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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Communication No. 10/2013

Decision adopted by the Committee at its twelfth session (15 September–3 October 2014)

Submitted by:	S.C. (not represented by counsel)
Alleged victim:	The author
State party:	Brazil
Date of communication:	2 November 2012 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 5 September 2013 (not issued in document form)
Date of adoption of the decision:	2 October 2014
Subject matter:	Employer policy allowing for demotion after prolonged medical leave
Substantive issues:	Definition of disability
Procedural issues:	Substantiation of claims; exhaustion of domestic remedies
Articles of the Convention:	3 (paras. (b) and (e)); 4 (para. 1 (a), (b), (d) and (e)); 5 (paras. 1 and 2); and 27 (para. 1 (a) and (b))
Articles of the Optional Protocol:	1; 2 (paras. (d) and (e))

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Annex

Decision of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (12th session)

concerning

Communication No. 10/2013*

Submitted by:	S.C. (not represented by counsel)
Alleged victim:	The author
State party:	Brazil
Date of communication:	2 November 2012 (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 2 October 2014,

Having concluded its consideration of communication No. 10/2013, submitted to the Committee on the Rights of Persons with Disabilities by S.C. 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 S.C., a Brazilian national. She claims to have been the victim of violations by Brazil of articles 3, paragraphs (b) and (e); 4, paragraph 1 (a), (b), (d) and (e); 5, paragraphs 1 and 2; and 27, paragraph 1 (a) and (b), 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 1 September 2008.

1.2 On 21 August 2013, the Special Rapporteur on Communications under the Optional Protocol, acting on behalf of the Committee, decided in accordance with rule 70, paragraph 8, of the Committee's rules of procedure that the admissibility of the communication should be examined separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mohammed Al-Tarawneh, Martin Mwesigwa Babu, Munthian Buntan, María Soledad Cisternas Reyes, Theresia Degener, Hyung Shik Kim, Lotfi Ben Lallahom, Stig Langvad, Edah Wangechi Maina, Ronald McCallum, Ana Peláez Narváez, Silvia Judith Quan-Chang, Carlos Ríos Espinosa, Damjan Tatić and Germán Xavier Torres Correa.

Facts as presented by the author

2.1 The author began working for Banco do Estado de Santa Catarina (BESC) in July 2004. She was transferred from Campinas to Florianópolis to work as a bank teller. The author alleges that her employer assigned her to the teller position as a form of compensation for the geographical transfer.

2.2 The author had a motorcycle accident in June 2006. As shown in a medical certificate dated 14 December 2006, the accident resulted in an injury to the author's left knee.[1] She was only able to return to work two months after the end of her medical leave. In September 2007, the author had a second motorcycle accident and underwent surgery in June 2008. Her doctor issued a medical certificate requiring her to rest for 60 days due to illness. She had a third motorcycle accident in January 2009. In April 2009, before the author took medical leave, BESC was purchased by Banco do Brasil, which subsequently informed the author that, under the bank's internal policy, she was required to return to work within three months in order to retain her position as a teller. Under that policy, after an employee has taken medical leave for over three months, the bank has the discretion to decide whether to request the return of the employee after three or six months. Although the author wished to return to work within three months, she was unable to do so due to medical reasons attested to by the Banco do Brasil doctor and by her own doctor.[2] She tried to return to work before the end of the six-month period; however she was demoted from her position as a teller. She remained employed by Banco do Brasil but without a defined job role.

2.3 By letter dated 23 November 2009, the author requested to be transferred to the bank's office in Campinas, which was closer to her home. She made the request because her transfer in 2004 had been conditional upon her taking up a position as a teller, and, further to her demotion, she preferred to return home in order to have an easier commute to work. No longer willing to commute by motorcycle, she needed to travel to work by bus, which was very time-consuming. In her letter, she explained that she was requesting a transfer due to her health problems, a need for ongoing treatment, and commuting difficulties. Banco do Brasil refused her transfer request, citing a surplus of staff in the Campinas office. The bank's response letter mentioned that, in accordance with the recommendations made by the state doctor in Florianópolis, the author had been able to resume work that did not require her to lift materials weighing more than five kilograms, go up or down stairs, or remain standing or sitting for long periods. In 2010, the author suffered from several episodes of muscle cramps and had to take a prescribed muscle relaxant.[3] On 8 December 2010, her doctor issued a medical certificate stating that she was suffering from chronic illness and that it was therefore advisable for her to work closer to home. The author had to take additional leave in 2010 because she continued to experience pain. In February 2011, the elevator in the bank building stopped working, and, since the

[1] The author provides a translation of a medical certificate dated 14 December 2006, stating that, due to a motorcycle accident on 9 June 2006, the author suffered trauma to the left knee in the form of a meniscal lesion, a chondral lesion, and a fracture of the femoral condyle and of the left tibial plateau. The fracture was conservatively treated, and the lesions were treated with surgery. A prognosis of post-traumatic osteoarthritis of the knee was made.

[2] The author states that she was required to undergo a medical examination by a Banco do Brasil physician. In support of this, the author includes a copy of a medical certificate issued on 21 July 2009 by an occupational health doctor, who stated that the author required 30 days of rest from her activities due to health problems. No further details are specified in the certificate. The author provides a separate undated medical certificate from her own doctor stating that she must refrain from working from 10 August 2009 to 10 October 2009 (i.e. for 60 days).

[3] The author provides a copy of her doctor's prescription for Miosan®, dated 18 June 2010.

author was working on the second floor and was required to avoid stairs, she was told she could work on the ground floor doing administrative work on a computer. However, the furniture in the office was not suitable, as the desk was high and the keyboard was on the same level as the computer.[4] The author was also required to be at work from 10 a.m. to 4 p.m., which required her to leave home at 6.30 a.m.

2.4 For the foregoing reasons, the author filed a complaint against Banco do Brasil on 21 February 2011 before the Regional Labour Court (Tribunal Regional do Trabalho) in Florianópolis. Her complaint alleged the unconstitutionality of Banco do Brasil's internal policy providing for demotion of staff on leave for more than three months, and the discriminatory nature of the policy, which affected only staff on leave for more than three months for medical reasons. During the court hearings, Banco do Brasil asserted that the author had voluntarily accepted to be bound by the bank's policy; that demotion after more than three months of medical leave applied to all employees without distinction; that it was authorized to effect promotions and demotions as needed (and that in the case in question, there were too many tellers employed); and that employees did not have the right to contest any reduction in their salaries. The author argues that, on 18 May 2011, the Regional Labour Court in Florianópolis denied the author's complaint on the grounds that she had not proved that her transfer to Florianópolis had been carried out against her will; that the transfer had not prejudiced her; that she had agreed to be bound by the bank's internal policy; that the fact that she had not been able to return to the same position after being on leave for more than three months was not a punishment, since the bank was authorized to modify its employees' assignments according to requirements; that the policy was not discriminatory since it was applied to all in the same manner; and that the author could not benefit from seniority bonuses since they were available only to employees who had worked as tellers for 10 years, which was not the case of the author.[5]

2.5 On 6 July 2011, the author appealed the decision. The appeal was rejected on 31 August 2011.[6] Because individuals wishing to file appeals before the Superior Labour Court must be represented, the author filed a request for legal aid. The request was denied by the public defender's office (Defensoria Pública) on 14 October 2011.[7] The author then requested the assistance of a private attorney, who declined to represent her. The author therefore decided to file an appeal without representation; and the appeal was denied, without an examination on the merits, on 7 December 2011. The author refiled an appeal, including a copy of her complaint as filed before the Brazilian Bar. The appeal was denied on 17 January 2012.[8]

[4] The author provides a photograph of the workstation in question.

[5] This reasoning was given in an informal French translation of the decision provided by the author.

[6] The author provides an informal French translation of the appeal decision, rejecting the claim on the grounds that the bank's internal policy providing for a lesser appointment as from the 91st day of medical leave was not discriminatory, since all personnel were subject to the same rule without distinction; that the author had not referred to the policy in question before the court, as she would have been required to do; that the policy was not unconstitutional since it assured equal treatment for persons in similar legal situations; that the fact that one of the author's co-workers was not subject to the same rule after her 90th day of maternity leave does not prove the author's claim, since the rule in question did not apply to maternity leave but to medical leave; and that the decision on the author's transfer to a new location did not guarantee that she would be allowed to remain permanently in her position as a teller.

[7] The author provides an informal French translation of the negative decision by the Public Defender's Office.

[8] The author provides an informal French translation of the negative decision on her appeal. The translation appears to indicate that case law prevents litigants from bringing cases *jus postulandi* before the court (i.e. without representation by a lawyer) except under certain circumstances,

2.6 The author provides a translation of an "Expert Report" dated 5 August 2011, issued by the Institute of Forensic Medicine in Santa Catarina. It is stated in the report that a forensic doctor examined the author at the request of the police bureau delegate for the purpose of determining whether the author had a permanent disability. The report concludes that the author had a permanent disability to her left knee with moderate loss of function, and that she was permanently unable to occupy the specific job in question but had no general disability for work purposes.

2.7 The author adds that, since she exhausted domestic remedies, her situation with Banco do Brasil, where she continues to work, has not improved.[9] The author suffered from a very serious shoulder complaint and was required to go on medical leave from July 2011 until April 2012. Only thereafter did the bank repair the elevators and install new furniture. In a medical certificate dated 29 March 2012, the author was diagnosed as having a partial rupture of a shoulder tendon associated with fibromyalgia, an illness causing predisposition to muscle cramps and inflammation brought on by stress. The doctor stated that she was permitted to work with certain restrictions: she should have 10-minute breaks for every hour of repetitive activity (such as computer work) and should not be near air conditioning, and her work schedule should allow for the incorporation of daily physical activity .[10] The author considers that her demotion compromised her health, as fibromyalgia is rooted in emotional disturbance. When she went back to work in April 2012, she presented the medical certificate, but was assigned to work in the archives in a post requiring significant physical effort to open and close drawers, and squatting, which was damaging to her knee. After two weeks, the bank offered her a position working with administrative records at Banque Postale, in a different building. She was tasked with resolving various problems and coordinating the work of a team. While doing that job, she was unjustly subjected to reprimands from two assistants and from her superiors. After about 45 days at Banque Postale, the bank requested that she return to her previous office, and put her in charge of resolving "various problems". However, because a number of telemarketers were working near her workstation, she had difficulty performing her functions. She was harassed by an employee who ejected her from her workstation, and the bank did nothing to reprimand him.[11] During that period, she was ordered to begin working for operations control, performing analytical work to determine whether transactions were executed in conformity with the law.

inapplicable in the present case.

[9] The author states that, despite her problems there, she has not resigned from her position at the Banco do Brasil because she needs the job for subsistence, and because she has had serious problems with politicians due to her work as a freelance journalist, and therefore believes that she would be persecuted even if she went to work for a different agency or a private business.

[10] The author provides the medical certificate and a French translation.

[11] The author provides an informal French translation of an e-mail she sent on 27 August 2012 to her manager at Banco do Brasil. In the e-mail she states that she had been wrongly forced to leave her computer station at work and no longer had a place to work. The e-mail indicates that her co-workers had started to use the computers she had been using, and had not let her return to them to finish the articles she had stored on them. The author also provides an informal French translation of an e-mail she sent on 29 August 2012 to a different manager at Banco do Brasil, in which she states that one of her co-workers had become angry with her the previous day when she asked him to lower his cell phone ring volume. He replied that she was asking too much, as she had previously asked him to stop drumming his fingers on the table. The author stated in the e-mail that the noise made it difficult for her to do her work.

The complaint

3.1 The author asserts that the State party has violated her rights under articles 3, paragraphs (b) and (e); and 5, paragraphs 1 and 2 of the Convention, in that the measures taken by her employer (the State-run Banco do Brasil) and endorsed by domestic courts, are aimed at limiting the opportunities of persons with disabilities and are thus discriminatory.

3.2 The author further maintains that the State party violated her rights under articles 4, paragraphs (a), (b) and (d), insofar as Banco do Brasil's conduct promotes discrimination based on disability by requiring the demotion of any staff member who remains on medical leave for more than three months or for more than six months.[12] The author argues that the State therefore requires an individual to remain in good health in order to keep a position.

3.3 The author also argues that the State party violated her rights under article 27, paragraph 1 (a), of the Convention, insofar as the discrimination she suffered was linked to her employment and working conditions. The author also invokes article 27, paragraph 1 (b), of the Convention, asserting that she has not enjoyed the same working conditions and opportunities as her colleagues due to her impairment, even though her skills are equivalent to those of her colleagues. Specifically, she maintains that, during the period when the bank had a surplus of tellers, she was not allowed to work as a teller, whereas two other employees, one of whom had taken maternity leave, were allowed to work intermittently as tellers.

3.4 The author further asserts that the State party has violated article 4, paragraph (e), of the Convention, insofar as Banco do Brasil is both a public and a private bank.

3.5 As a remedy, the author requests the revocation of Banco do Brasil's policy providing for demotion following medical leave for longer than three months, and acknowledgement by the State party that the policy is contrary to the Convention. The author also requests to resume her position as a bank teller and to receive back pay from November 2009. She points out that the policy deters employees from taking necessary medical leave.

State party's observations on admissibility

4.1 In its observations dated 9 July 2013, the State party considers the communication to be inadmissible *ratione materiae* because the author does not have a disability as defined under the Convention. Whereas article 1 of the Convention defines disability as consisting of a long-term impairment, the author was diagnosed by professionals of the National Institute of Social Security (INSS) with a temporary incapacity to work. INSS is the federal agency charged with certifying disability for the purposes of granting monetary benefits to persons with disabilities who are unable to live independently or to work. The author's diagnosis entitles her to sickness benefit for short continuous periods of, at most, four months during the years 2007 to 2012, during which the author claims to have had three separate accidents. The expert diagnosis of temporary incapacity to work implies that the patient is able to recover, which explains why the benefit is authorized for a short period. The medical certificates provided by the author with her complaint confirm the INSS diagnosis of temporary incapacity to work, as they recommend that the author take periodic rest in the form of "60 days of sick leave", "absence from the functions from April 28th 2009 to day May 12th 2009", "absence from the functions from day May 13th 2009 to day June 30th 2009", "30 days' sick leave", etc. None of the medical certificates attests

[12] The author explains that, under the policy, after an employee has taken three months of medical leave, the bank has the discretion to decide whether to request the return of the employee after three months or six months.

disability as specified under domestic legislation[13] or the Convention. Moreover, under domestic legislation a person claiming to have a disability must provide confirmation of the disability with a medical report issued by a physician in order to receive benefits, but the author has never submitted such a report to the domestic authorities or to the Committee.[14]

4.2 The State party also considers the communication to be inadmissible under the "fourth district court's formula" because the domestic courts had already examined the author's claim with regard to her transfer to another position at Banco do Brasil. Under the "fourth district court's formula", international organizations are not competent to examine alleged errors of fact and law that may have occurred in domestic courts unless there has been a flagrant violation of human rights standards protected by international treaties.[15]

4.3 The State party further considers the communication to be inadmissible due to the author's failure to exhaust domestic remedies.[16] Although she brought a claim relating to the decrease in pay that resulted from her transfer to a different position at Banco do Brasil, she did not bring a claim that her demotion was linked to a disability. The author thus did not invoke her rights under the Convention before domestic courts.

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

5.1 In a further submission, dated 15 August 2013, the author asserts that the communication is admissible *ratione materiae* because she has an impairment within the meaning of article 1 of the Convention. She again notes that a medical certificate issued by the Institute of Forensic Medicine in Santa Catarina found that she had permanent impairment to her left knee and permanent incapacity to perform specific tasks.

5.2 The author also maintains that her claim was examined by domestic courts, which flagrantly violated her rights under the Convention.

5.3 The author further submits that her claim before the Committee originates in the discrimination suffered by employees who, by remaining on medical leave for more than three months or more than six months, lose their right to remain in a particular post.[17]

[13] The State party cites Brazilian Federal Decree No. 3.298/99, of 20 December 1999, art. 3 (defining disability, permanent disability, and incapacity).

[14] The State party cites Brazilian Federal Decrees No. 3.298/99 (see footnote 25), arts. 3 and 4 and No. 5.296/04, of 2 December 2004, art. 70; International Labour Organization Convention No. 159 (1983) concerning Vocational Rehabilitation and Employment (Disabled Persons) (part I, art. 1). A qualifying medical report must be issued by an occupational health doctor from the claimant's company or by another doctor. The type of disability must be specified in the report.

[15] The State party cites Inter-American Court of Human Rights case No. 11.137, *Abella* v. *Argentina*, 18 November 1997; and case No. 11.472, *Gilbert Bernard Little* v. *Costa Rica*, 28 September 1998.

[16] The State party cites, inter alia, International Court of Justice case concerning *Elettronica Sicula S.p.A. (ELSI),* judgment of 20 July 1989, p. 15; and Inter-American Court of Human Rights, Consultative Opinion OC-11/90, of 10 August 1990, para. 41.

[17] The author provides an informal French translation of an excerpt from her complaint filed before the Regional Labour Court, in which she states that she requested to be transferred to the office in Campinas in order to have an easier commute and to have time to do physical exercises. Her request for a transfer was denied in October 2009 on the ground that there was a surplus of personnel in the office, and that there were pending issues to resolve with City Hall in São Pedro de Alcântara. Halfway through the year 2010, the author had acute problems with her left knee and was diagnosed with muscular atrophy. In September and October, she went on medical leave, in order to obtain muscular therapy treatment. With no time to do physical exercise, she also had severe episodes of fibromyalgia in 2010. On the basis of medical certificates, she again requested a transfer to any office close to her home, but that request was denied, as all offices claimed that they had too many employees. The author was therefore demoted from her position as a teller, in accordance with the

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim 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 has ascertained, as required under article 2, paragraph (c), of the Optional Protocol, that the same matter has not already been examined by the Committee, and that it has not been, and is not being, examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the author alleges a violation of articles 3, paragraphs (b) and (e); 4, paragraphs (a), (b), (d) and (e); 5, paragraphs 1 and 2; and 27, paragraphs (a) and (b), of the Convention, claiming that Banco do Brasil's policy providing for demotion of employees after three months of medical leave is discriminatory on the basis of disability and resulted in her demotion in 2009, when she remained on medical leave for over three months due to an injury permanently impairing her knee. The Committee also notes the author's allegation that violations also occurred in 2010, when Banco do Brasil denied her disability-based request to be transferred to an office closer to her home. The Committee notes the State party's assertion that the author's knee injury is not a disability under article 1 of the Convention as, at the time of the facts under review, she had been diagnosed with a temporary incapacity to work and did not provide qualifying evidence of a long-term impairment, and that her communication therefore does not fall within the *ratione materiae* competence of the Committee. The Committee considers that, under article 1 of the Convention, persons with disabilities include, but are not limited to, those who have 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. In the present case, the information provided by the parties does not preclude the Committee from considering that the author's physical impairment, in interaction with barriers, did in fact hinder her full and effective participation in society on an equal basis with others. The Committee considers that the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the diversity of persons with disabilities to be taken into account (preamble, para.(i)) together with the interaction between individuals with impairments and attitudinal and environmental barriers (preamble, para. (e)). The Committee further notes that, under article 4, paragraph 4, of the Convention, the obligations of the State party as set forth in other human rights instruments to which it is a party, such as the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, are not affected. The Committee notes that the latter Convention defines the term "disability" as a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment. The Committee therefore considers that it is not precluded by article 1 of the Optional Protocol from examining the communication.

bank's policy, because she had spent more than three months in medical treatment in 2009. Owing to her health problems, the author needed to return to the Campinas office in the position to which she had gained entitlement by passing a competitive recruitment examination.

6.4 The Committee notes the State party's assertion that the author's transfer request was denied on the basis of a surplus of employees in the office in question, and not on the basis of any disability and that her claim is therefore not substantiated. The Committee notes that the bank's demotion policy applied to all employees who have taken medical leave of over three months, regardless of the reason. It further notes the State party's assertion that the transfer denial and the Bank's demotion policy were applied in order to maintain an equilibrium in staff numbers among offices. The Committee considers that discrimination can result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate, but that disproportionately affects persons with disability. The Committee therefore considers that the question before it is whether, by requiring the demotion of persons on medical leave for over 90 days, the Bank's policy had a disproportionately adverse impact on the author and concludes that it is not precluded by article 2, paragraph (e), of the Optional Protocol, from examining the communication.

6.5 The Committee notes the State party's argument that the author has not exhausted domestic remedies since she has not brought a claim that her demotion was linked to a disability before domestic courts. The Committee takes note that the author brought an appeal raising claims under the Convention before the Superior Labour Court, and that the appeal was denied without an examination on the merits on the ground that the author was not represented by counsel as required by law. The Committee also observes that, after the author's request for free legal aid was denied by the Public Defender's Office for lack of merit, the author contacted one attorney, who declined to represent her. However, the author has not substantiated that there were no other options for legal representation open to her. In the circumstances, the Committee finds that it is precluded from considering the communication under article 2, paragraph (d), of the Optional Protocol.

7. The Committee on the Rights of Persons with Disabilities therefore decides:

(a) That the communication is inadmissible under article 2, paragraph (d) of the Optional Protocol;

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