Case summary:[[1]](#footnote-1) FOF v Brazil

Case code: [CRPD/C/23/D/40/2017](https://undocs.org/CRPD/C/23/D/40/2017)

Communication no 40/2017

Date of communication (initial submission): 21 December 2016

Date of adoption of Views: 2 September 2020

Invoked provisions of the Convention: Articles [2, 5, 13, 17, 25](https://ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx) and [27 (1) (a), (b)](https://ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx) and [(i)](https://ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx)

Provisions of the Optional Protocol: Articles [2 (d) and (e)](https://ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx)

Keywords: Discrimination on the grounds of disability; access to court; protection of the integrity of the person; right to health services; work and employment

Decision: Inadmissible under article [2 (d)](https://ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx) and [(e)](https://ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx) of the Optional Protocol.

Full decision in PDF format: [Arabic](https://undocs.org/ar/CRPD/C/23/D/40/2017), [Chinese](https://undocs.org/zh/CRPD/C/23/D/40/2017), [English](https://undocs.org/en/CRPD/C/23/D/40/2017), [French](https://undocs.org/fr/CRPD/C/23/D/40/2017), [Russian](https://undocs.org/ru/CRPD/C/23/D/40/2017) and [Spanish](https://undocs.org/es/CRPD/C/23/D/40/2017)

**Facts**

The author is a person with physical disability arising from chronic osteomyelitis in his left leg. He also has thrombosis in his left leg and a herniated disc, resulting from of lack of reasonable accommodation in his workplace. In 2009, the author submitted a request for reasonable accommodation at work to prevent his health deterioration, including flexible working hours, tolerance of commuting time and tolerance of a total of 3 hours and 20 minutes for physical therapy, without deductions from his salary, which was rejected by his employer, the the São Paulo Regional Council of Engineering and Agronomy (Crea-SP).

In 2013, the author started labour proceedings for equal remuneration for work of equal value, taking as a reference the higher salary of his colleague, B.C., allegedly performing the same function with the same productivity and the same quality standard. The first-instance labour judge dismissed his complaint because B.C. was better qualified (more experience). In 2014, the regional labour court dismissed his appeal. In 2015, the Superior Labour Court maintained the first-instance decision. In 2018, the regional labour court declared inadmissible the author’s request for extraordinary proceedings to declare null and void the decision delivered at first instance and in appeal, and also rejected a later appeal.

**Administrative proceedings for failure to provide reasonable accommodation**

In 2013, the author requested assistance from the national Secretariat for Human Rights, complaining of discrimination because he was not allowed to undergo physiotherapy during his working hours without a deduction from his salary, despite other employees being allowed to do so. In March 2015, the Regional Labour Prosecutor’s Office of the Second Region dismissed the author’s request, for lack of evidence demonstrating the existence of discrimination. According to its decision, the author had been hired following a competitive process, therefore, he was entitled to special support only, not to adopt special procedures. Crea-SP had a legal duty to grant differentiated working hours only to persons with disabilities who entered the labour market through selective placement under a special procedure, in which case there was a proportional adjustment in salary. However, the author had the option of submitting his medical certificates to his employer in order to request allocation of time for his treatment and, if denied, the right way for the author to proceed would be to lodge an individual complaint before the labour courts.

**Court accessibility proceedings**

In 2015, the author brought court proceedings against a company by the name of Tenda in order that it be required to comply with accessibility norms for persons with disabilities at their place of residence by providing allocated parking for persons with disabilities. He sought a waiver of the court fees for lack of financial resources, invoking article 13 of the Convention. In 2015, São Paulo Court of Justice denied the benefits of free justice because the author had an income well above the average of the population, so his case did not fit the concept of poverty defined by the law. Therefore, the São Paulo Court requested payment of the court fees. Author`s appeals were dismissed by the São Paulo Court, the Federal Supreme Court, and the Superior Court of Justice.

**Further administrative proceedings**

In 2016, the author complained to the Office of the Regional Labour Prosecutor, raising the fact that Crea-SP had not to date issued any document that would allow him, as a resident of Santos, to undergo physiotherapy and receive a salary allowance corresponding to the time granted to employees who lived in São Paulo (3 hours and 20 minutes). The author requested the Regional Labour Prosecutor’s intervention in order to eliminate that discrimination in treatment. He complained that Crea-SP had not presented any studies on the suitability of the furniture to the author’s disability or on the suitability of the working hours to the author’s needs. He also invoked his right to equal pay for work of equal value, making reference to his colleague, B.C.

In 2016, the author was diagnosed with medial epicondylitis in his right elbow and was prescribed physiotherapy. The medical report claimed that the author’s workstation was inappropriate for his body. On February 2016, the author informed Crea-SP about his new condition caused by the inadequacy of his workspace and reiterated his request to be allowed to undergo physiotherapy in the municipality in which he resided by granting him the tolerance period of 3 hours and 20 minutes that was normally granted to employees who resided in São Paulo.

**The complaint**

Regarding articles 2, 5, 13, 17, 25 and 27 (1) (a), (b) and (i), the author claims that the State has breached its obligations because it denied the reasonable accommodation at author`s workplace necessary for preventing the deterioration of his health. The lack of ergonomic furniture at author`s workplace led to the thrombosis in his left leg, a herniated disc and medial epicondylitis in his right elbow. He also contests the different treatment of persons with disabilities depending on whether they enter the labour market through competition or through selection.

Regarding article 27 (1) (b), the author claims that his right to equal pay for work of equal value were violated, when the domestic authorities declared that he was not entitled to equal remuneration based on the explanation that more time spent on the job amounted to work experience.

Regarding article 13, the author alleges a violation of his right to access to justice consistent in the regional labour court declaring inadmissible his extraordinary remedy in March 2018, as it applied the provisions of the Code of Civil Procedure, which is hierarchically inferior to the federal Constitution, and did not examine the merits of his complaint. Besides, he was unable to obtain protection from the courts of his Convention rights and he was ordered to pay the procedural fees.

The author declares that, although there might be other domestic remedies available, these remedies might be unreasonably prolonged or might be unlikely to result in an effective remedy that would prevent deterioration of his health.

**State party’s observations on admissibility and the merits**

The State claims that, when hired by Crea-SP, the author underwent a medical examination that had certified his classification as a person with disability. However, the examination report contains no recommendations on adjustments in his working environment and other working conditions. Besides, the author was hired following a competitive process, which means that Crea-SP was obliged to provide special support only, not to adopt special selection procedures.

Crea-SP agrees to reduce the author’s daily work charges as long as there is a corresponding reduction in his salary, in accordance with the law. According to the decisions issued by the organs to which the author has complained, none of his claims amounts to any irregularity. The author’s claim for 3 hours and 20 minutes from his working day to undergo physiotherapy exceeds the standard two-hour limit. The two hours would be enough if the author chose a specialized clinic of good quality near his workplace, as suggested by Crea-SP.

As to the author’s claim for equal remuneration for work of equal value, the State explains that article 461 of the Consolidated Labour Laws establishes that, if the function is identical and the work is delivered with the same productivity and the same “technical perfection” to the same employer and in the same place, the same salary will be awarded, without distinction of gender, nationality or age between persons whose period of service does not differ in length by more than two years. The State mentions that the author’s colleague, B.C., was one of the most experienced professionals at Crea-SP and the difference in service between B.C. and the author is 29 years.

The State notes that the essential disagreement between Crea-SP and the author as to the effectiveness of the solutions adopted. The national judicial system questions the limits and compatibility between what is necessary in the working environment from a biopsychosocial perspective and what is possible from the employer’s and from the legal perspective. In this sense, it seems that the definition of what constitutes reasonable accommodation according to the national legal regime leaves room for conflicts of interpretation. Reasonable adjustments and modifications that do not impose a disproportionate or undue burden, where needed in a particular case, may be made only after hearing the perspectives of all the parties in conflict. It is not possible for an organ of the executive power – such as the National Secretariat for the Rights of Persons with Disabilities, under the Ministry of Women, Family and Human Rights – to issue a conclusive statement because it does not have the necessary coercive instruments to make informed decisions about a given situation.

In the author’s case, there is a divergence of views on the effectiveness of the measures taken by the author’s employer, Crea-SP. However, even the judicial power – which has the last word on the dispute – has accepted the allegations submitted by Crea-SP. The obligation established under article 27 (i) of the CRPD applies to all national entities, be they public or private. Crea-SP has demonstrated before the administrative and judicial authorities that it acted in accordance with the law. The present conflict revolves around an interpretation with which the author disagrees, mainly regarding the measures adopted by his employer and the refusal of his request to reduce his working hours without reducing his salary. These issues have already been examined in administrative and judicial proceedings.

The State considers that there is no violation of article 27 (i) of the CRPD. In disagreement with the negative decisions delivered by administrative and judicial bodies, the author seeks alternatives to confirm his own interpretation of what constitutes reasonable accommodation to be provided by his employer. The Committee should not act as an appeal body. Through its National Secretariat for the Rights of Disabled Persons, the State will continue monitoring the conclusion of the case at the domestic level.

**Author’s comments on the State party’s observations on admissibility and the merits**

Regarding article 27 (1) (b), the author informs the Committee that he used an extraordinary remedy to have the previous judgments delivered in the proceedings for equal pay declared null and void, but the regional labour court dismissed his request. He contests the reasoning of the regional labour court, alleging that the judges did not take into account the fact that he is a person with disabilities, whereas his colleague, B.C., is not.

Regarding article 13, the author complains that in dismissing his request for a court fees waiver, the courts revealed his and his wife’s incomes in their public decisions.

**State party’s additional observations**

The State reiterated its previous observations, recalling that the author’s claim for equal pay for equal work had already been considered by the domestic judicial bodies. Therefore, the Committee should not interfere with matters already decided by the judiciary. Besides, the State submits that the **author failed to exhaust available domestic remedies** as author`s complaints that are still under consideration by the competent domestic organs.

**Author’s additional comments**

The author confirms that he has no other remedies to exhaust in order to defend his Convention rights and that all the facts that he has denounced have been examined by the courts. As for those who acted towards the degradation of his health, it is only the public Ministry that has the power to act, so the State cannot hold him responsible because that Ministry has not acted in that regard. He therefore requests the Committee to request clarifications from the State as to the alleged available domestic remedies for his case. The author alleges that no verifications were made by the State as to the degradation of his health owing to the lack of ergonomic furniture adapted to his needs in his workplace.

**Committee’s consideration of admissibility**

**The Committee notes the State’s argument that the communication should be found inadmissible under article 2 (d) of the Optional Protocol on the grounds of non-exhaustion of all available domestic remedies, although it does not refer to any specific remedies that would be available and effective.** The Committee notes the author’s statement that, although there might be other domestic remedies available, these remedies might be unreasonably prolonged or unlikely to result in an effective remedy that would prevent deterioration of his health.

Regarding articles 17, 25 and 27 (1) (i) in conjunction with article 2, the Committee considers that the author’s complaint is inadmissible pursuant to article 2 (d) of the Optional Protocol. The Committee notes that, in response to the author’s claim about the absence of reasonable accommodation to allow him to undergo physiotherapy, the Ministry of Labour clearly indicated to him that the adequate avenue was to lodge a complaint before labour courts instead of an administrative complaint before the Ministry of Labour. The Committee notes that the author complained to the Regional Labour Prosecutor about lack of suitable furniture in his workplace, but did not bring the matter before the labour courts. Therefore, the Committee considers that, by failing to lodge an individual complaint before the labour courts related to his complaints about an absence of reasonable accommodation to allow him to undergo physiotherapy or to obtain suitable furniture in his workplace, the author failed to exhaust available domestic remedies.

Regarding articles 5 and 27 (1) (a), (b) and (i) in conjunction with article 2, the Committee considers that this part of the complaint is inadmissible under article 2 (e) of the Optional Protocol for lack of substantiation. As regards the author’s claim that he was discriminated against on the basis of his disability because he was not granted reasonable accommodation to the extent allegedly granted to other persons without impairments, the Committee notes that his claim was dismissed by the Office of the Regional Labour Prosecutor in the absence of any evidence demonstrating the existence of discrimination. The Committee also notes that the author does not provide any arguments to explain how he has personally been affected in a discriminatory manner by the existence and application of a legal provision according to which a person with disabilities may enter the labour market either through competition or through selection.

Regarding articles 13 and 27 (1) (b), the Committee considers that this part of the communication is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 (e) of the Optional Protocol. The Committee notes the author’s complaints that he was refused equal remuneration for work of equal value, and that he was denied access to courts because when the domestic courts dismissed his request for a waiver of procedural fees, they applied the provisions of the Code of Civil Procedure, which is hierarchically inferior to the federal Constitution. In this respect, the Committee notes that domestic courts have examined these two complaints in both ordinary and extraordinary proceedings. The Committee recalls that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee is not in a position, on the basis of the material at its disposal, to conclude that, in deciding the author’s case, the domestic courts acted arbitrarily or that their decision amounted to a denial of justice.

**Conclusion**

The Committee concluded that the communication is inadmissible under article 2 (d) and (e) of the Optional Protocol.

1. This summary has been prepared by the International Disability Alliance. For more information on how to lodge individual communications under the Optional Protocol to the CRPD, visit [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/es/node/105)  [↑](#footnote-ref-1)