EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/43 The impact of Ring on European and Austrian practice (Article)

<p>This article reviews and comments on the recent European Court of Justice (the ‘Court’) ruling in the joined cases <i>Ring </i>and <i>Skoube Werge1</i>1 (together: ‘Ring’). The Court adopted a definition of ‘disability’ within the meaning of Directive 2000/78 in line with the UN Convention on the Rights of Persons with Disabilities. The Court also held that a reduction in working hours can be a reasonable accommodation. Has Ring brought anything new when compared with the Court’s 2006 ruling in <i>Chacón Navas</i>2?</p>

Summary

This article reviews and comments on the recent European Court of Justice (the ‘Court’) ruling in the joined cases *Ring* and *Skoube Werge1*[1] (together: ‘Ring’). The Court adopted a definition of ‘disability’ within the meaning of Directive 2000/78 in line with the UN Convention on the Rights of Persons with Disabilities. The Court also held that a reduction in working hours can be a reasonable accommodation. Has Ring brought anything new when compared with the Court’s 2006 ruling in *Chacón Navas*[2]?

The Decision

This is the Court's first decision on the concept of disability since the EU ratified the UN Convention on the Rights of Persons with Disabilities (the 'Convention'). The Convention was adopted on 13 December 2006 and entered into force on 3 May 2008. The EU made the Convention part of its own legal order by Decision No 2010 0048 dated 26 November 2009. This was an historic ratification by the EU, as it was the first time ever that the EU had become a party to an international human rights treaty. The Convention was signed by all 28 EU countries. As international agreements signed by the EU are binding, they prevail over acts of the EU.[3] Hence, in order to interpret 'disability' in a manner consistent with the Convention, the Court had to amend its earlier definition of disability in *Chacón Navas*[4], which was solely based on the Directive adopted in 2000.

In Chacón Navas the Court stated that "the concept of 'disability' 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".[5] As the Directive does not provide for a definition of disability this was the first autonomous and uniform interpretation of disability within the Community.

The Convention, contrary to the Directive, does provide a definition of disability. However, by stating that persons with disabilities **include** those persons who fall within the definition, it avoids an exhaustive definition. According to Article 1 of the Convention, "*persons with disabilities include those who have long-term physical, mental intellectual or sensory impairments which in* **interaction with various barriers may hinder**[6] *their full and effective participation in society on an equal basis with others*". This non-exhaustive definition clearly includes, besides a medical approach, also a social one. Within the medical approach, a disability is an individual characteristic of a person, such as a physical, mental, intellectual or sensory impairment. The social approach, by contrast, recognises disability as primarily an issue of failure by society to be inclusive, irrespective of a person's individual impairments. Nevertheless, a physical impairment and/or mental health difficulties remain a key element of 'disability' - as otherwise no clear criteria would exist to determine who is protected.

Besides the fact that the Convention's definition is non-exhaustive, the preamble of the Convention states that the concept of disability is an evolving one. Thus, given that both social views and medical science develop over time, impairments considered as disabilities today may not be deemed as such in the future or vice versa.

In the present ruling the Court stated that "*the concept of 'disability' must be understood as referring to a limitation which* in interaction with various barriers may hinder[7] *the full and effective participation of the person concerned in professional life on an equal basis with other workers*".[8] In so doing, the Court clearly iterated for the first time that the decisive basis for

assessment of disability must include a combination of personal (medical) and social factors. Thus, for example, persons with poor eyesight or hearing problems may have impairments, but not barriers. On the other hand, for example, homosexual persons may have barriers but not impairments.

Following its ruling in *Chacón Navas*, the Court stated again that illness and disability cannot simply be treated in the same manner. However, in addition the Court made it clear that a curable or incurable illness may also cause a disability. Considering both this and the implementation of the 'social approach', conditions such as, for example, asymptomatic HIV (this stage of HIV being free from major symptoms and possibly lasting for several years) may fall within the new definition of disability, as the attitudes of both individuals and employers may create barriers for affected people.

The Court also stated that the impairment must be 'long-term', without specifying what that means. Given the range of different definitions of 'long-term' used by Member States, further specification by the Court would have been desirable.

The Court also stated that the 'appropriate measures' that must be taken under certain circumstances are not decisive in terms of a person qualifying as disabled. These measures are merely the consequence of a disability. By contrast, the Court took the view that if the employer has to take measures to enable an employee to function properly, this may be indicative of disability. Nevertheless, if for example an employer does not need to make any accommodation to make desk work possible for a mobility-impaired person, this may alter whether the person is regarded as disabled.

No explicit answer was given by the Court as to whether the basis for assessing a person as disabled in terms of his or her medical impairments or social barriers should be the abstract labour market or a concrete workplace. Whether employers are required to assess the 'disability' of an employee based on the workplace the employee is employed at or on the abstract notion of the labour market may make a significant practical difference. A mobility impaired person, for example, may be fully capable of doing desk work ('concrete workplace'), whereas in terms of the abstract concept of the labour market, the same person would generally be assessed as disabled. However, the Court says that the appropriate measures for a concrete workplace are not decisive and so it is likely that the whole labour market should be the basis for assessment.

However, the Court says that the appropriate measures for a concrete workplace are not decisive, so it may be argued that for the qualification of a disability the whole labour market is the basis. Moreover, based on the Convention, the Court now states that disability may be

presumed if the person's full and effective participation in professional life may be hindered. In its earlier definition of 'disability' in *Chacón Navas* the Court had said that, for a person to be assessed as disabled, his or her participation in professional life had to be hindered. This reference by the Court to an abstract rather than concrete hindrance in terms of participation in professional life may also indicate that it is the abstract notion of the labour market as opposed to the concrete workplace that is the decisive basis for assessment as to whether a person is disabled.

From a practical perspective, a significant part of the current ruling deals with the obligation on employers to offer part-time work to those with disabilities. The Court thereby provides for an entitlement to part- time work. If the employer does not offer a reduction in working hours before termination on notice, this may be considered to be unlawful discrimination against a person with a disability. Under national law such discrimination may also have the effect that the termination is void. As the Court does not give any guidance how the entitlement to part time work must be arranged (e.g. same work but part-time or same pay but part-time or other work but part-time or reduction of pay, etc.), this question may have to be solved under national law, taking into account any possible discrimination under the Directive. Besides taking measures to allow an employee to continue in his or her own job, it may even be conceivable, at least from an Austrian perspective, that employers are required to offer different positions provided this is appropriate for both the employer and the disabled employee.

Generally, it may be advisable for employers to consider offering part- time work to staff with disabilities proactively during the employment relationship. This may help to avoid a situation in which the employee successfully claims discrimination based on his or her disability. Such an offer – if permitted under national law – may be connected with a probationary period.

However, if part-time work may lead to a disproportionate burden on the employer, someone with a disability may not be entitled to it. This must be assessed on the facts, taking into account, for example, the financial cost, the size of the undertaking, public funding or other assistance available to the employer, and so forth. However, as a disproportionate burden on the employer is only found in rare circumstances and may not be easy to prove, it may be advisable to agree on a trial period of part- time work in order to collect evidence of disproportionate burden in the individual case.

If the disability is based on sickness and the working time is reduced as a result, it is unclear whether the employee will be entitled to continued payments based on sickness to the extent of the reduced working time. As the Court did not consider this point, it remains to be seen how the Court and the national courts will deal with this issue. Moreover, it should be noted

that a reduction of remuneration of a person with a disability needs to be based on the justifiable reasons, as otherwise it may be discriminatory. Thus, employees are entitled to the same remuneration for equal work or work that is recognised as equivalent (e.g. taking into account things like the fact that a person with a disability may work more slowly or only perform certain tasks, etc.).

Finally, the Court stated that a dismissal with a reduced notice period (a “favoured dismissal”) is precluded by the Directive if the employer has not taken appropriate measures to avoid the applicability of the reduced notice period. A provision that allows for a favoured dismissal of employees due to sickness may not directly discriminate against disabled persons. Nevertheless, as indirect discrimination may occur, objective justifications are required to enable this and to apply it to persons with disabilities. The Court stated that it was up to the referring Danish court to assess these questions. However, the Court appeared to doubt that the existing Danish legislation was based on objective justifications for indirect discrimination against persons with disabilities.

To sum up, *Ring* may not have brought big changes in terms of qualifying as disabled under the Directive when compared with the situation since *Chacón Navas*. However, the Court did clarify a number of issues. It clearly stated in *Ring* that illness can qualify as a disability; that the concept of ‘disability’ is an evolving one; and that a social approach also applies. All of these facts may also have been deduced from *Chacón Navas*, but were clearly stated for the first time in *Ring*.

The Austrian perspective

From an Austrian point of view, the most important source of law in this context is the Austrian Act on Employment of People with Disabilities (*Behinderteneinstellungsgesetz* – BEinstG; the ‘Act’), which is partly based on the Directive. By section 3 BEinstG a disability is defined as the effect of a non-temporary physical, mental or psychological impairment or an impairment of the senses which makes participation in working life difficult. Non-temporary means a period which is (or is expected to be) more than six months. Thus, the decisive basis for a disability under Austrian law is not the level of disability but the fact that discrimination may be based on it. Therefore, for example, diagnosed HIV without the characteristics of AIDS may be regarded as a disability under this definition.

The Austrian definition of disability may thus be considered as being in line with the current definition by the Court. Accordingly, the ruling may not lead to material changes in Austria. However, as the Court did not provide a definition of ‘long-term’ in connection with an impairment that leads to a disability, a period of at least six months is still required under

Austrian law by section 3 BEinstG. Whether this period is in line with the Directive may have to be assessed in each individual case. However, based on a purely semantic interpretation, a shorter period is generally unlikely to fulfil the meaning of 'long-term'.

Anti-discrimination law based on the Directive makes no requirement for a given degree of disability. However, under Austrian law, degrees of disability exist. These are the so-called 'favoured persons with a disability' (*begünstigt Behinderte*). These people have a degree of disability of at least 50% according to a state regulation (the *Einschätzungsverordnung*). The degree is decided upon by the state authorities, based on a medical assessment. 'Favoured persons with a disability' enjoy, inter alia, special protection against termination.

Moreover, a favoured person with a disability will more or less always qualify as a person with a disability under Austrian employment law and, thus, will enjoy all the protections based on the Directive in any event. Given the Austrian concept of favoured persons with a disability and the fact that employers do not have to give reasons for termination when giving notice in Austria, it is rare to find case law concerning whether a person qualifies as disabled in Austria. It remains to be seen whether this changes and Austrian employees who are not 'favoured' but are still 'persons with a disability' begin to make more claims about discrimination following the Court's decision.

Contrary to other protected employees (e.g. parents of young children), those with disabilities are not explicitly entitled in Austria to part-time work. Thus, for Austrian employers the most significant element of the ruling is likely to be the introduction by the Court of such an entitlement for disabled employees, as, based on the BEinstG which implements Directive 2000/78, employees with a disability may be entitled to part- time work. If the employer does not fulfil a request for a reduction of working time for a person with a disability, this may even lead to an entitlement of the employee to damages. Moreover, termination by the employer may be void if part-time work was not offered to the employee with a disability before termination.

From an Austrian perspective it also is questionable whether a reduction of the working time of an employee with a disability based on a sickness may trigger entitlements to continued payments, such as sick pay. The Court was silent on this topic.

Footnotes

1 ECJ 11 April 2013, joined cases C-335/11 (Ring) and C-337/11 (Skoube Werge).

2 ECJ 11 July 2006, case C-13/05 (Chacón Navas).

3 Cf ECJ Case C-366/10 Air Transport Association of America and Others [2011], paragraph 50 and the case law cited.

4 Cf ECJ Case C-13/05 Chacón Navas.

5 Cf ECJ Case C-13/05 Chacón Navas, paragraph 43.

6 Author's emphasis.

7 Author's emphasis.

8 Cf ECJ Case C-335/11 and C337/11 Ring and Skouboe Werge, paragraph.

Creator:
Verdict at:
Case number: