Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 December 2012 [1]

Joined Cases C-335/11 and C-337/11

HK Danmark, acting on behalf of Jette Ring
v
Dansk Almennyttigt Boligselskab (DAB)
and
HK Danmark, acting on behalf of Lone Skouboe Werge
v
Pro Display A/S, in liquidation

(References for a preliminary ruling from the Sø- og Handelsret (Denmark))

(Equal treatment in employment and occupation — Directive 2000/78/EC — Prohibition of discrimination on grounds of disability — Concept of disability — Distinction between sickness and disability — Reasonable accommodation for disabled persons — Indirect discrimination — Justification)

I – Introduction

1. When is there a disability within the meaning of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2] and how is the concept of disability to be distinguished from that of sickness? This is the question that lies at the heart of the present preliminary ruling proceedings. The Court of Justice is therefore called upon to clarify the definition of the concept of disability which it formulated in *Chacón Navas*. [3]

2. These proceedings are also concerned with the meaning to be ascribed to the reasonable accommodation for disabled persons which the employer must provide under Article 5 of Directive 2000/78. Finally, the Sø- og Handelsret (Maritime and Commercial Court) (Denmark) asks whether a period of notice which is shortened on account of periods of absence due to sickness may constitute discrimination on grounds of disability.

1 — Original language: German.

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

3 — Case C-13/05 [2006] ECR I-6467.

II – Legal context

A – *International law*

3. Paragraph (e) in the preamble to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities [4] reads: '[r]ecogni[s]ing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

4. The second paragraph of Article 1 of the UN Convention contains the following definitions:

'Persons with disabilities include 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'.

B – *European Union law*

5. Recital 20 in the preamble to Directive 2000/78 provides:

'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.'

6. In accordance with Article 2(2)(b) of Directive 2000/78, indirect discrimination is to 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

…'

7. Article 5 of Directive 2000/78 provides, under the heading 'Reasonable accommodation for disabled persons', as follows:

'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.'

4 — Ratified by the European Union on 23 December 2010 ('the UN Convention'). See Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion of the UN Convention (OJ 2010 L 23, p. 35).

C – *National law*

8. Directive 2000/78 was transposed into Danish law by the Forskelsbehandlingslov.[5] Under Paragraph 7 of that law, a claim for compensation can be brought for breach of the prohibition of discrimination or failure to take appropriate measures by the employer.

9. The Funktionærlov[6] governs the legal relationship between employers and employees.

10. Paragraph 5(2) of the FL contains a special provision on the termination of an employment relationship on account of the employee's sickness and provides:

'However, it may be stipulated by written agreement in the individual employment relationship that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has been in receipt of salary during periods of sickness amounting in total to 120 days in any period of 12 consecutive months. The validity of the notice shall be dependent on it being given immediately on the expiry of the 120 days of sickness and while the employee is still ill, but its validity shall not be affected by the employee's return to work after the notice of dismissal has been given. …'

III – Facts and main proceedings

11. The present references for a preliminary ruling have their origin in two actions brought in 2006 by the Handels- og Kontorfunktionærernes Forbund Danmark (HK Danmark)[7] on behalf of the employees Jette Ring and Lone Skouboe Werge with a view to obtaining compensation under the Danish law on equal treatment for discrimination on grounds of disability. It had been agreed that Paragraph 5(2) of the FL was applicable to both employment relationships.

A – *Case C-335/11*

12. In *Ring*, the national proceedings are based on the following facts.

13. Ms Ring had been employed as a customer service centre operator with the firm Dansk Almennyttigt Boligselskab (DAB) since 2000. Between June 2005 and her dismissal in November 2005, she was off sick for several periods, her absences amounting in total to more than 120 days. The medical certificates submitted in respect of those periods of absence referred primarily to chronic back complaints attributable inter alia to osteoarthritis between the lumbar vertebrae, the symptoms of which were constant pain in the lumbar region. Once the doctors treating her had established that her lumbar vertebrae were stiffening as a result of spontaneous fusion, no further treatment options were available. Measures which might have alleviated those complaints while Ms Ring was at work, such as the acquisition of an adjustable-height desk for her workstation or the offer of part-time working, were not taken. Part-time posts were in principle available at DAB, however.

5 — Lov om forbud mod forskelsbehandling på arbejdsmarkedet (Law on the prohibition of discrimination in the labour market).

6 — Lov om retsforholdet mellem arbejdsgivere og funktionærer, Funktionærlov (Law on the legal relationship between employers and salaried employees) ('the FL').

7 — Association of Danish commercial and office employees.

14. On the basis of her accumulated periods of absence, Ms Ring was dismissed with a shortened period of notice in accordance with Paragraph 5(2) of the FL. Immediately after Ms Ring's dismissal, DAB placed an advertisement for a part-time position with a comparable job description in a regional office located nearby. Ms Ring took up a new position as a receptionist with another firm, which provided her with an adjustable-height desk and fixed her actual working time at 20 hours per week. She was appointed on a full-time basis under the Danish flexijob scheme and the position qualified for a 50% rebate. [8]

B – *Case C-337/11*

15. In *Skouboe Werge*, the Sø- og Handelsret set out the following facts.

16. Ms Skouboe Werge had been employed as an administrative assistant with the firm Pro Display A/S since 1998. After suffering whiplash following a road traffic accident in December 2003 and having been certified sick for three weeks, she initially resumed her full-time employment with Pro Display. When, in late 2004, it became clear that Ms Skouboe Werge was still suffering from the after-effects of whiplash, she was given a sickness certificate, issued provisionally for four weeks, on the basis of which she worked only approximately four hours per day. In January 2005, Ms Skouboe Werge certified herself sick, on account of ongoing complaints, in respect of the entirety of her working hours. In accordance with the 120-day rule laid down in Paragraph 5(2) of the FL, she was then dismissed with a shortened period of notice of one month expiring on 31 May 2005.

17. Ms Skouboe Werge's complaints manifested themselves in various symptoms, in particular neck pains spreading to her shoulders, jaw problems, fatigue, disturbances in concentration and memory, difficulties in expressing herself, hypersensitivity to noise, a low stress threshold and dizziness. In June 2006, approval was therefore given for Ms Skouboe Werge to receive an early retirement pension based on an assessment of her capacity for work as being approximately eight hours a week at a slow pace. Moreover, by decision of the Arbejdsskadestyrelsen (Office for Accidents at Work and Occupational Diseases), Ms Skouboe Werge's degree of disability was assessed as 10% and the reduction in her capacity for work as 65%.

18. In the main proceedings, HK Danmark took the view that dismissing the employees in question with a shortened period of notice in accordance with Paragraph 5(2) of the FL was precluded by the fact that this infringes the prohibition of discrimination on grounds of disability laid down in Directive 2000/78. The referring court therefore wishes to ascertain what definition is to be given to 'disability' within the meaning of Directive 2000/78.

IV – The questions referred for a preliminary ruling and the procedure before the Court

19. By orders of 29 June 2011, received at the Court Registry on 1 July 2011, the Sø- og Handelsret stayed the proceedings in each case and referred the following questions to the Court for a preliminary ruling:

'(1) (a) Is any person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Paragraph 45 of the judgment of the Court of Justice in Case C-13/05 *Chacón Navas* covered by the concept of disability within the meaning of [Directive 2000/78]?

8 — The flexijob scheme is a Danish scheme under which the State provides wage subsidies for the employment of persons with a permanently reduced capacity for work.

(b) Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the directive?

(c) Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?

(2) Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [Directive 2000/78]?

(3) Is a reduction in working hours among the measures covered by Article 5 of [Directive 2000/78]?

(4) Does [Directive 2000/78] preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of sickness for a total of 120 days during a period of 12 consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the directive, where

(a) the absence is caused by the disability

or

(b) the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work?'

20. By order of 4 August 2011, the President of the Court joined Cases C-335/11 and C-337/11 for the purposes of the written procedure, the oral procedure and the judgment.

21. As well as the parties to the dispute in the main proceedings, the Danish Government, Ireland, the Polish and United Kingdom Governments and the European Commission took part in the written and oral procedures before the Court. In addition, the Belgian and Greek Governments submitted written observations.

V – Assessment

22. The first and second questions referred by the Sø- og Handelsret must be answered together, as they both concern the definition of the concept of disability (see A below). The third question has to do with the substance and extent of the measures which the employer must take in accordance with Article 5 of Directive 2000/78 (see B below). It is necessary, finally, to examine the fourth question, that is to say, whether the shortening of a period of notice on account of absence due to sickness is discriminatory (see C below).

A – *Questions 1 and 2*

1. Definition of the concept of disability

23. Directive 2000/78 itself does not contain any definition of the concept of disability.

24. The Court had already been called upon to define that concept independently for the purposes of European Union law in *Chacón Navas*. According to that definition, the concept of disability refers to a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[9] It must also be probable that it will last for a long time.[10]

25. In 2010 – and, therefore, some years after the judgment in *Chacón Navas* – the European Union ratified the UN Convention. That convention refers first of all, in its preamble, to the fact that the concept of disability must be understood dynamically and that the understanding of disability is constantly evolving.[11] Article 1 of the UN Convention then contains a definition of the concept. According to that definition, 'persons with disabilities include 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'.

26. It follows from Article 216(2) TFEU that international agreements concluded by the European Union are binding upon the institutions of the European Union and on its Member States. Once they enter into force, international agreements concluded by the European Union form an essential ('integral') part of the European Union legal order.[12] Consequently, provisions of secondary European Union legislation must, so far as is possible, be interpreted in a manner consistent with the European Union's obligations under international law.[13]

27. Accordingly, the concept of disability within the meaning of Directive 2000/78 should not fall short of the scope of the protection afforded by the UN Convention. In accordance with the definition contained in the UN Convention, the hindrance to participation in society arises from 'interaction with various barriers'. To that extent, there might be certain circumstances in which the definition given in *Chacón Navas* falls short of the definition contained in the UN Convention and would have to be interpreted in a manner consistent with international law.

28. In the present cases, however, the heart of the problem does not lie in the 'barriers' element of the definition. The referring court wishes to ascertain whether a condition caused by a medically diagnosed incurable or temporary, curable sickness is capable of being covered by the concept of disability. Neither the definition given in *Chacón Navas* nor that contained in the UN Convention provides, in itself, an answer to the referring court's questions. After all, leaving aside the requirement that the limitation must last for a long time, neither definition contains any explicit criteria for distinguishing between disability and sickness.

29. Consequently, in order to answer the referring court's questions, we must now look at the distinction between sickness and disability.

9 — *Chacón Navas*, cited in footnote 3, paragraph 43.

10 — Ibid., paragraph 45.

11 — See also to this effect the Opinion of Advocate General Geelhoed in *Chacón Navas,* cited in footnote 3, point 66.

12 — See to this effect Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-311/04 *Allgemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 42; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 307; and Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50.

13 — See *Commission* v *Germany*, cited in footnote 12, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraph 57; and Case C-161/08 *Internationaal Verhuis- en Transportbedrijf Jan de Lely* [2009] ECR I-4075, paragraph 38.

2. Distinction between disability and sickness

30. In *Chacón Navas*, the Court held that workers do not fall within the scope of the protection afforded by Directive 2000/78 as soon as they develop any type of sickness.[14] The Court thus distinguishes between sickness and disability. After all, 'sickness' is not referred to in the directive as a separate prohibited ground of discrimination.

31. However, the Court excluded only 'sickness as such' from the scope of the directive.[15] It cannot be inferred from the judgment in *Chacón Navaz* that sickness as a cause of disability rules out classification as a disability. Finally, the Court also made it clear in its second judgment concerning discrimination based on disability that it cannot be inferred from the judgment in *Chacón Navaz* that the scope *ratione materiae* of that directive must be interpreted strictly.[16]

32. In particular, there is nothing to indicate that Directive 2000/78 is intended only to cover disabilities which are congenital or result from accidents. To define the scope of the directive by reference to the cause of the disability would be arbitrary and would thus be contrary to the very aim of the directive of giving effect to the principle of equal treatment.

33. A distinction must therefore be drawn between sickness as the possible cause of the impairment and the impairment resulting from sickness. A permanent limitation resulting from sickness which hinders participation in professional life is also covered by the protection of the directive.

34. The present cases concern physical impairments that manifest themselves inter alia in pain and lack of mobility. The distinction between sickness and disability is therefore easier to draw in these cases than in the case on which the Supreme Court of the United States of America had to rule, where it held that even an *asymptomatic* HIV infection may constitute a disability within the meaning of the Americans with Disabilities Act of 1990 (ADA 1990).[17] Whether a person's complaints constitute a limitation in a particular set of circumstances is a matter for assessment by the court of the Member State.

35. There is nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability.[18] Since, however, this issue has been neither raised by the referring court nor discussed by the parties to the proceedings, it does not need to be definitively resolved here.

36. Furthermore, for the purposes of the existence of a disability, it is decisive that the limitation will probably last for a 'long time'.[19] In this regard, the UN Convention states that the impairment must be 'long-term'.[20] I do not see any substantive difference between these two forms of words.

14 — *Chacón Navas*, cited in footnote 3, paragraph 46.

15 — Ibid., paragraph 57.

16 — Case C-303/06 *Coleman* [2008] ECR I-5603, paragraph 46.

17 — US Supreme Court, *Bragdon v. Abbott*, 524 US 624 (1998). Section 12102(1)(A) of the ADA 1990 states that there is a disability where 'a physical … impairment … substantially limits one or more of [an individual's] major life activities'.

18 — The European Court of Human Rights, too, has recognised sickness from diabetes mellitus type 1, which the national authorities considered to be minor, as a disability for the purposes of protection against discrimination: *Glor v. Switzerland*, no. 13444/04, ECHR 2009.

19 — *Chacón Navas*, cited in footnote 3, paragraph 45.

20 — In the English-language version, 'long-term … impairments', in the French-language version, 'incapacités … durables'.

37. A limitation resulting from an incurable illness will usually be regarded as lasting for a long time. However, even an illness which is in principle curable may take so long to be completely cured that the limitation lasts for a long time. Moreover, even an illness which is basically curable may leave behind a long-term limitation. Precisely in the case of chronic illnesses, the transition from a (treatable) illness to what is likely to be a permanent limitation, which only then has the character of a disability, may actually be an evolving process. Not until there is a prognosis of permanent limitation can there be any question of a disability.

38. Consequently, the mere finding than an illness is in itself curable or incurable, permanent or temporary is not such as to support a definitive conclusion as to whether there will subsequently be a permanent limitation.

3. Need for special aids

39. The referring court also asks whether the assumption of a disability presupposes a need for special aids or whether it is sufficient that the person concerned is no longer able to work full-time.

40. The concept of disability within the meaning of the directive does not presuppose a need for special aids.

41. Article 5 of Directive 2000/78 makes it clear that it is necessary first of all to establish the existence of a disability in order then to take the appropriate measures necessary. Recital 20 gives some indication of what appropriate measures might mean and refers in particular to 'adapt[ing] the workplace to the disability'. The need for special adaptations and aids is therefore a *consequence* of the establishment of the disability and does not form part of the definition of the concept of disability.

42. The need for special aids as a part of the definition of disability is also unconvincing from the point of view of the meaning and purpose of the directive. Disabilities within the meaning of the directive may be the result of physical, mental or psychological impairments. However, the requirement of a need for special aids seems to be based only on the scenario of a person with physical impairments. If aids were required as a compulsory element of the concept of disability, the mental or psychological impairments explicitly referred to in the directive would not be covered, as they do not normally call for aids. What is more, such a requirement would actually operate to the disadvantage of disabled persons whose disability cannot be offset or alleviated by an aid and who, for that reason alone, are usually more severely affected than other disabled persons.

43. In conclusion, therefore, the only decisive criterion is whether there is a hindrance to participation in professional life.

44. DAB and Pro Display have submitted that a person may be regarded as disabled only if he is completely excluded from professional life, so that a reduced capacity to work is not sufficient for the purposes of classification as a disability. That argument is unconvincing. Even on a general linguistic understanding, the phrase 'hindered from participating in professional life' also covers barriers which are only partial and is not confined only to a comprehensive 'exclusion' from professional life.

45. The proposition that that phrase includes people who are hindered from participating in professional life by not being able to work full-time is also supported by recital 17 in the preamble to Directive 2000/78. This provides that the protection afforded by the directive covers workers who are in principle 'competent, capable and available to perform the essential functions of the post'. The directive is therefore specifically intended to protect persons who are in principle capable of participating in professional life, albeit in some circumstances to a limited extent or if special accommodation is provided. Consequently, the applicability of the directive does not presuppose that the person concerned is excluded from professional life.

46. The interim conclusion must therefore be that the concept of disability covers a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. It is immaterial to the definition of disability that the impairment was caused by an illness; the only decisive factor is whether the limitation lasts for a long time. Even a long-term reduction in functional capacity which does not entail a need for special aids but means only or essentially that the person concerned is not capable of working full-time is to be regarded as a disability within the meaning of Directive 2000/78.

B – *Question 3*

47. By its third question, the Sø- og Handelsret wishes to ascertain whether reasonable accommodation for disabled persons also includes a reduction in working hours.

48. The first sentence of Article 5 of Directive 2000/78 provides that reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. This means that employers must 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. Employers are exempt from that obligation where such measures would impose a disproportionate burden on them.

49. The purpose of that provision is to enforce not only the equal *treatment* but also the equal *status* of a disabled person and thus to enable him to participate in employment.

50. Article 5 of Directive 2000/78 itself provides simply that the measures must be 'appropriate' and 'needed in a particular case' in order to enable a person with a disability to have access and so on to employment.

51. However, recital 20 in the preamble to the directive brings greater clarity to that provision. According to that recital, 'effective and practical measures' are to be provided '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'.

52. A reduction in working hours might be covered by the explicit example given in that recital of 'adapting patterns of working time'. However, DAB and Pro Display take the view that the phrase 'patterns of working time' does not relate to working hours but only to the performance and pace of work or the distribution of tasks between employees.

53. Even if the view is taken that a reduction in working hours does not fall within the scope of the phrase 'adapting patterns of working time', I am of the opinion that the reduction in working hours is covered by Article 5 of the directive.

54. It is clear not least from the wording of recital 20 that the list it contains is given purely by way of example and is not meant to be exhaustive. It cannot be concluded from the mere fact that a reduction in working hours is not expressly mentioned in that recital that it is not covered by Article 5 of the directive.

55. DAB and Pro Display also point out that the concept of working hours is not mentioned in the directive and was not discussed in the preparatory work for the directive either. Furthermore, they submit, the concept of a reduction in working hours is so closely associated with the Part-Time Working Directive[21] that any corresponding heads of claim must be assessed under that directive alone.

56. However, the European Union legislature framed the wording of Article 5 broadly. It speaks in general terms of measures enabling people with disabilities to have access to employment. A reduction in working hours is undoubtedly capable of enabling a person with a disability to participate in employment.

57. In this regard, recital 20, too, supports a broad understanding of Article 5. It is after all clear from that recital that, contrary to the view taken by DAB and Pro Display, not only physical but also organisational measures are covered. 'Adapting premises or equipment' refers to the removal of physical barriers, whereas 'adapting patterns of working time, the distribution of tasks or the provision of training or integration resources' refers to measures of an organisational nature. This is consistent in particular with the understanding of disability under the UN Convention, which, in the context of limitations, attaches relevance not only to physical but also in particular to social barriers.

58. The meaning and purpose of Directive 2000/78 also indicate that part-time working is covered. That directive calls for individually agreed measures on equal treatment and thus improved participation of people with disabilities in professional life.[22] The decisive factor must therefore be whether a particular measure is capable of enabling a person with a disability to take up a profession or to continue to exercise his profession. From that point of view, a measure to ensure that disabled employees who are able to work at least part-time are not entirely excluded from the labour market but are afforded the possibility of adequately participating in professional life by being offered part-time work is eminently consistent with the meaning and purpose of the directive. There is nothing to indicate that the directive requires only measures such as the installation of a lift or wheelchair-friendly sanitary facilities – which can also be time-consuming and expensive – but cannot cover a reduction in working hours.

59. Admittedly, the objection raised by DAB and Pro Display, to the effect that part-time working may constitute in certain circumstances a considerable interference with the legal relationship between employer and employee and impose a burden on the employer, cannot be dismissed out of hand. However, the same may also be true of the example of adapting premises. That is why the second sentence of Article 5 imposes the obligation on the employer but does so on condition that the measures must not impose a disproportionate burden on the employer. To this extent, the directive requires an appropriate balance to be struck between the interest of the disabled employee in benefiting from measures to support him and that of the employer in not being compelled to accept interferences with the organisation of his business and economic losses without further consideration.

60. The interim conclusion must therefore be that a reduction in working hours may be a measure covered by Article 5 of Directive 2000/78. It is for the national court to determine in each individual case whether such a measure imposes a disproportionate burden on the employer.

21 — Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

22 — See recitals 8, 9, 11 and 16 in the preamble to Directive 2000/78.

C – *Question 4*

1. First part of Question 4

61. By the first part of the fourth question, the Sø- og Handelsret wishes to ascertain to what extent a provision of national law which permits dismissal with a shortened period of notice in cases involving absence due to sickness is contrary to Directive 2000/78 in so far as it is also applied in situations where the absence is caused by the disability.

62. Article 1 in conjunction with Article 2(2) of Directive 2000/78 prohibits direct or indirect discrimination on the grounds of disability as regards employment and occupation. Direct discrimination is taken to occur where one person is treated less favourably than another in a comparable situation on grounds of disability. Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put disabled persons at a particular disadvantage compared with other persons, unless this is justifiable. In accordance with Article 3(1)(c), the scope *ratione materiae* of the directive explicitly covers conditions governing dismissal. Consequently, it must now be examined, first, whether the shortened period of notice is to be regarded as a direct or indirect disadvantage and, if so, whether it is justifiable.

a) Disadvantage

63. First of all, however, I should like to clarify the subject-matter of the examination. The referring court asks only whether the provision allowing the period of notice to be shortened on account of absences due to sickness is in conformity with European Union law.

64. Another obvious question in the circumstances would be to what extent absences connected with a disability or with an illness resulting from a disability may constitute a permissible ground for dismissal at all. The Court has already held that the directive precludes dismissal which, in the light of the employer's obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not available to perform the essential functions of his post.[23] By converse inference, it might be concluded from this that dismissal is permissible where the accommodation necessary to adapt the workplace would impose a disproportionate burden on the employer or the employee is not available to perform the essential functions of his post because of his absence. I would argue, however, that that finding by the Court does not in itself conclusively dispose of the question as to whether a dismissal on account of absences due to sickness resulting from disability is permissible. Nevertheless, in answer to the question referred, I shall now concern myself exclusively with the shortening of the period of notice.

65. Where an employee with a disability is absent because of a 'general' illness, the fact that absences due to sickness are taken into account for the purpose of shortening the period of notice does not put that employee at a disadvantage compared with a non-disabled employee. After all, the likelihood of contracting an illness such as flu bears no relation to the disability and affects employees in the same way whether they are disabled or not.

23 — *Chacón Navas*, cited in footnote 3, paragraph 51.

66. The present cases, however, are concerned with absences which are due to a disability. At first sight, Paragraph 5(2) of the FL appears to be neutral, since it applies to all employees who have been absent on account of sickness for more than 120 days. It does not therefore give rise to direct discrimination against disabled persons, as it does not directly apply the prohibited differentiating criterion of disability and does not prescribe unequal treatment by reference to a criterion which is inseparably linked to disability. After all, a disability does not always necessarily lead to illness and absences due to sickness, so that there cannot be said to be an inseparable link.

67. There is, however, an indirect disadvantage here. In so far as the sickness is connected with a disability, unequal situations are treated equally. Generally speaking, employees with a disability have a much higher risk of contracting an illness connected with their disability than employees without a disability. The latter can contract only 'general' illnesses. Employees with a disability, on the other hand, can additionally contract a 'general' illness. The provision on the shortened period of notice is therefore one which indirectly puts employees with a disability at a disadvantage compared with non-disabled employees.

68. The objection raised by some of the parties to the proceedings, to the effect that, taking into account the right of employees not to have to disclose the nature of their illness, it is not practicable to differentiate between 'general' illnesses and those which are the result of a disability, is unconvincing. There are, after all, ways of resolving this issue, for example by recourse to a medical examiner.

b) Justification

69. In accordance with Article 2(2)(b)(i) of Directive 2000/78, a provision such as Paragraph 5(2) of the FL is justified where it pursues a legitimate aim and the means of achieving that aim are appropriate and necessary. That wording contains the general requirements recognised in European Union law for the justification of unequal treatment. [24]

70. Thus, the provision must be appropriate for the purposes of achieving a legitimate aim. It must also be necessary, which is to say that the legitimate aim pursued must not be capable of being achieved by more moderate but equally appropriate means. Finally, the provision must also be proportionate within the narrower meaning of that term, which is to say that it must not give rise to disadvantages disproportionate to the aims pursued. [25]

71. It must be borne in mind when examining these criteria that it is recognised in case-law that the Member States enjoy broad discretion in their choice of measures capable of achieving their aims in the field of social and employment policy. [26]

72. The order for reference contains no information on the aims pursued by Paragraph 5(2) of the FL. This makes an assessment difficult. It will therefore be for the referring court to make a definitive assessment of whether the provision at issue is justified.

24 — See my Opinion in Case C-499/08 *Andersen* [2010] ECR I-9343, point 42.

25 — Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 41; and Case C-343/09 *Afton Chemical* [2010] ECR I-7023, paragraph 45 and the case-law cited.

26 — See, in the context of discrimination on grounds of age, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68, and Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 41.

73. The Danish Government has submitted that Paragraph 5(2) of the FL attempts to strike a fair balance between the interests of employers and those of employees in cases involving long absences due to sickness. Ultimately, however, that provision serves the interests of employees. In its view, the shortened period of notice applicable in the case of a long absence due to sickness gives the employer an incentive not to dismiss a sick employee at the earliest opportunity but, initially, to continue to employ him because the employer knows that, if the employee is absent for a long period of time, the period of notice will, by way of compensation, be shortened.

74. The aims pursued are legitimate and, moreover, in the light of the discretion available to the Member States, the provision is not manifestly inappropriate for the purposes of achieving those aims.[27] An alternative, less drastic, measure would have to be capable of being incorporated into the remaining scheme of employment law provisions. Whether such a measure is conceivable is therefore difficult to assess without further information.

75. The decisive factor is whether the disadvantages sustained by disabled employees as a result of the shortened period of notice in its present form are proportionate to the aims pursued, in other words, whether they have undue adverse effects on the persons concerned. This requires that the right balance be found between the various conflicting interests involved.[28] A question here is whether an appropriate provision should not also take into account the severity of the disability and the chances of re-employment of the employee concerned. The more severe the employee's disability and the more difficult it is for him to find new employment, the more important the length of his period of notice becomes. It is for the referring court to assess this issue in detail.

76. In conclusion, the answer to the first part of the fourth question should therefore be that Directive 2000/78 must be interpreted as precluding a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. This does not apply where the disadvantage is objectively justified by a legitimate aim in accordance with Article 2(2)(b)(i) of Directive 2000/78 and the measures taken are appropriate and necessary for achieving that aim.

2. Second part of Question 4

77. By the second part of the fourth question, the referring court wishes to ascertain, finally, whether Directive 2000/78 precludes the shortening of the period of notice where the employee's absence is due to the fact that the employer did not take the measures appropriate to enable a person with a disability to perform his work, in accordance with Article 5 of the directive.

78. An examination of proportionality is already implicit in the question as to what measures are appropriate within the meaning of Article 5 of Directive 2000/78. Whether the measures to be taken can be expected of the employer is clarified in this connection, with a balance being struck between the interests of the disabled employee and those of his employer. If the employer fails to take these appropriate measures which he can be expected to take, in other words, if he fails to comply with his obligation under Article 5 of the directive, he must not gain any legal advantage thereby. The obligation under Article 5 would become meaningless if the failure to take proportionate measures could justify placing a disabled worker at a disadvantage. Therefore, in the light of the spirit and purpose of the provision, any absences on the part of the employee which are due to the failure to take a measure cannot justify a shortening of the period of notice.

27 — See in this regard *Palacios de la Villa*, cited in footnote 26, paragraph 72, and Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 70.

28 — See in this regard my Opinion in *Andersen*, cited in footnote 24, point 68, and my Opinion in Case C-286/12 *Commission* v *Hungary* [2012] ECR, point 78.

79. Consequently, the application of a shortened period of notice on account of absences on the part of the employee which were due to the fact that the employer did not take any appropriate measures in accordance with Article 5 of Directive 2000/78 constitutes an unjustifiable disadvantage.

VI – Conclusion

80. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling as follows:

(1) (a) The concept of disability within the meaning of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation covers a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

(b) It is immaterial to the definition of disability that the impairment was caused by an illness; the only decisive factor is whether the limitation is likely to last for a long time.

(c) Even a long-term reduction in functional capacity which does not entail a need for special aids but means only or essentially that the person concerned is not capable of working full-time is to be regarded as a disability within the meaning of Directive 2000/78.

(2) A reduction in working hours may be a measure covered by Article 5 of Directive 2000/78. It is for the national court to determine in each individual case whether such a measure imposes a disproportionate burden on the employer.

(3) Directive 2000/78 must be interpreted as precluding a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. This does not apply where the disadvantage is objectively justified by a legitimate aim in accordance with Article 2(2)(b)(i) of Directive 2000/78 and the measures taken are appropriate and necessary for achieving that aim. However, the application of a shortened period of notice on account of absences on the part of the employee which were due to the fact that the employer did not take any appropriate measures in accordance with Article 5 of Directive 2000/78 constitutes an unjustifiable disadvantage.