Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 April 2013 *

(Social policy — United Nations Convention on the Rights of Persons with Disabilities — Directive 2000/78/EC — Equal treatment in employment and occupation — Articles 1, 2 and 5 — Difference of treatment on grounds of disability — Dismissal — Existence of a disability — Employee absent because of disability — Obligation to provide accommodation — Part-time work — Length of the period of notice)

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

REQUESTS for a preliminary ruling under Article 267 TFEU from the Sø- og Handelsret (Denmark), made by decisions of 29 June 2011, received at the Court on 1 July 2011, in the proceedings

HK Danmark, acting on behalf of Jette Ring,

v

Dansk almennyttigt Boligselskab (C-335/11),

and

HK Danmark, acting on behalf of Lone Skouboe Werge,

v

Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, G. Arestis, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 October 2012,

after considering the observations submitted on behalf of:

— HK Danmark, acting on behalf of Ms Ring, by J. Goldschmidt, advokat,

* Language of the case: Danish.

— HK Danmark, acting on behalf of Ms Skouboe Werge, by M. Østergård, advokat,

— Dansk almennyttigt Boligselskab, by C. Emmeluth and L. Greisen, advokaten,

— Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, by T. Skyum and L. Greisen, advokaten,

— the Danish Government, originally by C. Vang, and subsequently by V. Pasternak Jørgensen, acting as Agents,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent, and C. Power BL,

— the Greek Government, by D. Tsagkaraki, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and C. Gerardis, avvocato dello Stato,

— the Polish Government, by M. Szpunar, J. Faldyga and M. Załęka, acting as Agents,

— the United Kingdom Government, by K. Smith, Barrister,

— the European Commission, by M. Simonsen and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2012,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 1, 2 and 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The requests have been made in proceedings, first, between HK Danmark ('HK'), acting on behalf of Ms Ring, and Dansk almennyttigt Boligselskab ('DAB') and, secondly, between HK, acting on behalf of Ms Skouboe Werge, and Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation ('Pro Display'), concerning the lawfulness of the dismissals of Ms Ring and Ms Skouboe Werge.

Legal context

International law

3 The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), states in recital (e) in its preamble:

'Recognising 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 Under Article 1 of the UN Convention:

‘The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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.’

5 Under the fourth indent of Article 2 of the Convention, ‘“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’

European Union law

6 Recitals 6 and 8 in the preamble to Directive 2000/78 state:

‘(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

…

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.’

7 According to recitals 16 and 17 in the preamble to the directive:

‘(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.’

8 Recitals 20 and 21 in the preamble to the directive read as follows:

‘(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.’

9 In accordance with Article 1 of Directive 2000/78, the purpose of the 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'.

10 Article 2 of the directive, 'Concept of discrimination', provides:

'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.

…'

11 Article 5 of the directive, 'Reasonable accommodation for disabled persons', reads 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.'

Danish law

12 Paragraph 2 of the Law on the legal relationship between employers and salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer, 'the FL') provides:

'1. The employment contract between the employer and the employee may be terminated only after prior notice has been given in accordance with the rules stated below. This shall also apply to the termination of a fixed-term employment contract before expiry of the employment contract.

2. Termination of the employment contract on the part of the employer must take place with at least

(1) one month's notice, expiring at the end of a month, during the first six months' employment,

(2) three months' notice, expiring at the end of a month, after six months' employment.

3. The period of notice in subparagraph 2(2) shall be increased by one month for every three years of service, subject to a maximum of six months.'

13 Paragraph 5 of the FL, which provides inter alia that a salaried worker is entitled to receive his salary when absent because of illness, states:

'1. If the salaried employee becomes unable to carry out his work because of illness, the resulting absence from work shall be regarded as lawful absence on his part unless he has contracted the disease intentionally or by gross negligence during the employment relationship or he has fraudulently failed to disclose at the time when he took on the job that he was suffering from the disease in question.

2. 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 received his salary during periods of illness for a total period of 120 days during 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 illness 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.'

14 Directive 2000/78 was transposed into national law by Law No 1417 amending the law on the prohibition of discrimination on the labour market (Lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 22 December 2004 ('the Anti-Discrimination Law'). Paragraph 2a of the Anti-Discrimination Law provides:

'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 enable a person with a disability to undergo training. This does not however apply if such measures would impose a disproportionate burden on the employer. This burden shall not be regarded as disproportionate if it is sufficiently remedied by public measures.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

15 From 1996 Ms Ring was employed in Lyngby (Denmark) by the housing association Boligorganisationen Samvirke, and then from 17 July 2000 by DAB, which took over Boligorganisationen Samvirke. Ms Ring was absent on several occasions from 6 June 2005 to 24 November 2005. The medical certificates stated inter alia that she was suffering from constant lumbar pain which could not be treated. No prognosis could be made as regards the prospect of returning to full-time employment.

16 By letter from DAB of 24 November 2005, Ms Ring was dismissed, in accordance with Paragraph 5(2) of the FL.

17 According to the documents before the Court, the working area was altered after her dismissal. DAB submitted an estimate dated 3 September 2008, at a total cost of 'approx. DKK 305 000 (+ a little)', for 'a reception desk with a number of workstations behind it', 'removing and replacing old carpet' and installing 'adjustable-height desks'.

18 On 1 February 2006 Ms Ring started a new job as a receptionist for ADRA Danmark, working for 20 hours a week. The parties to the main proceedings in Case C-335/11 agree that her workstation is a normal workstation which includes an adjustable-height desk.

19 Ms Skouboe Werge started work for Pro Display in 1998 as an office assistant/management secretary. On 19 December 2003 she was the victim of a road accident and suffered whiplash injuries. She was then on sick leave for about three weeks. She was subsequently absent because of illness for a few days only. On 4 November 2004 the director of accounts of Pro Display sent the staff an email informing them that, by agreement, Ms Skouboe Werge would be on part-time sick leave for four weeks, during which she would work for about four hours a day. Pro Display was reimbursed the part of Ms Skouboe Werge's pay which corresponded to the daily sickness allowances.

20 On Monday 10 January 2005 Ms Skouboe Werge went on full-time sick leave. By email of 14 January 2006 she informed Pro Display's managing director that she was still very poorly and was to consult a specialist that day. According to a medical report of 17 January 2005, she had seen the doctor that day and had said that she had been unfit for work from 10 January 2005. The doctor considered that that unfitness for work would last for a further month. In a medical report of 23 February 2005, the same doctor said that he could not give an opinion on the duration of the unfitness for work.

21 By letter of 21 April 2005 Ms Skouboe Werge was dismissed with one month's notice expiring on 31 May 2005.

22 Ms Skouboe Werge underwent an assessment procedure at Jobcenter Randers, which concluded that she was capable of working for about eight hours a week at a slow pace. In June 2006 she was granted early retirement on the ground of her incapacity for work. In 2007 the Arbejdsskadestyrelsen (National office for accidents at work and occupational diseases) assessed Ms Skouboe Werge's degree of invalidity at 10% and her loss of working capacity at 50%, subsequently revised to 65%.

23 The trade union HK, acting on behalf of the two applicants in the main proceedings, brought proceedings against their employers in the Sø- og Handelsret (Maritime and Commercial Court), seeking compensation on the basis of the Anti-Discrimination Law. HK submits that both employees were suffering from a disability and that their employers were required to offer them reduced working hours, by virtue of the obligation to provide accommodation pursuant to Article 5 of Directive 2000/78. HK also argues that Paragraph 5(2) of the FL cannot apply to those two employees, because their absences because of illness were the result of their disability.

24 In both main proceedings the employers dispute that the applicants' state of health is covered by the concept of 'disability' within the meaning of Directive 2000/78, since the only incapacity that affects them is that they are not able to work full-time. They also dispute that reduced working hours are among the measures contemplated by Article 5 of that directive. They submit, finally, that, in cases of absence on grounds of illness caused by a disability, the dismissal of a worker with a disability pursuant to Paragraph 5(2) of the FL does not constitute discrimination, and is not therefore contrary to that directive.

25 The referring court observes that in Paragraph 45 of its judgment in Case C-13/05 *Chacón Navas* [2006] ECR I-6467 the Court stated that, for a limitation of the capacity to participate in professional life to fall within the concept of 'disability', it must be probable that it will last for a long time.

26 In those circumstances, the Sø- og Handelsret decided to stay the proceedings and to refer the following questions, which are formulated in the same terms in Cases C-335/11 and C-337/11, 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 [in *Chacón Navas*] covered by the concept of disability within the meaning of [Directive 2000/78]?

(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 illness for a total of 120 days within 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?'

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

Consideration of the questions referred

Preliminary observations

28 It should be noted, as a preliminary point, that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50 and the case-law cited).

29 It should also be recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR, paragraph 39 and the case-law cited).

30 It follows from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order (see, to that effect, Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5).

31 Moreover, according to the appendix to the Annex II to that decision, in the field of independent living and social inclusion, work and employment, Directive 2000/78 is one of the European Union acts which refer to matters governed by the UN Convention.

32 It follows that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention.

33 It is in the light of those considerations that the questions put to the Court by the referring court must be answered.

Questions 1 and 2

34 By its first and second questions, which should be considered together, the referring court asks essentially whether the concept of 'disability' in Directive 2000/78 must be interpreted as including the state of health of a person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work, for a period that will probably last for a long time, or permanently. It further asks whether that concept must be interpreted as meaning that a condition caused by a medically diagnosed incurable illness may be covered by that concept, that a condition caused by a medically diagnosed curable illness may also be covered by that concept, and that the nature of the measures to be taken by the employer is decisive for considering that a person's state of health is covered by that concept.

35 It must be recalled that the purpose of Directive 2000/78, as stated in Article 1, is to lay down a general framework for combating discrimination, as regards employment and occupation, on any of the grounds referred to in that article, which include disability (see *Chacón Navas*, paragraph 41). In accordance with Article 3(1)(c) of the directive, it applies, within the limits of the areas of competence conferred on the European Union, to all persons, in relation inter alia to conditions of dismissal.

36 The concept of 'disability' is not defined by Directive 2000/78 itself. The Court therefore held, in paragraph 43 of its judgment in *Chacón Navas*, that the concept must be understood as referring 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.

37 The UN Convention, which was ratified by the European Union by decision of 26 November 2009, in other words after the judgment in *Chacón Navas* had been delivered, acknowledges in recital (e) 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'. Thus the second paragraph of Article 1 of the convention states that 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'.

38 Having regard to the considerations set out in paragraphs 28 to 32 above, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

39 In addition, it follows from the second paragraph of Article 1 of the UN Convention that the physical, mental or psychological impairments must be 'long-term'.

40 It may be added that, as the Advocate General observes in point 32 of her Opinion, it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. It would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability.

41 It must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78.

42 On the other hand, an illness not entailing such a limitation is not covered by the concept of 'discrimination' within the meaning of Directive 2000/78. Illness as such cannot be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination (see *Chacón Navas*, paragraph 57).

43 The circumstance that the person concerned can work only to a limited extent is not an obstacle to that person's state of health being covered by the concept of 'disability'. Contrary to the submissions of DAB and Pro Display, a disability does not necessarily imply complete exclusion from work or professional life.

44 The concept of 'disability' as defined in paragraph 38 above must be understood as referring to a hindrance to the exercise of a professional activity, not, as DAB and Pro Display submit, to the impossibility of exercising such an activity. The state of health of a person with a disability who is fit to work, albeit only part-time, is thus capable of being covered by the concept of 'disability'. An interpretation such as that suggested by DAB and Pro Display would, moreover, be incompatible with the objective of Directive 2000/78, which aims in particular to enable a person with a disability to have access to or participate in employment.

45 In addition, a finding that there is a disability does not depend on the nature of the accommodation measures such as the use of special equipment. It should be noted here that the definition of the concept of 'disability' within the meaning of Article 1 of Directive 2000/78 comes before the determination and assessment of the appropriate accommodation measures referred to in Article 5 of the directive.

46 According to recital 16 in the preamble to Directive 2000/78, such measures are intended to accommodate the needs of disabled persons. They are therefore the consequence, not the constituent element, of the concept of disability. Similarly, the measures or adaptations referred to in recital 20 in the preamble make it possible to comply with the obligation under Article 5 of the directive, but do not apply unless there is a disability.

47 It follows from the above considerations that the answer to Questions 1 and 2 is that the concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.

Question 3

48 By its third question the referring court asks essentially whether Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article.

49 As that article states, the employer is required to take appropriate measures in particular to enable a person with a disability to have access to, participate in, or advance in employment. Recital 20 in the preamble to the directive gives a non-exhaustive list of such measures, which may be physical, organisational and/or educational.

50 Neither Article 5 of Directive 2000/78 nor recital 20 in its preamble mentions reduced working hours. However, the concept of 'patterns of working time' mentioned in that recital must be interpreted in order to determine whether an adaptation of working hours may be covered by that concept.

51 DAB and Pro Display submit that that concept refers to such matters as the organisation of the patterns and rhythms of work, for example in connection with a production process, and of breaks, so as to relieve as much as possible the burden on workers with disabilities.

52 However, it does not appear from recital 20 in the preamble or from any other provision of Directive 2000/78 that the European Union legislature intended to limit the concept of 'patterns of working time' to such elements and to exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time to work part-time.

53 In accordance with the second paragraph of Article 2 of the UN Convention, 'reasonable accommodation' is 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'.

54 Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.

55 As recital 20 in the preamble to Directive 2000/78 and the second paragraph of Article 2 of the UN Convention envisage not only material but also organisational measures, and the term 'pattern' of working time must be understood as the rhythm or speed at which the work is done, it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive.

56 It should be observed, moreover, that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to Directive 2000/78 is not exhaustive and, consequently, even if it were not covered by the concept of 'pattern of working time', a reduction in working hours could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours make it possible for the worker to continue employment, in accordance with the objective of that article.

57 It must be recalled, however, that, as stated in recital 17 in the preamble, Directive 2000/78 does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities, which includes a possible reduction in their hours of work.

58 Moreover, in accordance with Article 5 of that directive, the accommodation persons with disabilities are entitled to must be reasonable, in that it must not constitute a disproportionate burden on the employer.

59 In the disputes in the main proceedings, it is therefore for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers.

60 As follows from recital 21 in the preamble to Directive 2000/78, account must be taken in particular of the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or any other assistance.

61 It should be recalled that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 35 and the case-law cited).

62 It may be of relevance for the purposes of that assessment that, as noted by the referring court, immediately after the dismissal of Ms Ring, DAB advertised a position for an office worker to work part-time, 22 hours a week, in its regional office in Lyngby. There is nothing in the documents before the Court to show that Ms Ring was not capable of occupying that part-time post or to explain why it was not offered to her. Moreover, the referring court stated that soon after her dismissal Ms Ring started a new job as a receptionist with another company and her actual working time was 20 hours a week.

63 In addition, as the Danish Government pointed out at the hearing, Danish law makes it possible to grant public assistance to undertakings for accommodation measures whose purpose is to facilitate the access to the labour market of persons with disabilities, including initiatives aimed at encouraging employers to recruit and maintain in employment persons with disabilities.

64 In the light of the foregoing, the answer to Question 3 is that Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

Question 4(b)

65 By part (b) of its fourth question, the referring court asks essentially whether Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

66 The circumstance that an employer has failed to take those measures may have the consequence, having regard to the obligation under Article 5 of Directive 2000/78, that the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability.

67 Should the national court find that the absences of the workers are attributable, in the present cases, to the employer's failure to adopt appropriate accommodation measures, Directive 2000/78 would preclude the application of a provision of national law such as that at issue in the main proceedings.

68 Having regard to the foregoing, the answer to Question 4(b) is that Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

Question 4(a)

69 By part (a) of its fourth question, the referring court asks essentially whether Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability.

70 By this question the referring court is raising the case of Paragraph 5(2) of the FL being applied to a disabled person following absence on grounds of illness attributable wholly or partly to his disability, not to the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of Directive 2000/78.

71 As the Court held in paragraph 48 of *Chacón Navas*, 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. A disabled worker covered by that directive must be protected against all discrimination in comparison to a worker not so covered. The question thus arises whether the national legislation at issue in the main proceedings is liable to produce discrimination against persons with disabilities.

72 On the question whether the provision at issue in the main proceedings contains a difference of treatment on grounds of disability, it must be noted that Paragraph 5(2) of the FL, which relates to absences on grounds of illness, applies in the same way to disabled and non-disabled persons who have been absent for more than 120 days on those grounds. In those circumstances, that provision cannot be regarded as establishing a difference of treatment based directly on disability, within the meaning of Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78.

73 It should be observed that a person whose employer terminates his employment contract with a shortened notice period solely on grounds of illness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78 (see, by analogy, *Chacón Navas*, paragraph 47).

74 It must therefore be concluded that Paragraph 5(2) of the FL does not contain direct discrimination on grounds of disability, in so far as it uses a criterion that is not inseparably linked to disability.

75 On the question whether that provision is liable to produce a difference of treatment indirectly based on disability, it must be observed that taking account of days of absence on grounds of illness linked to disability in the calculation of days of absence on grounds of illness amounts to assimilating illness linked with disability to the general concept of illness. However, as the Court said in paragraph 44 of *Chacón Navas*, the concepts of 'disability' and 'sickness' cannot simply be treated as being the same.

76 A worker with a disability is more exposed to the risk of application of the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability. As the Advocate General observes in point 67 of her Opinion, compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence on grounds of illness, and consequently of reaching the 120-day limit provided for in

Paragraph 5(2) of the FL. It is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78.

77 In accordance with point (i) of that provision, it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve the aim pursued by the Danish legislature.

78 As regards the aim of Paragraph 5(2) of the FL, the Danish Government states that this is to encourage employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness, by allowing them subsequently to dismiss them with a shortened period of notice, if the absences tend to be for very long periods. As a counterpart, those workers can retain their employment during the period of illness.

79 The Danish Government observes that the provision thus has regard to the interests both of employers and employees and is in line with the general regulation of the Danish labour market, which is based on a combination of flexibility and freedom of contract, on the one hand, and the protection of workers, on the other.

80 DAB and Pro Display state that the 120-day rule laid down in Paragraph 5(2) of the FL is regarded as protection for workers who are ill, since an employer who has agreed to apply it will generally be inclined to wait longer before dismissing such a worker.

81 It should be recalled 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 (see, to that effect, Case C-141/11 *Hörnfeldt* [2012] ECR, paragraph 32, and Case C-152/11 *Odar* [2012] ECR, paragraph 47).

82 The Court has previously held 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 (see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 65). Similarly, a measure taken to promote the flexibility of the labour market may be regarded as a measure of employment policy.

83 Consequently, aims such as those referred to by the Danish Government may 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 Paragraph 5(2) of the FL.

84 It remains to ascertain whether the means used to achieve those aims are appropriate and necessary and do not go beyond what is needed to achieve them.

85 The Danish Government argues that Paragraph 5(2) of the FL enables, first, the objective of enabling the recruitment and maintenance in employment of persons who have, at least potentially, a reduced work capacity and, secondly, the superior objective of a flexible, contractual and secure labour market to be achieved most appropriately.

86 DAB and Pro Display submit that, under the Danish legislation on sickness benefits, an employer who pays wages to a worker on sick leave is entitled to have the sickness benefits reimbursed by the local authorities of the worker's place of residence. However, the entitlement to those benefits is limited to 52 weeks, and their amount is lower than the pay actually paid. In those circumstances, the provisions of Paragraph 5(2) of the FL ensure a reasonable balance between the opposing interests of the employee and the employer with respect to absences on grounds of illness.

87 Having regard to the broad discretion enjoyed by the Member States 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, it does not appear unreasonable for them to consider that a measure such as the 120-day rule laid down in Paragraph 5(2) of the FL might be appropriate for achieving the aims mentioned above.

88 It may 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 over 120 days, that rule has the effect, for employers, of encouraging recruitment and maintenance in employment.

89 In order to examine whether the 120-day rule laid down in Paragraph 5(2) of the FL goes beyond what is necessary to achieve the aims pursued, that provision must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered (see, to that effect, *Odar*, Paragraph 65).

90 In this respect, it is for the referring court to examine whether the Danish 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, omitted to take account of relevant factors relating in particular to workers with disabilities.

91 In this respect, the risks run by disabled persons, who generally face 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 (see, to that effect, *Odar*, paragraphs 68 and 69).

92 In the light of the above considerations, the answer to Question 4(a) is that Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.

Costs

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The concept of 'disability' in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.**

2. **Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.**

3. **Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.**

4. **Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.**

[Signatures]