Madelaine Geuzi Karaian*
Beretta Godoy, Buenos Aires
geuzi@berettagodoy.com

Recent developments on the right to work for persons with disabilities in Argentina

'Many disabled people say that the social disapprobation they experience is much more burdensome than the disability from which they suffer, maintaining simultaneously that they suffer only because society treats them badly, and that they have unique experiences that set them apart from the world – that they are eminently special and in no way different.'[1]

Creating awareness and providing protection

In December 2006, the UN approved the Convention of the Rights of Persons with Disabilities (the 'Convention') with the purpose of promoting, protecting and ensuring full and equal enjoyment of human rights and fundamental freedoms by persons with disabilities. The Argentine Republic adopted the Convention through Law No 26,378, in 2008.

According to the Convention, persons with disabilities include those with 'long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others'.[2]

The Convention marks a paradigm shift, as disability is no longer defined from the view of the medical profession but from the perspective of the individual, by considering the social and cultural obstacles that such an individual must overcome to be a part of society and stressing the significant impact that such obstacles have on their lives.[3]

The Convention also recognises full capacity to act in persons with disabilities and states that discrimination on the basis of disability is produced by any 'distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.

With respect to work and employment, the Convention recognises the right of persons with disabilities to work on an equal footing with fellow individuals, prohibiting discrimination on the basis of disability with regard to matters concerning all forms of employment, including conditions of recruitment, hiring, continuance of employment, career advancement and safe and healthy working conditions.

The Convention also sets forth that signatory states shall safeguard and promote the right to work by taking appropriate steps, including, inter alia, enacting legislation prohibiting discrimination and ensuring that reasonable accommodation[4] is provided to persons with disabilities in the workplace and in relation with educational services. [5]

From the ground up – putting the UN Convention into practice

A first step towards social and labour inclusion of people with disabilities was taken in Argentina on 9 January 2013. On that date, the Federal Congress passed Law No 26,816, which established a Federal System of Protected Employment for Disabled People. The main purpose of the system is to promote career development opportunities for people with disabilities by granting subsidies and tax cuts to companies that employ people with disabilities, and allowing early retirement to these employees.

Also, in September 2011, the Federal Executive issued Executive Order No 1375/2011 creating a federal programme to assist people with disabilities in their relations with the administration of justice. This measure was seen as a step forward in putting

into practice the obligations arising from Article 13 of the Convention, which provides that States Parties shall ensure effective and equal access to justice to persons with disabilities.

The position adopted by the Judiciary

Although the Argentine Republic adopted the Convention through Law No 26,378, back in 2008, protection to individuals with disabilities was already granted by the National Constitution[6] and by Law No 23,592.[7]

In recent years, Argentine courts have followed this trend by identifying discriminatory actions taken by employers against disabled employees, and granting compensation and/or reinstatement in the workplace of employees who considered such actions as constructive terminations of their labour contracts.

In 2010 the Federal Supreme Court ruled on the now seminal case *Alvarez*[8] and established that Law No 23,592 was not only applicable to labour relationships, but also that – on its terms – employees that suffered from this sort of discrimination were entitled to request the reinstatement of their jobs, or to obtain full compensation for damages.

Appellate and lower courts have also followed this position. In particular, labour courts have been particularly active in safeguarding the rights of individuals against discrimination on the basis of medical conditions. To do so, courts have resorted not only to the terms of Law No 23,592 but also to the shifting burden of proof set forth in 2011 by the Federal Supreme Court in the case *Pellicori*.[9] *Pellicori* requires employers to provide evidence to the contrary if employees provide preliminary evidence – or even indicia – of the unreasonableness of their termination.

In one case,[10] an employee, who returned to work following prostate cancer treatments during a sick leave, found that another individual had been hired to occupy his position. Worse still, the employee was dismissed, without cause, three days later. The employee claimed unfair dismissal based on discrimination. The defendant argued that there was no such discrimination, and that the reason for the plaintiff's termination was that he was unable to keep pace with the dynamic structure of his employer's business.

The Court of Appeals held that the chain of events (employment relationship, disease, sick leave and dismissal without cause) was indicative of discrimination. This led to the imposition on the employer of an obligation to compensate the plaintiff for damages arising from the improper termination.

In another case,[11] an employee suffering from diabetes who was forced to take repeated sick leave as a consequence of his condition (this was timely reported by the employee's physicians to the employer) was terminated without cause. The employee filed an action seeking compensation for the emotional distress she suffered as a consequence of the discriminatory termination. The defendant argued that the plaintiff's termination was not based on her medical condition, but on a recently adopted downsizing policy, but failed to provide evidence that this policy affected other employees.

The Court of Appeals of Labour Matters found, given the evidence produced in the case, and the defendant's failure to establish the application of the alleged downsizing policy to other dependents of the defendant, that it was reasonable to conclude that the plaintiff's termination had been on the basis of her medical condition. This constituted an act of discrimination and made the defendant liable for damages.

Based on these and similar precedents dealing with multiple sclerosis[12] and lupus,[13] it is reasonable to conclude that the current position of the Argentine labour courts on matters dealing with discrimination on the basis of medical conditions is that employees are only required to provide evidence – or indicia – of their employer's prior knowledge about the condition in order to shift the burden of proof to the employers, and to impose on them the obligation to prove that the condition was a factor that lead to the termination of the labour relationship.

A token that evidences the commitment of the Argentine State to eliminate any sort of discrimination is the precedent set by the *Universidad de la Matanza*[14] ruling of the Federal Court of Appeals on Civil and Commercial Matters. Litigation arose as a consequence of a public university's decision to deny admission to its physical education programme to an individual suffering from permanent spastic quadriplegia on the basis that the applicant was unable to take the physical exams established under the university's admission process.

The appellate court found that, on the basis of Article 24 of the Convention, the defendant's decision to deny admission to the plaintiff was in breach of the university's obligation to provide reasonable accommodations to applicants with disabilities, in general, and that the

university failed to take into consideration the plaintiff's skills and capabilities, in particular. Therefore, the appellate court mandated the university to take immediate action to adapt its admission process to allow the plaintiff take the admission tests, considering his skills and abilities.

Conclusion

The road to complete social inclusion of persons with disabilities is neither short nor free from obstacles. In recent years, the Argentine Republic has provided evidence of its long-standing commitment to achieving complete enjoyment of human rights by, inter alia, adopting an inclusive public policy, and ensuring its sustainability. Now, the challenge is to turn this public policy into social conduct and we, as lawyers and active members of our communities, will play a significant role in achieving this goal.

Notes

* Madelaine Geuzi Karaian is an Associate at Beretta Godoy, a Member of the Employment Law Committee and Latin American Liaison Officer of the Human Rights Law Working Group of the International Bar Association.

1 'Far from the Tree', Andrew Solomon, p 32. Andrew Solomon is a writer and lecturer on psychology, politics and the arts. Winner of the US National Book Award and an activist in LGBT rights, mental health and the arts.

2 Art 1.

3 This is probably a consequence of the major characteristic of the Convention: it was developed with the participation of organisations that represent persons with disabilities who are the everyday witnesses of the lack of real inclusion.

4 Art 2.

5 Art 5 of the Convention, which imposes on signatory states the obligation to assure that 'necessary and appropriate modifications and adjustments [to the accommodation are made] not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. Also, Article 24 imposes on States Parties the obligation to provide reasonable accommodation of the individual's requirements, to ensure full access to educational services.

6 Art 16: 'All inhabitants are equal before the law, and entitled to employment without any other requirement than their ability.'

7 Art 1 indicates that which establishes that 'anyone who arbitrarily impedes, obstructs, restricts or in any way impairs the full enjoyment on an equal basis of fundamental rights and guarantees recognised in the National Constitution shall be liable, at the request of the victim, to revoke the discriminatory act or to cease the conduct and repair the moral and material damage caused'.

8 *Álvarez, Maximiliano y otros v Cencosud s/ acción de amparo* Federal Supreme Court, 7/12/2010.

9 *Pellicori, Liliana Silvia v Colegio Público de Abogados de la Capital Federal s/ amparo*, Federal Supreme Court, 15/11/2011.

10 *Sch, FM c/Laboratorios Temis Lostaló SA*, Court of Appeals on Labour Matters, Court Room VII, 08/21/2013.

11 *SF, MC c/Mistucal SRL y otro*, Court of Appeals on Labour Matters, Court Room VII, 21/08/2013.

12 *P, EC c/Toko Argentina SA*, Court of Appeals on Labour Matters, Court Room II, 28/02/2013.

13 *GP, MA c/Actionline de Argentina SA y otro*, Court of Appeals on Labour Matters, Court Room V, 23/04/2013.

14 *EPN v Universidad Nacional de La Matanza (UNLAM),* Federal Court of Appeals on Civil and Commercial Matters, 17/03/2014.