is 'normal', often, but not always, based on characteristics belonging to a majority of the population, either through numbers or through power. Such norms are often the basis of indirect differential treatment by overlooking those who do not belong to the norm in question, for example homosexual persons breaching the norm of heterosexuality. The triggering of negative emotions based on stereotypes is therefore less often an issue, instead overlooking or disregarding diversity is the key feature of indirect discrimination.

In order to establish a presumption of indirect discrimination, the complainant needs to establish that the contested measure constitutes a disadvantage and that this disadvantage is likely to affect persons possessing a protected characteristic more than others. One way of demonstrating such a disadvantage is to produce statistics on the impacts on various group groups this has for example been used many times regarding sex discrimination before the Court of Justice of the European Union (CJEU). [44] However, such statistics are often difficult to obtain, and in practice it is sufficient to show that the measure has an adverse impact mainly or specially members of a protected group. For example, rules concerning uniforms at a workplace create a disadvantage for persons with religious convictions requiring clothing that does not conform to these rules.

One of the reasons behind the protection against discrimination is widespread norms such as the hetero norm, whiteness norm, ability norm, and gender norms

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42 Cour de Cassation, Chambre sociale, no.10-20.765, 3 November 2011.

43 Section 8 GEADA.

44 Ringelheim, Julie, 'The Burden of Proof in Anti-Discrimination Proceedings. A Focus on Belgium, France and Ireland.' (2019), 2 European Equality Law Review 49, 54.

such as gender stereotypes and the cis norm, or stereotypes that are common assumptions about what is 'normal'. They therefore tend to create disadvantage for those who don't conform to these norms. A good understanding of such norms is thus essential for making good assessments of both the facts and the interpretation of the law.

### *3.3 Dismissing Complaints and the Lack of Investigation*

The Tribunal has since 2018 a wider authority than before to dismiss a complaint for being 'clearly not in breach' of the GEADA or WEA or if it is impossible to obtain sufficient proof to reach a decision. In practice, most of the dismissals from 1 January 2018 to 31 September 2018 were made on the basis that there had not been established a presumption of discrimination. Forty-five percent of all the Tribunal's decisions from January 2018 to September 2021 were dismissals, often with little explanation of the decision. This does not include cases which were rejected for procedural reasons.[45]

The Tribunal is a low-threshold complaints mechanism for individuals with a variety of resources and backgrounds. Their duty to investigate should therefore include asking concrete questions about the facts in the case, including any facts indicating a causal link between the differential treatment and the protected characteristic. Still, the Tribunal has in several cases interpreted their duty to investigate in a very limited manner.[46] For example, in Tribunal case no. DIN-2018-249, the Tribunal stated that since there was no indication in the initial complaint that the complainant's disability and language were the reasons behind her not being recruited to the position, the burden of proof was not transferred to the employer, and the case could be dismissed.[47] If the complainant doesn't provide any information to support their claim that there has been a differential treatment or result *because* of a protected ground, the Tribunal does not investigate further and dismisses the case.

When the Tribunal dismisses a complaint, they inform the complainant that they cannot reopen a dismissed case.[48] They also state that the dismissal cannot be appealed to the courts. While this is technically correct, any complaint may be assessed by the courts, so the information provided by the Tribunal is somewhat misleading.

In its yearly report on discrimination law,[49] the Ombud raised several concerns regarding the Tribunal's work: First, the number of rejections or dismissals of cases where the reasoning is so briefly described that it is often impossible to understand why the case was dismissed. The second concern is that a dismissed case may not be reopened according to the Ombud's legal

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45 The Tribunal may also reject a complaint if the complainant has no legitimate interest in the outcome, or if the claim is too old.

46 See, for example, Tribunal case no. DIN-2018-249.

47 See, for example, Tribunal case no. DIN-2019-103

48 See, for example, Tribunal case no. DIN-2021-25.

49 The Equality and Anti-Discrimination Ombud (2021); '*Diskrimineringsretten 2020'* (Discrimination Law 2020)

interpretation. The Ombud therefore recommends that the Government clarifies the EAOA so that dismissed or rejected cases may be reopened, and that the Tribunal explains their dismissals and rejections more thoroughly. The Ombud also recommends that the extent of the Tribunal's duty to investigate is clarified.[50] While there is a duty for the respondents to answer any enquiries by the Tribunal, the Tribunal also lacks effective sanctions to make them fulfil this duty.

The Tribunal's current limited interpretation of its duty to investigate, in combination with an almost complete lack of access to a reassessment of a dismissal of a complaint, create a significant barrier to justice.

### *3.4 Justice for All? Group Differences*

Of 1066 complaints to the Tribunal from January 2018 to September 2021, the Tribunal assessed the complaint in 640 cases.[51] Of the latter, approximately 13 % concerned age, 33 % disability, 30 % ethnicity or religion, 28 % gender or pregnancy, 3 % gender identity and 1 % sexual orientation.[52] A few concerned other grounds, such as political views.

Some protected grounds have a level of dismissals significantly higher than average in the Tribunal. Of the complaints which concerned ethnicity, religion, gender identity and sexual orientation, 60 % or more were dismissed. Of 129 cases where a breach was found,[53] 33 had legal representation.[54] In the sexual orientation and gender identity cases, none had legal representation, but several cases concerning ethnicity had. While it is a disadvantage not to have legal representation, it is clearly not sufficient to explain the differences between groups.

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[50] The Equality and Anti-Discrimination Ombud (2021); '*Diskrimineringsretten 2020'* (Discrimination Law 2020) chapter 2.5.4.

[51] Due to the quality of the data from the Tribunal, there are no accurate numbers concerning complaints. Any fairly accurate numbers concern the complaints which have been assessed. See 'Søk i statistikk' (Search statistics) at the Tribunal's website; www.diskrimineringsnemnda.no.

[52] Some complaints concern several grounds and are counted several times. There are a few cases concerning other grounds, such as political views and membership in a trade union.

[53] From 1 January 2018 to 30 September 2021.

[54] In five cases no information on this was available due to anonymisation of all of the facts.

Table 1: Analysis of Tribunal Cases 2020

| | Total number of cases[55] | Dismissal of the complaint | No discrimination | Discrimination[56] |
|---|---|---|---|---|
| All cases | 640 | 45 % | 35 % | 20 % |
| Age | 83 | 42 % | 41 % | 17 % |
| Disability | 213 | 33 % | 41 % | 25 % |
| Ethnicity | 162 | 65 % | 24 % | 11 % |
| Religion | 35 | 60 % | 26 % | 14 % |
| Gender | 145 | 51 % | 37 % | 12 % |
| Pregnancy and parental leave | 61 | 20 % | 46 % | 34 % |
| Gender identity | 21 | 62 % | 43 % | 5 % |
| Sexual orientation | 7 | 71 % | 29 % | 0 % |

In its analysis of the Tribunal's cases in 2020, the Ombud found that the common feature in ethnicity cases which ended with a conclusion of unlawful discrimination was that the facts were uncontested.[57] Many complaints, including many which concerned hiring procedures, were dismissed because the complainant had not described any circumstances indicating that their ethnicity was the reason for them not obtaining the positions in question.

This problem is not new: The Ombud has also studied cases concerning ethnicity in employment in depth in an unpublished report from 2012, to investigate why a breach was found in significantly fewer cases concerning ethnicity than other grounds (except disability).[58] While the Ombud did not find any obvious explanations, it was clear that the facts in many of the cases did not indicate discrimination. On this basis, they concluded that the lack of transparency in the hiring procedures together with the employers' legitimate use of discretion makes the level of proof required from the complainant rather high and that the complainants should be made aware of the level of proof required. They further stated that they should improve their advice to these groups, including providing written examples of sufficient evidence, and that they should increase their level of investigation.[59] These conclusions still appear valid for ethnic minorities' access to justice in discrimination cases.

Recognition of stereotypes is another issue of concern for at least some groups. For example, in Tribunal case no. DIN-2018-452 the question was whether the complainant and his partner were denied fertility treatment because he had previously gone through gender-affirmation treatment. It was his female partner who was to undergo fertility treatment. The hospital had to some extent

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55 Decisions by the Tribunal from 1 January 2018 until 15 September 2021. Complaints dismissed for procedural reasons, such as being older than 3 years, or where the case has been filed due to lack of response from the complainant when the Tribunal investigated the case, are not included in these numbers.

56 This includes cases where the Tribunal concluded with a partial breach of the GEADA.

57 The Equality and Anti-Discrimination Ombud (2021); '*Diskrimineringsretten 2020'* (Discrimination Law 2020) 42.

58 The Equality and Anti-Discrimination Ombud (2012), *Analyse av etnistet- og arbeidslivssaker*, (An analysis of cases from work and ethnicity).

59 Ibid.12.

refused treatment on the grounds the complainant had undergone gender affirmation treatment. The Tribunal dismissed the complaint as being 'clearly not' discrimination, a decision which also has been criticised by the Equality Ombud.[34] This dismissal can be seen as an example of a lack of recognition of the stereotypes and norms concerning gender identity. A breach was found in only one gender identity case, and in no sexual orientation cases, while more than 60 % of the complaints were dismissed. Gender identity has only been explicitly protected against discrimination in Norwegian law since 2014, and sexual orientation was until that same year only protected in employment. More knowledge in the Tribunal about norms and stereotypes concerning sexual orientation and gender identity might improve access to justice for these groups.

In the Tribunal, few members seem to have any considerable experience in the anti-discrimination field.[60] Since 2018 the Tribunal members are recruited on the basis of the qualifications in law in general, and most work as judges, while previously Tribunal members were recruited through recommendations from NGOs in the sector. In 2019 there were only jurists among those preparing the cases as well, while the Ombud as first instance had a broad range of qualifications among its employees, even if only lawyers formally assessed the cases. The knowledge of stereotypes and mechanisms behind discrimination is therefore not at the same level as before 2018. Since the reorganisation there is thus an increased risk of overlooking widespread stereotypes, and several of the dismissals appear debatable, especially those concluding that the matter is 'clearly not in breach of' the anti-discrimination legislation.[61]

### *3.5 A Presumption Dismissed: Pregnancy and Parental Leave Before the Tribunal*

Once a presumption of discrimination has been established and the burden of proof has been moved over to the respondent, the respondent has two choices: To disprove that there has been a differential treatment on the basis of a protected characteristic, or to justify the differential treatment. The latter is addressed below. The cases concerning pregnancy and parental leave have benefited from the clearer rules concerning the establishment of a presumption of discrimination and have been assessed more often than those concerning other characteristics and have a significantly higher percentage of conclusions of discrimination. Still, all except one ended with a conclusion that there was no differential treatment or causal link to the pregnancy or parental leave. The Tribunal found that the employers had shown that there was either no real differential treatment, or no causal link to the pregnancy or parental leave.

The Tribunal does not explicitly apply EU law in these decisions. The protection of pregnancy, maternity and parenthood has been one of the aims of

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60 See https://diskrimineringsnemnda.no/nemndas-medlemmer,https://diskrimineringsnemnda.no/nemndas-medlemmer, read 1 September 2021.

61 As provided in Section 10(2) EAOA. See, for example, Tribunal case no. DIN-2018-239, which is, at best, too brief to justify the dismissal. The Ombud also mentions these issues in their yearly report on discrimination law from 2019 and 2020.

EU law, and several treaties and directives have been gradually developed in the EU.[62] In addition, the Tribunal is not consistent in its application of the shared burden of proof. In Tribunal case no. DIN-2018-40, the Tribunal moved the burden of proof over to the respondent but found that the employer had managed to disprove that there had been a differential treatment because of pregnancy or parental leave. In Tribunal case no. DIN-20-250, on the other hand, the Tribunal doesn't discuss the burden of proof, and simply states that the complainant had not been discriminated and argued that the police district had assessed her application against the said provision, concluding that the desired working hours would lead to significant disadvantages in the form of organizational challenges and increased burden on other employees.

## 4 Justified Differential Treatment

After discovering or recognising direct and indirect differential treatment, assessing whether this differential treatment is justifiable may be seen as the main test concerning the Tribunal's understanding of substantive equality. At this stage, the Tribunal balances other interests against the differential treatment of ethnic minorities, persons with disabilities etc. It may redress disadvantage, take steps towards structural change, or ensure participation through social inclusion or political participation. In this chapter we look into how the Tribunal assesses justifications of differential treatment in practice. Two areas where the Tribunal often see differential treatment as justified, are accommodation at work and municipal services to persons with disabilities. In the following we will take a closer look at these two areas, in addition to a general assessment of access to justice and justification of differential treatment.

Differential treatment is allowed if it has a reasonable aim, is necessary to achieve that aim, and if the negative consequences are not disproportionate in comparison to the aim.[63] There is an absolute prohibition against differential treatment based on pregnancy in connection with recruitment or dismissals.[64] In employment relationships and in connection with the selection and treatment of self-employed persons and hired workers, direct differential treatment on the basis the protected grounds is only permitted if the characteristic in question is a

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[62] See for example Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and Recast Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[63] It should be noted that according to Section 9(3) GEADA, age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition in section 6, thus assuming that any such laws or regulations are justified, necessary and proportionate. This is a debatable implementation of EU Directive 2000//78/EC, since this means that differential treatment on the basis of age is permitted per se if it has been done so through law or a regulation.

[64] Section 10(3) GEADA. Differential treatment on the basis of pregnancy, childbirth, breastfeeding leave in connection with childbirth or adoption is only permitted if it is necessary to protect the woman, the foetus or the child or if other obvious grounds apply, according to Section 10(1) GEADA.

genuine and determining requirements for the performance of the work or the pursuit of the occupation and the conditions in the first paragraph are met.[65]

### *4.1 Legitimate Aim*

The preparatory works of the GEADA[66] provide a number of examples of aims which after a concrete assessment can be justifiable in the individual cases, such as other people's health and safety, modesty or hygiene, protection against physical, mental or financial damage, or ensuring fair and safe competition.[67] Financial reasons may be valid aims, depending on the ground of discrimination and area of society,[68] and will be part of the proportionality assessment concerning for example individual accommodation and universal design.[69] An example of an unjustifiable aim is overprotection of persons with disabilities, who as a main rule shall have the same liberty to take risks as other persons.[70] In practice, the key issue is most often whether the differential treatment is necessary or proportionate.

### *4.2 Necessity*

Is a measure or a practice necessary? While the respondent almost always will argue that it is, access to justice requires a real assessment of this issue. This may be done by looking at how reasonable it seems, or whether there exist other options, which have less negative impact for the complainant. In practice, the Tribunal often fails to assess whether alternative options exist.[71] Sometimes this seems to stem from a lack of investigation,[72] while occasionally the Tribunal seems to not take all relevant facts into consideration.[73] For example, in Tribunal case no. DIN-2018-32, a nurse who had five years of higher education from Norway, including her nursing diploma, and had worked as a nurse for six years, was required to take a language test since she didn't have a Norwegian diploma from her secondary education. The Tribunal considered this to be direct differential treatment. But they did not take her extensive education and work

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65 Section 9 GEADA.

66 Proposition to Parliament, Prop 81L (2016-2017) 'Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)'; White paper NOU 2009:14 *'Et helhetlig diskrimineringsvern'* and Proposition to Parliament, Ot.prp.44 (2007-2008*)* 'Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne'.

67 Prop 81L (2016-2017) chapter 15.10.6.

68 Anne Jorun Bolken Ballangrud and Margrethe Søbstad, *Likestillings- og diskrimineringsloven. Lovkommentar* (Universitetsforlaget 2021) 189 ff.

69 Sections 17 and 20-23 GEADA.

70 Ot.prp.44 (2007-2008*) Om lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne* (The former Act on Disability from 2009) chapter 9.7.7.

71 See, for example, Tribunal case no. DIN-2018-39.

72 See, for example, Tribunal case no. DIN-2020-250.

73 In Tribunal case no. DIN-2020-102 the minority of the Tribunal did so, but not the majority. In Tribunal case no. DIN-2018-48 the alternative solution was dismissed by the majority.

experience in Norway into consideration when they discussed the test requirement, or whether it was necessary to require such a test for anyone without a secondary education from Norway. The conclusion was that this was justified, necessary and proportionate differential treatment.

The assessment of whether a measure is necessary is often entwined with the assessment of whether the aim is proportionate to the negative impact it has on the person or persons in question. The Tribunal seems particularly reluctant to assess the necessity and/or proportionality of the measure in two situations in particular: decisions by the public administration, and accommodation of differences in employment situations.

### *4.3 Accommodation at Work as a Tool for Substantive Equality*

Several groups require accommodation at work. This is instrumental for achieving substantive equality by accommodating difference and ensuring participation in the labour market. The Tribunal has repeatedly shown a reluctance to assess decisions by employers. While the employers do have a wide authority, it is important to assess their decisions to have a real access to justice. Different groups have different levels of protection by the GEADA. Do different groups have the same access to justice in comparable situations?

Table 2: Tribunal Cases Concerning Accommodation 2018-2021

| | Total number of cases[74] | Dismissal of the complaint | No discrimination | Discrimination[75] |
|---|---|---|---|---|
| All cases | 640 | 45 % | 35 % | 20 % |
| All employment cases | 280 | 33 % | 52 % | 15 % |
| Pregnancy and parental leave | 61 | 20 % | 46 % | 34 % |
| Individual accommodation for persons with disabilities | 30 | 24 % | 59 % | 17 % |
| Language requirements | 17 | 38 % | 53 % | 12 % |

The table above of Tribunal cases concerning employment for three different grounds requiring some degree of accommodation or extra work for the employer. These cases include both hiring procedures and persons already being employed at the enterprise in question. Cases that were rejected for procedural reasons are not part of the percentage total.

Pregnancy and parental leave have the strongest protection. There are clear rules for establishing a presumption for discrimination, and very little differential treatment is justifiable, see Section 10 GEADA. Individual

[74] Decisions by the Equality and Anti-Discrimination Tribunal from 1 January 2018 until 15 September 2021. Complaints dismissed for procedural reasons, such as being older than 3 years, or where the case has been filed due to lack of response from the complainant when the Tribunal investigated the case, are not included in these numbers.

[75] This includes cases where the Tribunal concluded with a partial breach of the GEADA.

accommodation of persons with disabilities has a more detailed protection in the law than accommodation concerning language, through Section 22 GEADA, giving employers a duty to provide adequate accommodation, as long as it is not disproportionately burdensome. While the adequacy of the accommodation must be assessed before one can assess the proportionality, the rules otherwise follow the general rule of burden of proof. With regards to language requirements, there are no clarifications of the general rule of permitted differential treatment.

Assessing all the cases for these three groups in depth is too big a task for this chapter, but we have taken a look at the statistics: In cases concerning individual accommodation in employment, the Tribunal found that there had been no discrimination in 59 % of the decisions, most often on the basis that the differential treatment was reasonable, necessary and proportionate. The numbers were almost as high for language requirements, 53 %, though more of these cases were dismissed. Except in one case concerning pregnancy or parental leave, Tribunal case no. DIN-2018-76, no justification for differential treatment was found (see below for further discussion of these cases). The Tribunal concluded with discrimination in 34 % of the cases concerning pregnancy and parental leave, in 17 % of the cases concerning individual accommodation, and in 12 % of the cases concerning language requirements.

The strong protection against pregnancy discrimination was mainly developed by the ECJ interpreting the general prohibitions against discrimination, so the Tribunal does have the opportunity to provide equal protection in all these situations. This requires a thorough understanding of stereotypes and substantive equality, though, as well as discrimination law. Our information is too limited for any definite conclusion, but our findings may indicate that the type of legal protection has an impact on the access to substantive equality for various groups. More research is needed concerning how to ensure an equal access to justice concerning accommodation at work in both theory and practice.

### *4.4 Language Requirements*

Cases concerning language requirements are of particular interest for the discussion of whether a measure was necessary. It varies whether the Tribunal interprets such requirements as direct or indirect differential treatment, which should have an impact on the assessment of justifiability. In for example Tribunal case no. DIN-2018-39 they see them as indirect differential treatment, while in Tribunal case no. DIN-2019-32 they see them as direct differential treatment. Sometimes the Tribunal does not say which type of differential treatment they consider language requirements to be. Of the 17 cases concerning language requirements, 6 were dismissed and in 7 cases the differential treatment was seen as justified. In cases regarding both language requirements and individual accommodation, the Tribunal appears reluctant to assess the reasoning from the employer, as we saw above.

It might be a better way of redressing disadvantage if the Tribunal asked whether any reasonable accommodation might have been made concerning language requirements. When it comes to redressing disadvantage concerning language difficulties, language training would be a good measure to ensure substantive equality. While this has been offered in some cases, this is usually

only when the person is already employed, as for example in Tribunal case no. DIN-2018-26. In some cases, taking a test is required without any accommodation from the employer, such as in Tribunal cases nos. DIN-2018-195 and DIN-2019-32, even for those already employed by them.

### *4.5 Proportionality in Practice*

If equality costs money or creates more work for someone else, it is more difficult to achieve. In individual cases, the interests of two parties are assessed in relation to one another. In this narrow perspective, substantive equality is easy to lose sight of, as well as the socio-economic benefits on a larger scale.

Human rights conventions provide some key principles concerning lower limits of what is acceptable, for example does the European Court of Human Rights (ECtHR) requires that interference in a person's private life by a public authority can only be done in accordance with the law and have a legitimate aim. The conventions also provide some rules and guidelines on how the assessment should be made, such as Article 12 CRPD on self-determination and recognition before the law. The Tribunal rarely uses any human rights conventions.

Taking substantive equality and human rights as a starting point is likely to improve access to justice in the Tribunal. In Tribunal case no. DIN-2019-171, when A was denied participation in a summer camp for persons with cognitive disabilities because she has diabetes and it cost extra to have a nurse attending, social inclusion and participation were denied her. She was offered attendance at the summer camp in another municipality than her own, which she rejected. She had attended this summer camp for 10 years, so she was denied spending time with people she knew. The Tribunal, however, did not discuss her social inclusion and self-determination, nor did they really assess the differences in the costs between the two solutions. Still, they concluded that the differential treatment was justified, focusing on the need to provide a summer vacation for as many as possible. This is a common way to assess the rights of persons with disabilities, and often other groups as well. As a result, the individual's substantive equality tends to lose against financial concerns and sharing of limited resources, without a real assessment of the necessity of the measure, and of the actual costs.

The right of self-determination for persons with disabilities is a problematic area concerning justification of differential treatment. Such autonomy is *redressing disadvantage* in terms of Fredman's substantive equality. In Tribunal case no. DIN-2019-102, the three members of the Tribunal dissented. While the majority concluded that it was reasonable, necessary and proportionate for the municipality to refuse the complainant to live in her own apartment, the minority found that the municipality had not provided good enough reasons why she could not do so. The minority view is noteworthy, since this is one of the very few instances where the Tribunal really makes a concrete assessment of the evidence and arguments from a municipality.

This decision has been criticised by the Ombud.[76] According to them, the Tribunal did not take the principles of self-determination found in the CRPD and in the statutory objective of the Act on Health and Care Services sufficiently into account.[77] It has also been disproven by research and surveys that persons in larger living units often do not receive services adapted to each individual.[78] The Ombud further stated that the increased costs of living in an apartment owned by the person with disability are costs necessary for providing the services they should have according to the law, and which they often do not receive in communal living spaces. The Ombud concluded that the Tribunal should take such arguments into consideration when assessing individual accommodation and the right to choose your place of residence. This case also raises questions about the level and type of investigation which can be reasonably expected from the Tribunal.

### *4.6 Assessment of Laws and Regulations*

The Tribunal has the power to assess regulations. This may be done in at least two different ways: By assessing the effect of the rules themselves, or by assessing the procedure behind the regulations. The Tribunal has used both.

Participation in the making of rules and regulations is one of the most important proactive measures to ensure substantive equality. There are several procedural rules concerning the making of regulations. The Norwegian government has to give groups whose interests are particularly affected the opportunity to express their opinions before the regulations are issued, amended or repealed.[79] The Government must also follow the Instructions for the preparation of central government measures[80] (*Utredningsinstruksen*) when they decide upon any measures. These instructions are regulations made by the Ministry for Finance. While the instructions do not mention human rights or anti-discrimination legislation explicitly, they are inferred.[81]

In Tribunal case no. DIN-2018-65 concerning a change in the Passport regulations requiring visible ears on the photograph, the Tribunal assessed whether Section 37 of the Public Administration Act had been breached when the changes were made without gathering input from religious groups which would have difficulties with such a requirement. The Tribunal focused on

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[76] The Equality and Anti-Discrimination Ombud (2021); and '*Diskrimineringsretten 2020'* (Discrimination Law 2020) 35.

[77] Act on Health and Care Services of 24 June 2011 no. 30.

[78] The Equality and Anti-Discrimination Ombud (2021); '*Diskrimineringsretten 2020'* (Discrimination Law 2020) 35.

[79] According to Section 37 (1) of the Public Administration Act. Such advance notifications may be omitted if is not practicable, may render the implementation of the regulation difficult or impair its effectiveness, or must be considered obviously unnecessary.

[80] See the Instructions; *Instruks for utredning av statlige tiltak* of 19 February 2016 no. 184.

[81] The Norwegian Government Agency for Financial Management (2016) 'Guidance Notes on the Instructions for Official Studies. Instructions for the Preparation of Central Government Measures (official studies)' 18-19.

whether there was reason to assume that the error had had a decisive effect on the contents of the regulations, in which case the change in the regulations might have been considered invalid.[82] This approach is a good way to ensure participation. Nevertheless, the Tribunal accepted the argument that the Ministry for Justice and Public Security was already aware that this would have negative impact on persons with religious convictions concerning headwear. They concluded that the Ministry had not acted in breach of the GEADA, while stating that the regulations were undergoing a revision, trusting that representation would be ensured in that process. Lawyer and researcher Njål Høstmælingen[83] found that the Ministry had made several wrong assumptions about the Sikh turban requirements while the level of security was not increased by this requirement, and that the Government's assessment of human rights was poor, irrelevant and/or lacking. A later revision of the Passport regulations did not require visible ears on passport photographs.

In Tribunal case no. DIN-2019-218, the Tribunal considered the regulations themselves. A fisherman claimed to have been discriminated against for not receiving compensation for loss of income from the Directorate of Fisheries for leave of absence when adopting a child, while other grounds for loss of income such as illness were considered valid. Even though this compensation was something the ministry might award, the Tribunal found that the directorate should have taken other valid reasons for loss of income into consideration, such as parental leave, including for adoption.

These two cases are not representative, in that the Tribunal to at least some degree assesses the reasoning behind a decision by the public administration. Most often the Tribunal appears reluctant to do so. Considering that decisions from by the public administration are in writing, and that the reasoning behind should be documented, there is potential for improvement. A more thorough investigation, building upon the approach in two cases mentioned above, is likely to improve access to justice in cases concerning regulations.

## 5 Sanctions and Remedies

The reorganisation of the complaints mechanism in 2018 had three main features which are relevant for access to justice: It changed from two instances to the Tribunal only, the Tribunal has now mainly written procedures whereas it used to have an oral one, and it has a wider range of sanctions. While sanctions may be obtained through both court and Tribunal, the Tribunal's powers are still more limited. We will first describe available sanctions from the courts and the

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[82] This would depend on an overall assessment of the decision in question. Kaare Andreas Shetelig, 'Saksbehandlingsfeil og ugyldighet': Betydningen av feils innvirkning på et forvaltningsvedtaks gyldighet.' (Case Processing Errors and Invalidity: The Significance of the Error's Impact on the Validity of an Administrative Decision) *Forsker og formidler: Festskrift til Erik Magnus Boe* (Universitetsforlaget 2013) 267-274.

[83] N. Høstmælingen 'Turban Difficulties: Human Rights Challenges Regarding the Norwegian Requirements of Visible Ears on Passport and ID photographs' (2019) (Turban til besvær: Menneskerettslige utfordringer ved det særnorske kravet om synlige ører på pass- og ID-fotografier), Kritisk Juss 3, 98.

Tribunal and how they have been used in practice, before discussing whether they are adequate tools for promoting substantive equality.

### *5.1 Administrative Orders*

The Tribunal has the authority to make an administrative order to stop discrimination, harassment, instructions or reprisals.[84] This includes the duty of individual accommodation and universal design. The Tribunal may also set a time limit for compliance with the order. Furthermore, the Tribunal may impose a coercive fine to ensure the implementation of orders if the time limit for complying with the order is exceeded.[85] The coercive fine accrues to the state. Administrative orders have so far not been used in any cases concerning harassment in Norway, but the option exists.[86]

Since 2018, the Tribunal has only made use of administrative orders in 11 cases, all except one concerning disability or universal design. Only once from 2018 to 2020 has it issued a fine, so the decision and its deadline is usually respected. A possible explanation is that most cases concern issues that are not still ongoing, at least for the person concerned, for example if another person has been offered the position. This will to some degree depend on how the Tribunal defines the matter at hand. For example, if a practice of for example racial profiling continues, even though the complainant's concrete experience is in the past, is it an ongoing situation or not?

### *5.2 Damages and Compensation*

Most complaints concern issues that have already taken place. In such cases, the only remedies available to the Tribunal are compensation for economic losses or damages for injury of a non-pecuniary character in cases where these are fairly simple to calculate under Section 12(2) EAOA. The latter is only available in employment cases. Harassment and other types of discrimination outside employment will thus most often lack an effective remedy from the Tribunal.

Several general rules on compensation in Norwegian legislation are applicable in discrimination cases. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault.[87] These damages are calculated strictly on the basis of the economic losses which were caused by the action in question, in this case, discrimination. The damages were above NOK 100 000 (approximately EUR 12 000) in three recent discrimination cases.[88] This is considered to be a high level of compensation when compared with, for example, the level of compensation in cases of unjustified dismissals

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84 Section 11 EAOA.

85 Section 13 EAOA.

86 Section 11 GEADA.

87 The Norwegian Compensation Act of 13 June 1969, No. 26 and customary law.

88 These are case nos. LH2008-99829 *Bang* (Hålogaland Court of appeal), TOSLO- 2006-52718 (Oslo district court); and LE-1994- 892 (Eidsivating Court of appeal) *Lufthansa*.

within employment. In cases concerning dismissals the courts have also rewarded compensation. In case no LB-2018-159246 (Borgarting Court of appeal), the compensation was set at NOK 705 000, about EUR 78 000.

Regarding damages for injury of a non-pecuniary character, the GEADA contains the general rule that compensation will be set at an amount that is reasonable in view of the scope and nature of the harm, the relationship between the parties and other circumstances.[89] Damages for injury of a non-pecuniary character are usually below EUR 8 000 (NOK 80 000) and can only be awarded in cases that concern employment.[90]

The amount of damages awarded tends to be low compared to the procedural risk of taking a case to court. An example from the Supreme Court is Tribunal case no. HR-2020-2476-A on sexual harassment, where the Court concluded that two male customers had sexually harassed a female welder. The Supreme Court awarded the victim NOK 20 000 in damages for injury of a non-pecuniary character (approximately EUR 2 000).

### *5.3 Sanctions and Results Available Only Through the Court System*

Some sanctions are only available through the court system. A practical form of 'sanction' often claimed by victims of discrimination in employment is preliminary injunction on the right to remain in the position until the case has been finally decided in court. This has been granted on one occasion in relation to age discrimination in the context of interlocutory judgments,[91] but refused by the Supreme Court,[92] and by the appellate court in later cases.[93]

According to constitutional customary law the courts may repeal decisions by the public administration, including regulations and decisions by the Equality and Anti-Discrimination Tribunal. They also have the authority within certain limits to assess legislation,[94] and have the right and duty to assess whether an act of Parliament is in accordance with the Constitution. Its Article 98 is the most

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89 Section 38(3) GEADA and Sections 13-9 WEA.

90 Section 12 EAOA.

91 For example, case no. 09-143503TVI-OTIR/02 (Oslo municipal court, Judgment of 19 November 2009).

92 In case no. Rt 2011-974/ HR-2011-1294-A of 29 June 2011, the Supreme Court did not give the claimant the right to continue her position when addressing the possible discriminatory aspects of a retirement age of 67 set unilaterally by the company. The Supreme Court stated that allowing the claimant the preliminary right to remain in position in these kinds of litigation would reduce the content of these age limits.

93 In case no. LB-2014-56188 of 18 June 2014 (Borgarting Court of appeal), (*Mediaas-saken*).

94 In case no. Rt-1995-72 of 17 January 1995 page 77 the Supreme Court said that when it comes to the Courts authority to assess acts and regulations 'No binding conclusions can be drawn from the wording of the law. The wording of the law is admittedly so vague and discretionary that it is in itself an argument against the courts having full jurisdiction, but the wording is not a decisive argument against such a right of review. The decisive factor must be the considerations that the law must take into account, combined with what can be deduced from the law's prehistory about the legislator's attitude to the same or related issues'. (translation by the authors).

relevant for discrimination issues and reads: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment'.[95]

In practice, the courts rarely assess legislation or regulations. While the court procedure is more thorough, the courts generally tend to choose the easiest solution to the case. This often means overlooking or using discrimination or human rights law so superficially it sometimes, like in this case, is misinterpreted.[96] The rare examples of a good application of discrimination law are usually cases where this is the main issue of the case, as in LB-2019-190061[97] concerning age limits for doctors working for the Norwegian Search and Rescue Service, and Supreme Court case HR-2020-2476-A concerning sexual harassment.[98]

### *5.4 Effective Remedies for Substantive Equality*

The European Court of Human Rights has developed some principles to determine what is an effective remedy.[99] An effective remedy must be *accessible*, be capable of *providing redress* in respect of the applicants' complaints and offer *reasonable prospects of success*.[100] In determining whether an equality body is able to provide an effective remedy, the facts of the case, the nature of the right at issue, and the powers and guarantees of the body must be considered.[101]

What does success in a discrimination case in Norway imply? To answer this question, we first need to look at the purpose of the GEADA. According to its Section 1, its aim is "to promote equality and prevent discrimination on the basis of the protected grounds" and has as its particular objective to improve the position of women and minorities, and "shall help to dismantle disabling barriers

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95 See https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf.https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf. The preparatory works to the constitutional clause: Dok 16 (2011-2012), Report on Human Rights in the Constitution from the Constitutional Committee to the *Storting* (Parliament), Chapter 6 see http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf.http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf.

96 See also case nos. LB-2018-190131 of 16 March 2021 (Borgarting Court of appeal) and LB-2018-154220 of 15 April 2020 (Borgarting court of appeal) concerning the former sterilisation requirement for transgender persons, and case no, LE-2018-145654 of 18 November 2019 (Eidsivating Court of appeal) concerning the persons with cognitive disability and self-determination concerning where to live.

97 Judgment from Borgarting Court of appeal of 3 November 2020.

98 Judgment from the Supreme Court of 22 December 2020.

99 ECtHR, M.S.S. v. Belgium and Greece, No. 30696/09, 21 January 2011, para. 288.

100 European Union Agency for Fundamental Rights and European Court of Human Rights *Handbook on European Non-discrimination law* (2018 edition) 95.

101 European Union Agency for Fundamental Rights and European Court of Human Rights *Handbook on European Non-discrimination law* (2018 edition) 99.

created by society and prevent new ones from being created". The GEADA defines *equality* as equal status, equal opportunities and equal rights, presupposing accessibility and accommodation. This is not exactly what Fredman defines as substantive equality. She criticises equality of opportunity for being "at most a partial basis for grounding the right to a quality."[102] Still, the purpose of the GEADA for the most part corresponds with her concept of substantive equality, mainly accommodating difference and structural change, as well as redressing disadvantage. The continuously transformative aspect of substantive equality is included both through the GEADA's focus on "promoting equality" and through "improving the position" of the protected groups. The participatory element of substantive equality might have been better expressed, concerning both political participation and social inclusion. Since the GEADA must be interpreted in accordance with the CEDAW and other human rights conventions, political participation and social inclusion should be seen as part of the purpose of the GEADA.

To what extent do the available remedies provide redress? Remedies should at the very least contribute to changing the situation at hand. Preferably, they should also provide motivation for both the discriminator and in the general population to try to prevent discrimination in similar situations in the future. As mentioned above, not all types of cases have access to sanctions through the Tribunal, and it is financially burdensome and risky to take the case to court. In cases concerning harassment and discrimination outside employment, when the matter is not ongoing, and where there are no economic losses, there is no remedy before the Tribunal. Such cases are rarely worth the financial burden and risk taking the case to the courts entail.

Even if there are no available sanctions, a conclusion of discrimination may sometimes be sufficient, at least when the discrimination is unintentional. It is possible to take a case to court which only concerns whether you have been discriminated or not, without any sanctions.[103] However, since this can be obtained from the Tribunal without any fees or paid legal representation, the latter is almost always the preferred alternative. In many cases, such a conclusion is enough to change a practice or rule, so repealing a decision by the public administration is not always necessary in order to achieve access to justice, but only if the discriminator has not understood the problem and is motivated to take action to make reparations. A more effective way of achieving such an understanding might be to have a mediation procedure which included explaining the cognitive processes behind unintentional discrimination in particular.

As for intentional and grossly neglectful discrimination, effective sanctions should create incentives to prevent people from doing it, in addition to remedy the situation at hand. Financial incentives are often effective, for example fines, compensation for economic losses or damages for losses of a nonpecuniary

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[102] Fredman, 724.

[103] The Norwegian Supreme Court states in case no. Rt-2011-1666 Section 32 that: 'There is no doubt that one may take a case to court to receive a judgment on whether there is a breach against an incorporated human rights convention.' ('Det er sikker rett at det kan reises fastsettelsessøksmål med krav om dom for at det foreligger brudd på en inkorporert menneskerettskonvensjon, jf. Rt-2003-301 avsnitt 39.')

character. The damages for losses of a nonpecuniary character are usually so low that they are unlikely to provide any deterrent. Outside employment, if you have not suffered economic losses, and the action has ceased, there is no remedy through the Tribunal. You may only receive confirmation that you have been discriminated or harassed, which cannot be called an effective remedy.

The other aspects of substantive equality require more effort than simply recognising it, for example by improving access to employment. How sanctions may be used, often depend on how detailed and targeted the provisions in the GEADA or WEA are. For example, some parts of the GEADA aim at redressing disadvantage more than the general prohibitions against discrimination, such as chapter 3 on individual accommodation. While economic sanctions or a conclusion that the individual accommodation is discriminatory often are sufficient to remedy the situation, their contribution to substantive equality will often be limited unless they also contribute to a change in how for example the individual accommodation or recruitment is done on a general basis. Administrative orders may occasionally be required in order to achieve the necessary change and could probably be used more often by the Tribunal if they assessed complaints more thoroughly.

While administrative orders with coercive fines are efficient for changing an ongoing situation, these situations are few within the complaints system, and they may not be used concerning decisions by the public administration, for example municipalities.

### *5.5 Recommendations*

The Tribunal does have a certain range of sanctions available to them, but not in all situations. They could also use them more often, but things are slowly improving. Outside employment, many complaints lack an effective remedy, and the courts are not a good option considering the quality of the assessment of discrimination law, the lack of free legal aid, and the financial risk of losing. Even in cases concerning employment the damages for losses of a nonpecuniary character are so small, that they do not provide much of an incentive not to discriminate. Higher amounts of damages or fines, depending on how blameworthy the action has been and, preferably, on the financial resources of the discriminator, which could be awarded in all types of situations, would be more effective for achieving substantive equality.

An effective remedy in an individual case should not be limited to sanctions only, but should be interpreted with a view to what provides the desired result. The way the decisions are written are part of what is an effective remedy. In many situations, the Tribunal does not have the authority to provide an effective remedy. In addition to more effective sanctions, especially outside employment, another way to improve access to substantive equality might be to have a mediation procedure, where both the law and the nature of discrimination were explained to the parties.

## 6 Proactive v. Reactive Systems to Achieve Justice

Individual complaints may contribute to substantive equality, but the extent to which they do so depend on numerous factors. More detailed rules targeting particular types of discrimination seem to provide better protection to at least some degree, such as rules on individual accommodation, universal design, or pregnancy discrimination. A thorough understanding of stereotyping and various aspects of equality and discrimination may improve the assessment of both facts and legislation. This requires training, experience and preferably close cooperation with social scientists and others with relevant knowledge that lawyers usually don't have. Such cooperation was common practice at the Ombud before the reorganisation, and often led to a more thorough assessment of the facts than what we can see from the Tribunal today. A good use of relevant human rights instruments is also necessary in order to improve substantive equality, since they often improve the interpretation of the GEADA and WEA regarding substantive equality, through rules such as the Article 12 CRPD, through general recommendations or through concluding observations from the committees.

Still, some changes to the framework of the institutions are required for the Tribunal to reach its full potential in contributing to substantive equality. First, more effective sanctions are needed. Second, substantive equality requires that the discriminator recognises what they have done and gain sufficient knowledge and motivation to ensure that it does not happen again. A mediation procedure, where the law and psychological mechanisms behind discrimination is explained, might contribute to more understanding and less adversity between many of the parties.

The most important measure for promoting substantive equality, however, would in the authors' opinion be to include knowledge and training about discrimination and human rights explicitly in the Instructions for the preparation of central government measures. It is well known that proactive measures are more effective than reactive ones, even though both are needed. Participation in the creation of legislation through hearings is necessary for creating legislation which is not a barrier to substantive equality. To discuss the necessity and proportionality of a measure in the preparatory works more often than is being done today, is likely to improve substantive equality significantly.

The main weakness of the complaints procedure is that it requires a disadvantaged person to take the burden of making a complaint, with all the effort and conflict that may entail. Proactive duties for employers, the public administration and others to work proactively for substantive equality remain the most important measure for improving substantive equality. However, individual complaints are necessary tools to supplement and create motivation for proactive efforts, as well as making reparation for the individuals experiencing discrimination.