Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 October 2017[1]

Case C‑270/16

Carlos Enrique Ruiz Conejero
v
Ferroser Servicios Auxiliares SA
and
Ministerio Fiscal

(Request for a preliminary ruling from the Juzgado de lo Social No 1 Cuenca (Social Court No 1, Cuenca, Spain))

(Equal treatment in employment and occupation — Prohibition of discrimination based on disability — National legislation permitting, subject to certain conditions, the dismissal of an employee by reason of repeated absence, even where justified — Duly justified absence linked to the employee's disability)

1. By this request for a preliminary ruling, the Court is asked to consider the application of the prohibition of discrimination on grounds of disability laid down by Council Directive 2000/78/EC[2] to national legislation which allows an employer to terminate a contract of employment following a period or periods of absence from work without reference to the fact that the employee in question may be disabled.

Legal framework

Directive 2000/78

2. The recitals of Directive 2000/78 include the following:

'(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

…

1 Original language: English.

2 Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

…'

3. Article 1 of Directive 2000/78, entitled 'Purpose', provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

4. Article 2 of Directive 2000/78 is entitled 'Concept of discrimination'. It states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

    (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

    (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

…'

5. Under Article 3 of Directive 2000/78, entitled 'Scope':

'1. Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay;

…'

6. Article 5 of Directive 2000/78 is entitled 'Reasonable accommodation for disabled persons'. It states:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

National law

7. Article 52(d) of Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 1/1995 of 24 March approving the consolidated text of the Law on the Workers' Statute)[3] ('Article 52(d) of the Workers' Statute') provides:

'Termination of the contract on objective grounds.

The contract may be terminated:

…

(d) For absences from work, albeit justified but intermittent, which amount to 20% of working hours in two consecutive months provided that total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-consecutive months within a 12-month period.

The following shall not be counted as absences from work for the purposes of the previous paragraph: absences due to industrial action for the duration of that action, acting as a workers' representative, industrial accident, maternity, risk during pregnancy and breastfeeding, illnesses caused by pregnancy, birth or breastfeeding, paternity, leave and holidays, non-industrial illness or accident where absence has been agreed by the official health services and is for more than 20 consecutive days or where absence is caused by the physical or psychological situation resulting from gender-based violence, certified by the social care services or health services, as appropriate.

Nor shall absences for medical treatment for cancer or serious illness be counted.'

8. Article 4(2)(c) of the Ley del Estatuto de los Trabajadores (the Law on the Workers' Statute) provides:

'2. Workers have the right, in their employment:

…

3 It is my understanding that the legislative decree in question has been replaced by Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 of 23 October approving the consolidated text of the Law on the Workers' Statute) which has re-enacted, without making any substantive changes to, the provisions at issue in the present case.

(c) not to be discriminated against directly or indirectly, when seeking employment or once in employment, on the basis of sex, marital status, age within the limits laid down by this Law, racial or ethnic origin, social status, religion or beliefs, political ideas, sexual orientation, membership or lack of membership of a trade union or on the basis of their language on Spanish territory.

Nor may workers be discriminated against on the basis of disability, provided that they are capable of carrying out the work or job in question.'

9. Article 2(d) of Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social (Royal Legislative Decree 1/2013 of 29 November approving the Consolidated Text of the General Law on the rights of persons with disabilities and their social inclusion) ('the General Law on Disability') provides:

'Definitions.

For the purposes of this law:

Indirect discrimination exists if a legal or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, a criterion or practice, or an environment, product or service, ostensibly neutral, is liable to create a particular disadvantage for one person compared with others on grounds of or by reason of disability, where, objectively, it does not satisfy a legitimate aim and the means of achieving that aim are not appropriate and necessary.'

10. Article 40(2) of the General Law on Disability provides:

'Employers shall take appropriate measures to adapt the workplace and enhance the accessibility of the workplace having regard to the needs arising in each individual case in order to allow persons with a disability to have access to employment, to carry out their work, to be promoted and to have access to training, unless such measures would place an excessive burden on the employer.

In order to determine whether a burden is excessive, it is necessary to consider whether it is restricted to a sufficient degree by the measures, assistance and subsidies applying to disabled persons and to take account of the financial and other costs entailed by those measures and the scale of the undertaking or organisation and its overall turnover.'

Facts, procedure and the question referred

11. Mr Carlos Enrique Ruiz Conejero has been a cleaner since 2 July 1993 and was employed at the material time by Ferroser Servicios Auxiliares, SA, which held the contract for the cleaning service at the Virgen de la Luz Hospital, Cuenca (part of the Castilla-La Mancha health service), where he worked. Prior to that, he was employed by the companies which had previously held the cleaning contract for those premises. He has had no employment-related difficulties nor has he been disciplined.

12. Mr Ruiz Conejero was recognised as having a disability by a decision of 15 September 2014, issued by the Cuenca local office of the Consejería de Salud y Asuntos Sociales de la Junta de Comunidades de Castilla-La Mancha (Regional Ministry of Health and Social Affairs of the Castilla-La Mancha Autonomous Government). The decision in question records that he had a degree of disability of 37%, of which 32% was the result of physical limitations (24% due to disease of the endocrine-metabolic system (obesity) and 10% due to functional limitation of the spine) and 5% was the result of additional

social factors.[4]

13. In 2014 and 2015, he took leave for common illness during the following periods:

– from 1 to 17 March 2014 for 'acute pain' which required hospitalisation (from 26 February to 1 March 2014);

– from 26 to 31 March 2014 for 'dizziness/nausea';

– from 26 June to 11 July 2014 for 'lumbago';

– from 9 to 12 March 2015 for 'lumbago';

– from 24 March to 7 April 2015 for 'lumbago'; and

– from 20 to 23 April 2015 for 'dizziness/nausea'.

14. According to the diagnosis of the Servicios Médicos de la Sanidad Pública (Public Health Medical Services), 'dizziness/nausea' and 'lumbago' are caused by degenerative joint disease and polyarthrosis, aggravated by Mr Ruiz Conejero's obesity; the diagnosis concluded that those limitations were the result of the diseases causing his disability.

15. Mr Ruiz Conejero kept his employer informed, within the period and in the manner prescribed, of all his absences and provided the relevant medical certificates confirming the reason for, and duration of, those absences. However, he did not inform his employer that he was disabled at any time before his dismissal and voluntarily refused the periodic medical examinations offered and performed by the employer's mutual insurance company. The order for reference records that, as a result, his employer was not aware that he was or might be disabled when it dismissed him.

16. By letter sent to Mr Ruiz Conejero on 7 July 2015, the employer informed him of his dismissal on objective grounds pursuant to Article 52(d) of the Workers' Statute, because he had exceeded the limits laid down in that provision for absences from work, albeit justified. In particular, the letter noted that in March and April 2015 he had been absent for more than 20% of his working hours and that, in the previous 12 months, he had been absent for more than 5% of his working hours.

17. Mr Ruiz Conejero subsequently challenged his dismissal before the Juzgado de lo Social No 1 Cuenca (Social Court No 1, Cuenca, Spain). In those proceedings, he does not dispute the truth or the accuracy of those absences from work or what they amount to in percentage terms. However, he contends that the exclusive reason for those absences was the disease causing his disability. From that, it follows that there is a direct connection between the absences from work and his status as a disabled person. He claims accordingly that his dismissal is void on grounds of discrimination.

4 Whilst the figures given would appear to add up to 39% overall disability rather than 37%, it may be that there is some further nuance in the structure of the national decision. In any event, these are the percentages recorded in the order for reference.

18. It was in those circumstances that the referring court decided to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for absences from work, albeit justified but intermittent, which amount to 20% of the employee’s working hours in two consecutive months, provided that the total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-consecutive months within a 12-month period, in the case of an employee who must be treated as disabled within the meaning of the directive when his absence from work was caused by his disability?’

19. Written observations have been submitted by Mr Ruiz Conejero, Ferroser Servicios Auxiliares, the Spanish Government and the European Commission. At the hearing on 22 March 2017, all of those parties presented oral argument and responded to questions put by the Court.

Analysis

Preliminary matters

Obesity as a disability for the purposes of Directive 2000/78

20. The order for reference notes that Mr Ruiz Conejero was recognised at national level as having a disability by reason, it would appear, essentially of his obesity.

21. In its judgment in *FOA*,[5] the Court was asked to consider whether EU law provided for a general principle of non-discrimination on grounds of obesity as regards employment and occupation. It held that no such principle existed.[6] However, it went on to consider whether obesity might be covered by the concept of ‘disability’ within the meaning of Directive 2000/78.

22. The answer was that it may do. The Court laid down an EU-wide test in that regard. It held that, where ‘the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of “disability” within the meaning of [the directive]’. Such would be the case, in particular, if the obesity of the worker concerned hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.[7]

23. Where a worker is certified as disabled under national law, he may, but need not, also satisfy the requirements laid down under EU law in that regard. Whether that is the case with Mr Ruiz Conejero will be a matter for the referring court, applying the test I have just set out. Since, however, that court has worded its question on the basis that that is indeed the position, I shall proceed with the remainder of my analysis on that assumption.

5 Judgment of 18 December 2014, C-354/13, EU:C:2014:2463 (also known as ‘*Kaltoft*’).

6 See paragraphs 31 and 40 of the judgment.

7 See paragraphs 59 and 60 of the judgment.

The scope of the referring court's question

24. Although the question asked by the referring court echoes the wording of Article 52(d) of the Workers' Statute alone, that court also explains in the order for reference that Mr Ruiz Conejero did not disclose his medical situation to his employer, a matter which it appears — at least implicitly — to consider precludes the application of Articles 2(2)(b)(ii) and 5 of Directive 2000/78. As I shall explain,[8] it seems to me that matters are less straightforward in that regard than the referring court may contemplate. In order to provide that court with a useful answer, I shall include an analysis of those provisions in my reasoning below.

Direct or indirect discrimination?

25. The combined effect of Article 2(1) and (2) of Directive 2000/78 is to prohibit direct discrimination by reason of disability in nearly every case.[9]

26. By virtue of Article 2(2)(a) of the directive, direct discrimination shall be taken to occur 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation' by reason, inter alia, of his disability.

27. The national provision at issue identified in the referring court's question, namely Article 52(d) of the Workers' Statute, applies equally to all workers. It does not treat those who are disabled any less favourably than those who are able-bodied and thus does not constitute direct discrimination for the purposes of Article 2(2)(a) of Directive 2000/78.

28. It then becomes necessary to consider whether its application may represent indirect discrimination under Article 2(2)(b). That refers to a provision, criterion or practice which is 'apparently neutral' but which may put, inter alia, persons having a particular disability at a particular disadvantage compared with other persons.

29. As the Court observed in *HK Danmark*,[10] a worker with a disability may be more exposed to the risk of application of a shortened notice period than a worker without a disability, since he has the additional risk of an illness connected with his disability and thus runs a greater risk of accumulating days of absence on grounds of illness.[11] It follows that the provision at issue is, prima facie, indirectly discriminatory.

30. That being so, it is necessary to continue the analysis by determining whether and, if so, to what extent, the exceptions laid down by Article 2(2)(b)(i) or (ii) of Directive 2000/78 may apply.

31. The first question that arises in that context is that of the interrelationship between those two derogations. The latter applies to cases of disability only. It is preceded by the word 'or'. Can it be deduced from that that the provisions in question are to be construed as being in some way mutually exclusive, even to the extent of arguing that disabled persons are covered by the second of those provisions alone?

32. I do not believe so.

8 See point 36 et seq. below.

9 Certain, very limited, exceptions are laid down by Articles 2(5), 4 and 6. They are not relevant here.

10 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222 (also known as '*Ring and Werge*').

11 See, to that effect, paragraph 76 of the judgment.

33. As the Spanish Government, rightly in my view, observed at the hearing, the two provisions should be read together, since the second can be seen as informing an understanding of the proportionality of the first. It cannot, moreover, be said that Article 2(2)(b)(ii) should be applied to disabled persons to the exclusion of Article 2(2)(b)(i) since, for reasons I shall explain below,[12] whilst it may be the case that the former will apply to the majority of persons suffering from a disability, it cannot apply to all of them.

Articles 2(2)(b)(ii) and 5 of Directive 2000/78 — Appropriate measures and reasonable accommodation

34. I shall start by considering Article 2(2)(b)(ii), which must in turn be read in conjunction with Article 5. Indirect discrimination shall not arise where, as regards 'persons with a particular disability', the employer is obliged under national legislation[13] to take appropriate measures to eliminate disadvantages entailed by an apparently neutral provision, criterion or practice which would otherwise amount to indirect discrimination. In order to satisfy the requirement to provide appropriate measures, the employer must provide 'reasonable accommodation'. That obliges the employer to take measures, if needed in a particular case, to enable a person with a disability to have access to, participate in or advance in employment or to undergo training. Further guidance is provided by recital 20 of the directive.[14] The Court has held that the expression 'reasonable accommodation' must be given a broad construction having regard, inter alia, to Article 2 of the United Nations Convention on the Rights of Persons with Disabilities.[15]

35. All of that is, however, subject to the important proviso set out in Article 5 of Directive 2000/78 that the measures to be taken should not impose what the legislation terms a 'disproportionate burden' on the employer. Clarification is provided in that regard by recital 21 of the directive, according to which account should be taken, in particular, of the costs of providing the accommodation, the nature of the employer's undertaking and the possibility of public funding or other assistance. There is, in other words, a balancing exercise to be undertaken.

36. The directive does not impose any obligation on employees or prospective employees who are disabled to disclose their disability. It is in my view plain that an employer who is justifiably in total ignorance of his employee's disability — there is nothing to put him on notice that the employee is disabled and the employee has not informed his employer of that fact — cannot be expected to take steps to provide 'reasonable accommodation'. In what circumstances, then, does the obligation laid down by Article 5 apply?

37. It is plain that that obligation will be triggered where the employee has told his employer of his disability and its extent, together with all relevant surrounding circumstances. Provided no disproportionate burden is placed upon him, the employer will then be in a position to take active steps to assist the employee and to provide reasonable accommodation. By virtue of those measures, the employee will have been assimilated into the workforce.

38. What is the position where, as in the present case, the employee does not disclose his disability? In some cases, it will on any reasonable basis be evident to the employer that the person concerned is disabled. To take the most obvious of examples, that will be the case where that person has lost a limb through amputation. The employer cannot be unaware of the situation and it can be assumed

12 See point 50 below.

13 It does not appear to be disputed that the relevant legislation implementing Article 5 in national law in Spain is Article 40(2) of the General Law. See point 10 above.

14 See point 2 above. The Court has held that the list set out in that recital (which is prefaced by the words 'for example') is not exhaustive. See judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 56.

15 As approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35). See judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 53.

that he must either know or ought reasonably to be aware that the employee is disabled. There can be no reason to exclude that employee from the scope of Article 5. The question whether the employer ought reasonably to be aware of the disability will vary from case to case. Since the range of possible disabilities is both wide and varied, there can be no 'one size fits all' answer.

39. Even where the disability is manifest, however, that does not mean that the employer will in every case be aware of the appropriate measures — or all of the appropriate measures — that may be required in order to provide reasonable accommodation for the employee. The employer may ask the employee to provide further details, thereby enabling support and assistance to be provided where possible. If the employee refuses to provide that information or is unwilling to communicate it, he cannot be compelled to do so. He may prefer not to participate in such an exercise for reasons associated with what he perceives to be his personal dignity or independence. In such circumstances, the employer will be limited in what he can do to taking steps that are obvious.[16] The result of that action may, or indeed may not, achieve the result of assimilating the employee into the workforce. There can, though, be no duty on the employer to go any further.

40. Matters are also complicated by the fact that many disabilities are not static by their nature. An employee may, for example, start his career with a particular employer with a disability that has a minimal impact on his ability to work. Subsequently, however, his condition may worsen, with the result that that impact becomes more serious. In that context, it seems to me that similar principles to those set out above will apply. If and to the extent that the employee shares details of his situation with the employer, the latter must consider whether new measures will be necessary to provide reasonable accommodation. Where that does not happen, the employer will be under a duty to take any measures that are obviously required but he cannot be expected to go further than that.[17]

41. Generally, it seems to me that the obligation provided for in Article 5 to provide reasonable accommodation represents an important and valuable measure. By prescribing a series of positive steps to be taken by the employer, it enables disabled workers to participate in the employment market in a way that would otherwise not be open to many of them, thereby enriching their lives to a significant degree. The scope of the directive is, moreover, wide. By virtue of Article 3(1)(a) and (c), it applies at all stages of the employment relationship and at the recruitment stage which precedes it. It follows, in my view, that where the employer knows, or ought reasonably to be aware, that a person whom he proposes to recruit or who is already his employee suffers or may have a disability, that obligation represents the first step in the process leading to the avoidance of discriminatory treatment. A failure to recruit or, as the case may be, a dismissal resulting from a failure to respect such an obligation will amount to unlawful discrimination for the purposes of Directive 2000/78.

42. That point made, I should stress that Article 5 is not open ended. I have already indicated that the duty it imposes does not apply where its effect would be to impose a disproportionate burden on the employer.[18] It is also important to note that the provision strives to place disabled members of the workforce on an equal footing with able-bodied colleagues, not to afford them greater rights. Thus,

16 That would particularly be the case where, as in the present instance, the employee voluntarily refused periodic medical examinations offered by the employer. See point 15 above.

17 I shall address the position which may arise should the disability progress to a degree where no further reasonable accommodation may be provided or where such accommodation may be provided but only to a degree which is disproportionate in terms of the burden imposed on the employer in points 43 and 44 below.

18 See point 35 above.

recital 17 of Directive 2000/78 records, inter alia, that the directive does not require an employer to maintain in employment an individual who is not competent, capable and available to perform the essential functions of the post concerned. A disabled employee is, in that regard, in precisely the same position as an able-bodied one.[19]

43. More complicated is the situation which could arise as a result of a disability which, in its earlier stages, permitted of reasonable accommodation under Article 5 of the directive, but has progressed to a degree where such accommodation is either not practicable or can be provided only by imposing a burden on the employer which is unreasonable. Can the employer dismiss in such circumstances?

44. It seems to me that a dismissal which is based purely on the employee's disability cannot be justified. It would amount to direct discrimination for the purposes of Article 2(2)(a) of the directive. Should, however, the dismissal be based on one of the factors referred to in recital 20 or on any factor not amounting to discrimination, it would in my view not contravene the requirements of the directive.

45. Based on the foregoing analysis, I consider that the first part of the answer to the referring court should be that, in considering the application of Directive 2000/78 to the dismissal of an employee in circumstances which may amount to indirect discrimination for the purposes of the directive, it is first necessary to consider the application of Articles 2(2)(b)(ii) and 5 of the directive. Where an employee suffers from a disability and his employer either knows or ought reasonably to be aware of that disability, the employer will be under a duty to take appropriate measures to provide reasonable accommodation pursuant to Article 5 of the directive, unless to do so would impose a disproportionate burden on him. A failure to do so will result in the employee's dismissal being in contravention of the requirements laid down under the directive.

Article 2(2)(b)(i) of Directive 2000/78

46. I have indicated that the protection afforded to persons with a disability by Article 2(2)(b)(ii) read in the light of Article 5 may be both important and valuable. It is equally plain that the scope of that protection may be limited.[20]

47. Does the fact that those provisions make specific reference to disabled persons mean that they should be construed so as to mean that, when they apply, they are exhaustive? In other words, provided that an employer respects Articles 2(2)(b)(ii) and 5, and subject to the constraints I have mentioned in point 44, would a dismissal of an employee who has a disability be valid and would it be superfluous for the employer also to have regard to Article 2(2)(b)(i) in any way?

48. I consider that to be too simple an approach.

49. In my view, Articles 2(2)(b)(ii) and 5 of Directive 2000/78 do no more than give specific expression to a particular aspect of indirect discrimination on grounds of disability — both as regards the positive duties they impose and the limitations thereon. An employer may, in appropriate circumstances and within proportionate limits, be under a duty to take active steps to promote the interests of those who would otherwise be discriminated against. Indeed, I touched on this — albeit in overview — in my Opinion in *Bougnaoui*,[21] at point 125, in considering the application of the doctrine of proportionality to indirect discrimination in that case. I observed there that 'what is proportionate may vary depending

19 See, in that regard, judgment of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 51, where the Court held that 'the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post'.

20 See points 41 and 42 above.

21 Opinion in *Bougnaoui and ADDH*, C-188/15, EU:C:2016:553.

on the size of the undertaking concerned. The bigger the business, the more likely it will be to have resources allowing it to be flexible in terms of allocating its employees to the tasks required of them. Thus, an employer in a large undertaking can be expected to take greater steps to make a reasonable accommodation with his workforce than an employer in a small- or medium-sized one'.

50. Let us however assume that Article 2(2)(b)(ii) does not apply to a particular case. Its wording makes it clear that it does not extend to all disabled persons but only 'as regards persons with a particular disability'. The benefit of the measures as to reasonable accommodation provided for in Article 5 will thus be limited to the restricted category made up of (a) those disabled persons for whom reasonable accommodation may in fact be provided — it is not every category of disability that will allow of such accommodation — and (b) those persons in respect of whom that accommodation may be provided without imposing a disproportionate burden on the employer. I see no reason for taking those disabled persons who do not fall within that category out of the scope of application of Article 2(2)(b)(i), nor indeed does it seem to me that those who do fall within that category should not also be covered by that provision.

51. Such a restrictive approach would also run counter to the established case-law. In *HK Danmark*,[22] the Court considered separately the application of Article 5[23] and Article 2(2)(b)(i)[24] of Directive 2000/78 to an employee who was subject to an (allegedly discriminatory) notice period under national legislation. At no point did it state that the application of those provisions was mutually exclusive. On the contrary, it held that a dismissal under the national legislative provision at issue — which it later went on to find *might* be valid for the purposes of Article 2(2)(b)(i) of the directive provided the relevant conditions were met — could *not* be valid in the case of a dismissal where the employer had failed to take the appropriate measures to make reasonable accommodation in accordance with Article 5.[25]

52. Although that case and the present one are similar in so far as the subject matter of each includes the validity (or lack of validity) of a provision under national legislation governing dismissal periods in the context of Directive 2000/78, the referring court states in its request for a preliminary ruling in this case that what it terms 'the reason for its uncertainties as to the interpretation or validity of Directive 2000/78' is the interpretation given by this Court in the *HK Danmark* case.[26]

53. It is therefore worth considering that judgment in a little more detail.

54. The background to the proceedings before the national court in that case involved two employees who had been dismissed on grounds which were allegedly discriminatory by reason of a disability.[27] The national legislative provision[28] on which the dismissals were based provided that an employee could be dismissed with one month's notice if he had received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months. The period laid down by that measure was a reduced one: the normal rule under national legislation was that the period of notice was one of between three and six months. The provision in question applied in the same way to disabled and non-disabled persons. The Danish Government submitted that the aim of the provision was to encourage employers to recruit and maintain in their employment workers who were particularly likely to have repeated absences because of illness, by allowing those employers

22 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

23 See paragraphs 48 to 64 of the judgment.

24 See paragraphs 69 to 92 of the judgment.

25 See paragraph 68 and operative part 3 of the judgment.

26 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

27 There was some discussion in the judgment as to whether the illnesses from which the employees were suffering did in fact amount to a disability for the purposes of Directive 2000/78. However, that discussion is not relevant to this part of my analysis.

28 It appears that this provision was optional. It applied where it had been stipulated for by written agreement 'in the individual employment relationship'. See paragraph 13 of the judgment.

subsequently to dismiss the workers with a shortened period of notice if the absences tended to be for very long periods. In return, those workers could retain their employment during the period(s) of their illness. It argued that the provision at issue thus had regard to the interests both of employers and employees.[29]

55. The Court found (so far as relevant to these proceedings) as follows:

– it noted the rule set out in *Chacón Navas*[30] to the effect that unfavourable treatment on grounds of disability undermines the protection provided for by Directive 2000/78 only in so far as it constitutes discrimination within the meaning of Article 2(1) of that directive. The question thus arose whether the national legislation at issue in the main proceedings was liable to produce discrimination against persons with disabilities (paragraph 71);

– it recalled (i) that the Member States have a broad discretion not only in choosing to pursue a particular aim in the field of social and employment policy but also in defining measures to implement it (paragraph 81) and (ii) that encouragement of recruitment undoubtedly constitutes a legitimate aim of the social or employment policy of the Member States and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers. Similarly, a measure taken to promote the flexibility of the labour market may be regarded as a measure of employment policy (paragraph 82);

– it followed that aims such as those referred to by the Danish Government could in principle be regarded as objectively justifying, in national law, as provided for by Article 2(2)(b)(i) of Directive 2000/78, a difference of treatment based on disability such as that deriving from the provision of national law at issue (paragraph 83).

56. Having thus established that that provision pursued aims that might in principle be legitimate for the purposes of Article 2(2)(b)(i), the Court went on to consider whether the means used to achieve those aims were proportionate. It noted once again the broad discretion given to the Member States in the area and observed that it did not appear unreasonable for them to consider that the national measure at issue might be appropriate for achieving the aims described above (paragraph 87).

57. It went on to hold that:

– it could be accepted that, by providing for the right to make use of a shortened period of notice for the dismissal of workers who have been absent because of illness for a period which in that case extended to over 120 days, that rule had the effect, for employers, of encouraging recruitment and maintenance in employment (paragraph 88);

– in order to examine whether such a rule went beyond what is necessary to achieve the aims pursued, that provision must be placed in its context and the adverse effects it was liable to cause for the persons concerned must be considered (paragraph 89);

– it was for the referring court to examine whether the national legislature, in pursuing the legitimate aims of, first, promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, had omitted to take account of relevant factors relating in particular to workers with disabilities (paragraph 90). The risks run by disabled persons, who generally face

29 See paragraphs 26, 72, 78 and 79 of the judgment.

30 See judgment of 11 July 2006, C-13/05, EU:C:2006:456, paragraph 48.

greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked (paragraph 91).

58. What can be drawn from that judgment as regards the present case?

59. First, it seems to me that, in determining whether the national measure at issue pursues a legitimate aim, it is not necessary that the measure set out that aim in express terms. Whilst it is incumbent on the referring court to verify that the aim of the measure is indeed legitimate, its express or stated aim (if any) is not a factor which it needs to take into account. Neither in *HK Danmark*[31] nor in this case does there appear to have been any such reference in the national legislation at issue.[32]

60. Second, the aim of the provision at issue in *HK Danmark*[33] was to encourage employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness. The Court appears to have had little difficulty in concluding that such an aim, since it could encourage recruitment, might be a legitimate one.[34] In the present case, the objective referred to by the Spanish Government in adopting the legislation at issue is that of combating absenteeism, an issue which it argues represents a major cause for concern in that Member State.[35] In so doing, the measure aims to balance the interests of employers and the workforce in ensuring that undertakings may maintain their productivity and that workers are not unreasonably dismissed. As the Commission observes, the fact that the list of excluded absences comprises illnesses that are unlikely to be repetitive can be said to provide support for the position that the target of the measure is absenteeism.[36] In my view, combating absenteeism in the workplace where there is evidence that it is causing material harm both at national level and to employers who have to suffer its consequences could also be said to represent a legitimate aim.

61. As regards the proportionality of the national measure at issue, there seem to me to be two particular strands that can be isolated in the Court's reasoning summarised in points 56 and 57 above. In the first place, the referring court is under a duty to conduct a balancing exercise in order to determine whether the measure in question is appropriate, by having regard both to the interests of employers and of their workforce, or potential workforce, who have a disability. In the second place, that court must take into account the broad discretion given to the Member States in the area.

62. The presence of the second of these factors makes it difficult to give the referring court anything other than very general guidance — possibly, I accept, less guidance than that court would wish. Whilst the employer's interests do indeed appear to be taken into account by the measure at issue, there is less material before the Court as regards those of the disabled workforce beyond the statement referred to in point 60 above that 'workers [should not be] unreasonably dismissed'. In that general context, I would note that the national measure at issue in the *HK Danmark* case[37] provided

31 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

32 Indeed, I would observe that in its judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, where the national legislation at issue was considerably more explicit as regards the perceived ills it existed to combat (there, addiction to gambling), the Court nonetheless held that it was for the national court to carry out its own assessment of the circumstances in which the legislation was adopted and implemented (see, in particular, paragraph 52 of the judgment).

33 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

34 Although the referring court states in its order for reference that the Danish legislation at issue was part of a policy of integration of disabled workers, there is nothing in this Court's judgment that actually corroborates that point. It is true that paragraph 14 notes that such a policy exists under the national legislation implementing Directive 2000/78 but it is not suggested that the two sets of provisions are linked. Paragraph 78 notes the Danish Government's submissions as to the purpose of the national measure allowing for early dismissal: these refer to workers in general who are 'particularly likely to have repeated absences because of illness' and not to disabled workers specifically. Although paragraph 85 records that government's argument that the measure in question enables the recruitment and maintenance in employment of, in particular, disabled workers, that was intended to reflect the result of the legislation and not its objective.

35 At the hearing, the Spanish Government indicated that, for 2016, an average of 5.67% of the working population had been absent from work each day, with a resulting loss in production of goods and services amounting to 5.63% of gross national product.

36 See point 7 above.

37 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

for an employer to be entitled to dismiss a member of his workforce where the period of absence amounted to a total period of 120 days during any period of 12 consecutive months. The measure at issue in the present case is more complicated. It does however appear that on any basis the permissible absence periods under it are likely to be less generous than they were under the Danish one.

63. That does not of itself mean that those provisions are disproportionate. It will be for the referring court to determine whether they are so widely drawn that they are capable of extending to absences that are merely occasional and sporadic — in which case they will in my view clearly not be proportionate — or whether they are appropriately tailored to satisfy the aim of combating absenteeism. That court should also take into account the fact that it appears that the Danish arrangements provided for an employer to be reimbursed, at least in part, for sickness allowances paid to his employees,[38] whilst the applicable Spanish legislation does not: rather, the employer is obliged, at least to a material degree, to pay for those absences out of his own pocket.[39] Those factors on their own need not be conclusive in the referring court's consideration of the matter. They will merely be elements that should be taken into account in considering all relevant aspects of the question. The essential issue here is whether the measure is appropriate and necessary, a matter which it is for the referring court to determine. I stress that I express no concluded view on the matter.

64. I therefore consider that the second part of the answer to the referring court should be that, in determining whether to uphold a national measure which (i) allows an employer to dismiss an employee who must be treated as disabled within the meaning of Directive 2000/78 (ii) by reason of that employee's absence(s) from work as a result of his disability and (iii) sets out a threshold or series of thresholds which such absence(s) must exceed in order for the dismissal to be valid, it is necessary to have regard to the tests laid down in paragraphs 71 to 91 of the Court's judgment in *HK Danmark.*[40] In that regard, a national measure which seeks to combat absenteeism at the workplace where there is evidence that such absenteeism is causing material harm both at national level and to employers who have to suffer its consequences may be said to represent a legitimate aim for the purposes of Article 2(2)(b)(i) of the directive. As regards the proportionality of the national measure at issue, the referring court must place the legislation in its context and have regard to the adverse effects it may cause for the persons concerned. It will be for the referring court to determine whether absence periods provided for in that legislation are so widely drawn that they are capable of extending to absences that are merely occasional and sporadic — in which case they will not be proportionate — or whether they are appropriately tailored to satisfy the aim of combating absenteeism. The extent to which payments in respect of sick leave are to be met by the employer may also be relevant. However, none of those factors on their own will be conclusive. The essential question is whether the national measure at issue is appropriate and necessary, a matter which it is for the referring court to determine.

38 See judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 19 and 86. It appears that reimbursement was limited to 52 weeks and the amount was lower than the pay actually disbursed by the employer.

39 According to the Commission, the general rule which applies is that the employee will not be paid for the first 3 days of any absence, with the employer being liable to pay salary costs at a rate of 60% for the next 12 days, with the State intervening thereafter. In addition, Spanish employers are in most cases required to make payment on dismissal of 20 days' remuneration for each year worked up to a maximum of one year's salary.

40 Judgment of 11 April 2013, C-335/11 and C-337/11, EU:C:2013:222.

Conclusion

65. In the light of the foregoing considerations, I consider that the answer to the question referred by the Juzgado de lo Social No 1 Cuenca (Social Court No 1, Cuenca, Spain) should be that:

– in considering the application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to the dismissal of an employee in circumstances which may amount to indirect discrimination for the purposes of the directive, it is first necessary to consider the application of Articles 2(2)(b)(ii) and 5 of the directive. Where an employee suffers from a disability and his employer either knows or ought reasonably to be aware of that disability, the employer will be under a duty to take appropriate measures to provide reasonable accommodation pursuant to Article 5 of the directive, unless to do so would impose a disproportionate burden on him. A failure to do so will result in the employee's dismissal being in contravention of the requirements laid down under the directive;

– in determining whether to uphold a national measure which (i) allows an employer to dismiss an employee who must be treated as disabled within the meaning of Directive 2000/78 (ii) by reason of that employee's absence(s) from work as a result of his disability and (iii) sets out a threshold or series of thresholds which such absence(s) must exceed in order for the dismissal to be valid, it is necessary to have regard to the tests laid down in paragraphs 71 to 91 of the Court's judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222. In that regard, a national measure which seeks to combat absenteeism at the workplace where there is evidence that such absenteeism is causing material harm both at national level and to employers who have to suffer its consequences may be said to represent a legitimate aim for the purposes of Article 2(2)(b)(i) of the directive. As regards the proportionality of the national measure at issue, the referring court must place the legislation in its context and have regard to the adverse effects it may cause for the persons concerned. It will be for the referring court to determine whether absence periods provided for in that legislation are so widely drawn that they are capable of extending to absences that are merely occasional and sporadic — in which case they will not be proportionate — or whether they are appropriately tailored to satisfy the aim of combating absenteeism. The extent to which payments in respect of sick leave are to be met by the employer may also be relevant. However, none of those factors on their own will be conclusive. The essential question is whether the national measure at issue is appropriate and necessary, a matter which it is for the referring court to determine.