



Convention on the Rights of Persons with Disabilities

Distr.: General
13 November 2012

Original: English

Committee on the Rights of Persons with Disabilities

Communication No. 6/2011

Decision adopted by the Committee at its eighth session, 17 to 28 September 2012

| | |
|--|---|
| <i>Submitted by:</i> | Kenneth McAlpine (not represented by counsel) |
| <i>Alleged victim:</i> | The author |
| <i>State party:</i> | United Kingdom of Great Britain and Northern Ireland |
| <i>Date of communication:</i> | 25 May 2011 (initial submission) |
| <i>Document references:</i> | Special Rapporteur's rule 70 decision, transmitted to the State party on 21 December 2011 (not issued in document form) |
| <i>Date of adoption of the decision:</i> | 28 September 2012 |
| <i>Subject matter:</i> | Redundancy procedure of the author as an employee with diabetes mellitus (type 1 diabetes) |
| <i>Procedural issues:</i> | The facts occurred prior to the entry into force of the Optional Protocol for the State party; issues have been examined by another procedure of international investigation or settlement; the complaint is manifestly ill-founded or not sufficiently substantiated |
| <i>Substantive issues:</i> | General principles under the Convention; equality and non-discrimination; awareness-raising; equal recognition before the law; respect for privacy; work and employment |
| <i>Articles of the Convention:</i> | 4, paragraph 1 (d) and (e); 5, paragraph 2; 8, paragraph 1 (b); 12, paragraph 4; 22, paragraph 1; and 27, paragraph 1 (a) |
| <i>Article of the Optional Protocol:</i> | 2 (c), (e) and (f) |

Annex

Decision of the Committee on the Rights of Persons with Disabilities under article 2 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (eighth session)

concerning

Communication No. 6/2011*

Submitted by: Kenneth McAlpine (not represented by counsel)
Alleged victim: The author
State party: United Kingdom of Great Britain and Northern Ireland
Date of communication: 25 May 2011 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 28 September 2012,

Having concluded its consideration of communication No. 6/2011, submitted to the Committee on the Rights of Persons with Disabilities by Kenneth McAlpine under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Decision under article 2 of the Optional Protocol

1.1 The communication is submitted by Kenneth R. McAlpine, a British national born on 12 August 1964. He claims to be a victim of violations of his rights under article 4, paragraph 1 (d) and (e); article 5, paragraph 2; article 8, paragraph 1 (b); article 12, paragraph 4; article 22, paragraph 1; and article 27, paragraph 1 (a), of the Convention on the Rights of Persons with Disabilities (the Convention). The author is not represented by counsel. The Convention and the Optional Protocol thereto entered into force for the State party on 7 July 2009, pursuant to article 45, paragraph 2, of the Convention and 6 September 2009, pursuant to article 13, paragraph 2, of the Optional Protocol, respectively.

1.2 On 8 March 2012, the Special Rapporteur on communications under the Optional Protocol, acting on behalf of the Committee, decided in accordance with rule 70, paragraph

* The following members of the Committee participated in the examination of the present communication: Mohammed Al-Tarawneh; Monsur Ahmed Chowdhury; Maria Soledad Cisternas Reyes; Theresia Degener; Gábor Gombos; Hyung Shik Kim; Lofti Ben Lallahom; Stig Langvad; Edah Wangechi Maina; Ronald McCallum; Ana Peláez Narváez; Silvia Judith Quan-Chang; Carlos Ríos Espinosa; Damjan Tatic; Jia Yang.

8, of the Committee's rules of procedure that the admissibility should be examined separately from the merits.

Factual background¹

2.1 The author was diagnosed as having diabetes mellitus (type 1 diabetes) in February 1966 (at the age of one and a half years), which has been controlled by daily injections of insulin. He holds a Bachelor's Degree in Production Engineering and Management and a Master of Science Degree in Business Information Systems.

2.2 On 12 August 1998, the author started working at Oracle Corporation UK Limited (hereinafter Oracle) as a consultant. In July 2004, by request of the author, he was transferred to the On Demand Service Delivery team as a Service Delivery Manager (SDM). He was the seventh longest serving team member out of 14. He was in charge of one client account, which involved incident management, attending monthly meetings and preparation of a monthly report. By November 2005, due to the decrease in incidents of the first client account, the author's tasks also involved incident management for a second client account. On 16 December 2005, the author's line manager, Mr. P.S., after having been notified that the author was planning not to attend the monthly meeting of 21 December 2005, had a conference call with the author. After a discussion in which the author mentioned that he was not happy with his workload, it was agreed that he would no longer deal with incident management for the first client account, but would concentrate on the monthly report and monthly meetings of that account, and the remainder of his time would be dedicated to incident management for a second client account. In this conversation, Mr. P.S. learned for the first time that the author was diabetic and that he had been feeling stressed since November 2005 when the second client account was added to his workload. In a conversation with his second line manager, Mr. N.C., on 21 December 2005, the author had noted that he did not wish to take on a full SDM role, as he was home-based and wanted to minimize travel and wished to look for another role within the company.

2.3 In January 2006, Oracle announced that it would merge with another firm, involving a reorganization of its structure. As part of this process, the firm established the Oracle Global On Demand Service Desk and Customer Incident Managers (CIMs), which affected the role of the author, as the incident management was to be centralized and the only function remaining for the author was the production of the monthly report and attendance at monthly meetings for the first client account. On 30 May 2006, the author was informed by a Director that he had been provisionally selected for redundancy, because his role was no longer required due to the changing business model and he was not appropriate for a customer-facing Service Delivery Manager role. Before the reorganization, the author did not have customer contact, as he dealt mainly with incident management and reporting. After the reorganization, the incident management function was centralized at the Global Service Desk and Service Delivery Managers no longer did any incident management. The author acknowledged in the proceedings before the Employment Tribunal that, despite the advertisements of posts of new SDMs, he had not applied.² The Employment Tribunal noted that it was not disputed that between January to June 2006, the author looked for alternative roles of a technical nature within the company.³ On 10 July 2006, the author was made redundant (dismissed from his post).

¹ The facts are reconstructed based on the author's initial submission, including the annexes, in particular court judgements.

² See Employment Tribunal Judgment of 13 September 2007, S/116267/06, para. 47.

³ *Ibid.*, para. 39.

2.4 On 25 August 2006, the author lodged a complaint with the Employment Tribunal Service, claiming that Oracle failed to follow the appropriate dismissal and redundancy procedures. He further claimed that Oracle's decision was discriminatory and contrary to section 3A(1) and 3A(5) of the 1995 Disability Discrimination Act. He held that he was selected for redundancy because of his disability and/or because he had requested a reduction in his workload due to his disability, and that Oracle failed to make reasonable adjustments that would enable him to stay in the firm, carrying out his tasks in an adequate manner. During the court proceedings, Oracle disclosed electronic messages sent by one of its managers, Mr. P.S., stating that "the combination of diabetes and high blood pressure could result in a prolonged period of time off due to illness", and suggesting in one of them "to action redundancy from his role". The Tribunal concluded that, at that stage, due to the highly confidential nature of the redundancy list, the author's line manager, Mr. P.S., who made the statement, was not aware that the author's name had been added to a list of candidates for possible redundancy. The author notes that Oracle had acknowledged in the court proceedings that he had taken only two days of sick leave over the period of July 2004 to April 2006. The Tribunal noted that the line manager, Mr. P.S., who made the statement about the author's possible absence for illness, acknowledged during the proceedings that this had been a mistake, as the author, in fact, had very little illness-related absence. The author submitted that he was the only person fired from the SDM team, although he had the same job title and tasks as his colleagues and new personnel were hired afterwards. According to the findings by the Employment Tribunal, the author did not dispute that there were many aspects of the SDM role that he did not carry out and that according to the evidence, it was confirmed that the author, while having the job title of SDM, in fact carried out limited aspects of that role.⁴ Oracle noted that the decision to put the author's name in the list of candidates for possible redundancy (RIF list) was made in February 2006 due to the reorganization and that the person in charge of it, Mr. M.T., was not aware of the author's disability.

2.5 On 13 March 2007, the Employment Tribunal set out that the author had not complied with section 32 of the Employment Act 2002 in respect of raising a grievance regarding the complaint of an alleged failure to make reasonable adjustments; therefore, this part of his claim was struck out. The author lodged an appeal against this decision.

2.6 In July and August 2007, both the claim for unfair redundancy and the claim for disability discrimination were dismissed. The Employment Tribunal took note that the author performed a limited role as SDM which significantly diminished after Oracle was reorganized, and declared that the author's role was redundant. As to the claims of discrimination, the Tribunal relied on the fact that the electronic messages which referred to the author's diabetes did not lead to the selection for redundancy, that the RIF list was prepared before they were sent, and that the person who prepared the list did not know about the author's disability. The Tribunal rejected the author's argument in this regard, pointing out that one other SDM also had type 1 diabetes, but continued in her role. In order to determine direct discrimination, the Tribunal further held that "the correct comparator in cases of direct discrimination is a person who does not have that particular disability, but whose circumstances are not materially different from those of the person with disabilities". Finally, as to the claim that the author had been treated less favourably for a reason which is related to his disability, the Tribunal noted that there should be a causal link between the employee's disability and the treatment complained of, and sustained that the author was moved to the On Demand Service Delivery team and received different task adjustments, including reduction of workload, at his own request. Therefore, he could not argue that he was receiving less favourable treatment.

⁴ Ibid., paras. 144 and 145.

2.7 On 24 October 2007, the author appealed to the Employment Appeals Tribunal, arguing that there was no evidence about the reasons why his name was put in the RIF list, that the electronic messages of the Oracle managers proved that he was subject to redundancy because of his diabetes, that Oracle's effort at consultation was not genuine, and that its evidence was intentionally prepared or manipulated. The Employment Appeals Tribunal noted that it had jurisdiction to hear only appeals on questions of law and could not "re-hear the facts of a case or to review an Employment Tribunal's decision on those facts". The Employment Appeals Tribunal dismissed the author's application on 19 December 2007, holding that his appeal did not disclose reasonable grounds for bringing an appeal. Subsequently, the author filed an application for leave to appeal against the Employment Appeal Tribunal's decision, at the Court of Session, pursuant to section 37 of the Employment Tribunals Act 1996. On 12 February 2010, the Court refused all grounds of appeal, and held that grounds such as the assessment of the evidence were a matter for the Employment Tribunal and no error in law was identified. At the Employment Tribunal and Court of Session, costs of £3,700.00 and £6,968.25, respectively, were awarded against the author.

2.8 On 12 August 2008, the author lodged an application before the European Court of Human Rights (ECHR) claiming violations of his rights to a fair hearing and discrimination in conjunction with other rights. On 29 March 2011, the Court, sitting in a single-judge formation, declared it inadmissible because it "did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms or its Protocols".

The complaint

3.1 The author alleges that the State party failed to safeguard and promote the rights enshrined in article 4, paragraph 1 (d) and (e); article 5, paragraph 2; article 8, paragraph 1 (b); article 12, paragraph 4; article 22, paragraph 1; and article 27, paragraph 1 (a), of the Convention, due to the lack of application of its own legislation, which, in the author's opinion, occurred because of the stereotypical assumption that diabetes will result in prolonged periods of time off due to illness. Furthermore, he points out that the State party's tribunals and courts failed to adequately assess the evidence about discrimination brought before them, and relied on invented and/or manipulated evidence provided by Oracle.

3.2 With regard to the alleged violation of article 4, paragraph 1 (d) and (e), the author claims that the State party has not taken any measures to ensure that its authorities acknowledge disability discrimination based on diabetes. It also has not taken any measures to eliminate discrimination by private enterprises, such as Oracle.

3.3 The author further claims that the State party failed to prohibit discrimination on the basis of disability pursuant to article 5, paragraph 2, of the Convention when it held that the stereotypical assumption that disability equalled sickness and future absence did not constitute discrimination.

3.4 With regard to the alleged violation of article 8, paragraph 1 (b), the author claims that despite having laws protecting against discrimination of persons with disabilities, the State party has not adopted any immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices by employers, the legal system and judges who stereotypically assume that all diabetics have prolonged periods of time off due to their illness.

3.5 With respect to the alleged violation of article 12, paragraph 4, the author claims that he did not have a fair hearing, as the evidence on which the tribunals relied was tampered with by his former employer.⁵ He claims that electronic messages placing the author on the RIF list are not chronological, as the first electronic message is dated 2 February 2006, the second one 23 March 2006, the third one 21 February 2006 and the fourth 4 February 2006, and that his name was added to the list in handwriting while the other names were printed.

3.6 The author notes that he has been a victim of an arbitrary and unlawful interference in his privacy and family. On 8 September 2010, during his absence, a court officer proceeded to enquire about his whereabouts and his work with neighbours. On 14 September 2010, two officers of the court inquired about the value of the author's house and car without being able to tell the author the exact amount of the court costs to be recovered.⁶ The author notes that he had appealed against the cost and that the attempt of the recovery of the costs by the court officer was done to put pressure on him to drop future appeals. He also claims that the statement of the Employment Tribunal considering him "not to be a credible witness"⁷ was an attack on his honour and reputation, in breach of article 22 of the Convention.

3.7 With regard to the violation of article 27, paragraph 1 (a), of the Convention, the author claims that he was a victim of a stereotypical assumption that, due to his diabetes, he would take prolonged time off due to his illness and that this was not based on facts, since he had taken only two days of sick leave in the two years prior to his redundancy. He claims that he was being discriminated against because of his disability, as he was not working or being employed on an equal basis with others.

State party's observations on the admissibility

4.1 The State party submits that it considers the communication to be inadmissible as the facts occurred prior to the entry into force of the Optional Protocol, the author's claims have been examined by another procedure of international investigation or settlement and the complaint is manifestly ill-founded or not sufficiently substantiated.

4.2 The State party submits that the Optional Protocol came into force on 6 September 2009 and that the central incident of the author's redundancy took place on 10 July 2006. All judicial hearings that examined the fact of the author's redundancy took place before entry into force of the Optional Protocol. It claims that the communication should be declared inadmissible pursuant to article 2, paragraph (f), of the Optional Protocol.

4.3 The State party further submits that the author submitted his complaint to the ECHR, which found his application inadmissible as "it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The State party argues that the Court has examined the substance of the author's application and therefore the communication should be regarded as inadmissible pursuant to article 2, paragraph (c), of the Optional Protocol.

⁵ According to the Employment Tribunal Judgment of 13 September 2007, S/116267/06, para. 126, the author's allegation about the deliberate altering, amending or removal of documentation from the evidence before the Tribunal was unfounded.

⁶ An electronic message on file by a staff member of a law firm informs the author that the court officers were instructed by the law firm to carry out initial enquiries as part of preliminary procedures before taking steps to enforce the awards of expenses against the author.

⁷ See Employment Tribunal Judgment of 13 September 2007, S/116267/06, para. 122.

4.4 Lastly, the State party argues that other human rights treaty bodies have held that it is not for the Committee to replace domestic authorities in the assessment of the facts.⁸ The present communication is based upon the same facts as presented to challenge the redundancy decision before the domestic courts. The domestic court considered the facts and rejected the author's claims. The author has not explained in which way the national authorities would have breached the Convention when treating his challenge to his redundancy. The State party maintains that the author accepts that it has legislation prohibiting direct and indirect discrimination and less favourable treatment on the ground of disability at the workplace (1995 Disability Discrimination Act). It submits that the author's challenge of the decision of the Employment Tribunal is in effect requesting the Committee to overrule the domestic tribunal's findings of fact, without providing any evidence to support his allegation that the State party's legal system acted in such a way as to condone the alleged discrimination. It therefore finds that the communication is manifestly ill-founded or not sufficiently substantiated according to article 2, paragraph (e), of the Optional Protocol.

The author's comments on the State party's observations

5.1 On 4 March 2012, the author submitted his comments on the State party's observations and noted that the date of the last Court judgment regarding the facts of his case is 12 February 2010. This proves that the facts continued after the date of entry into force of the Optional Protocol, and are continuing to present.

5.2 With regard to the author's application to the ECHR, he argues that it concerned a part of his case struck out by the Employment Tribunal regarding reasonable adjustments. He also lodged a further application concerning alleged breaches of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning his rights to a fair hearing and discrimination in conjunction with other articles. A further application was also lodged in December 2010 concerning the awards of expenses made against him. On 29 March 2011, the ECHR informed him that his application, including all further joined applications, had been declared inadmissible by a single judge. He argues that the Convention on the Rights of Persons with Disabilities provides much broader protections to persons with disabilities than the European Convention for the Protection of Human Rights and Fundamental Freedoms, which does not even mention disability. He also notes that in the ECHR letter dated 29 March 2011, it is stated that "the present communication is made pursuant to Rule 52A of the Rules of the Court, which holds that a procedural decision can be taken without further examination".⁹ The author's complaint was therefore dismissed on procedural grounds, and was not substantively examined.

5.3 With regard to the State party's argument that the author's complaint is manifestly ill-founded or not sufficiently substantiated, the author states that he is not asking the Committee to replace the domestic authorities in the assessment of the facts, but the Committee is being asked to decide whether the State party is in violation of the

⁸ The State party mentions the following treaty body jurisprudence: Committee on the Elimination of Discrimination against Women communication No. 18/2008, *Vertido v. Philippines*, Views adopted on 16 July 2010, para. 8.2 and concurring opinion of Yoko Hayashi. See also Human Rights Committee communication No. 584/1994, *Valentijn v. France*, Views adopted on 22 July 1996, para. 5.3.

⁹ Rule 52A – Procedure before a single judge

1. In accordance with Article 27 of the Convention, a single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. The decision shall be final. The applicant shall be informed of the decision by letter.

Convention, based on articles contained in the Convention, and the merits and evidence to allege and prove a violation of the relevant articles of the Convention. He claims that his petition contains sufficiently developed merits, facts and arguments of the alleged violations of the Convention. He notes that the judgments are sufficient evidence that the State party's authorities have, on numerous occasions, stated that the affirmation that diabetes could result in future sickness absence is not discriminatory.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Convention.

6.2 The Committee notes the State party's argument that the central incident of the author's redundancy took place on 10 July 2006 and that all judicial hearings examining the facts of the author's redundancy took place before the entry into force of the Optional Protocol on 6 September 2009. It also notes the author's claim that the last court decision regarding the facts of his case is dated 12 February 2010 and that therefore the facts continued after the date of entry into force of the Optional Protocol for the State party.

6.3 With regard to the admissibility criteria *ratione temporis* under article 2, paragraph (f), of the Optional Protocol, the Committee observes that the Convention and the Optional Protocol entered into force for the State party on 7 July 2009, pursuant to article 45, paragraph 2, of the Convention, and 6 September 2009, pursuant to article 13, paragraph 2, of the Optional Protocol, respectively. The Committee notes that the author was made redundant on 10 July 2006 and that he lodged a complaint to the Employment Tribunal on 25 August 2006, which dismissed his complaint in July and August 2007. On 24 October 2007, the author appealed to the Employment Appeals Tribunal, which dismissed his application on 19 December 2007. On 12 February 2010, the Court of Session refused the author's application for leave to appeal against the Employment Appeal Tribunal's decision.

6.4 The Committee considers that, in accordance with article 2, paragraph (f), of the Optional Protocol, it may not examine alleged violations of the Convention that occurred before the entry into force of the Optional Protocol for the State party, in the present case on 6 September 2009, unless the facts continued after that date.

6.5 The Committee observes that the author's claim that his dismissal from his post as Service Delivery Manager was based on the assumption that his disability could result in prolonged periods of time off due to illness and was therefore discriminatory was examined by the State party's judicial authorities on the merits, notably in oral hearings. However, both the author's dismissal and the judicial review took place before the entry into force of the Convention and the Optional Protocol for the State party. Moreover, on 12 February 2010, after both instruments had entered into force, the Court of Session refused the author leave to lodge a new appeal, holding "the assessment of the evidence [was a] matter for the Employment Tribunal and no error in law was identified". The Committee considers that this decision, by its very nature, did not in itself constitute an act that reiterated the content of the judgements of the lower courts in their rulings on the question of discrimination raised by the author, and that, consequently, the decision did not violate the author's rights under the Convention. The Committee therefore concludes that the alleged violations took place before the entry into force for the State party of the Convention and the Optional Protocol, which cannot be applied retroactively, and consequently that, in accordance with

article 2, paragraph (f), of the Optional Protocol, it is precluded *ratione temporis* from examining the present communication.

6.6 As the Committee has decided to declare the communication inadmissible in application of the *ratione temporis* principle, it will not rule on its admissibility under article 2, paragraphs (c) and (e), of the Optional Protocol in respect of any of the rights invoked by the author.

7. The Committee therefore decides:

(a) That the communication is inadmissible *ratione temporis* under article 2, paragraph (f), of the Optional Protocol;

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

[Adopted in Arabic, Chinese, English, French and Spanish, the English text being the original version. Subsequently to be issued also in Russian as part of the Committee's annual report to the General Assembly.]
