

SUMMARY

ECJ 11 September 2019, case C-397/18 (Nobel Plastiques Ibérica), disability discrimination

DW – v – Nobel Plastiques Ibérica SA and Others, Spanish case

Legal background

Directive 2000/78/EC provides a general framework for equal treatment in employment and occupation. It aims to combat both direct and indirect discrimination, *inter alia* on grounds of disability.

Article 5 of the Directive stipulates that employers shall provide reasonable accommodation for disabled persons, to have access to, participate in, or advance in employment if this does not impose a disproportionate burden on the employer. Article 2(2)(b)(ii) forbids indirect discrimination on grounds of disability, unless an employer has taken appropriate measures within the meaning of Article 5 to eliminate any disadvantages entailed by such provision, criterion or practice.

Article 25 of the Spanish Law 31/1995 on the Prevention of Occupational Risks provides employees with the status of ‘workers particularly susceptible to occupational risks’. Such workers are not to be assigned to posts in which they may, owing to their own personal characteristics, a biological condition or a recognised physical, mental or sensory disability, place them, other workers or other persons associated with the undertaking in situations of danger.

Facts and initial proceedings

On 1 July 2004, DW started as an employee of Nobel Plastiques Ibérica (NPI) in which she was assigned to the processes of assembly and shaping of plastic pipes. In 2011, she was diagnosed with epicondylitis and consequently was qualified as a worker ‘particularly

susceptible to occupational risks'. The injury was classified as an 'occupational disease' and made the employee temporarily unable to do her work during several periods. After each return to work DW underwent several medical assessments after which she was declared 'fit with limitations' for her job or to perform the task of 'steam shaping'. Consequently, the employee was assigned to tasks involving lower risks to her health.

On 22 March 2017, NPI dismissed DW based on four 'objective selection criteria': (i) being assigned to the processes of assembly and shaping of plastic pipes, (ii) not meeting the productivity threshold, (iii) a low level of multi-skilling in the undertaking's posts and (iv) high rate of absenteeism.

DW challenged her dismissal. The referring court was unsure on how to interpret the status of worker 'particularly susceptible to occupational risks' vis-à-vis the concept of disability and asked preliminary questions.

Questions

Must Directive 2000/78 be interpreted as meaning that the state of health of a worker who is categorised as particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, falls within the concept of 'disability' within the meaning of that directive?

Must Article 2(2)(b) of Directive 2000/78 interpreted as meaning that dismissal of a disabled worker for 'objective reasons' on the basis that he or she satisfies the selection criteria taken into account by the employer to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes direct or indirect discrimination on grounds of disability, within the meaning of that provision?

Consideration

Question 1

Following the EU's approval of the UN Convention, the concept of disability must be understood as "*referring to a limitation of capacity of which results in particular from long-term 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*" (HK Denmark, C|335/11 and C|337/11, EU:C:2013:222, para. 38, and Ruiz Conejero, C|270/16, EU:C:2018:17, para. 28). The concept of 'being particularly susceptible

to occupational risks' in the Spanish Law on the Prevention of Occupational Risk differs from this definition. It can only fall under the scope of Directive 2000/78/EC if the referring court determines that DW's state of health led to a limitation of her capacity which satisfies the stated conditions of the concept of disability, taking into account the EU notions of 'disability' and 'long-term'. In addition, finding that the person concerned has a 'disability' comes before the determination and assessment of the appropriate accommodation measures within the meaning of Article 5 of Directive 2000/78.

Question 2

The 'objective selection criteria' do not constitute direct discrimination as they apply equally to both disabled and non-disabled persons. However, while the criteria are ostensibly neutral, they may be indirectly discriminatory. The criterion relating to the rate of absenteeism does expose a disabled worker more than non-disabled workers; since s/he has an additional risk of being absent due to an illness connected with his/her disability. Regarding productivity, a disabled employee also is less likely to obtain a good score. Nevertheless, unfavourable treatment resulting indirectly from a disability undermines the protection provided for by Directive 2000/78 only as far as it constitutes discrimination within the meaning of Article 2(1) of the Directive. Therefore, if the employer has responded appropriately to eliminate the disadvantages of the disabled worker it cannot be held that there has been indirect discrimination. This is for the referring court to decide.

Ruling

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of 'disability', within the meaning of that directive, where that state leads to a limitation of capacity arising from, inter alia, long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in their professional life on an equal basis with other workers. It is for the national court to determine whether those conditions are satisfied in the main proceedings.

Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that dismissal for 'objective reasons' of a disabled worker on the ground that he or she meets the selection criteria taken into account by the employer to determine the persons to be dismissed, namely

having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on grounds of disability within the meaning of that provision, unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of Article 5 of that directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to determine.

Creator: European Court of Justice (ECJ)

Verdict at: 2019-09-11

Case number: C-397/18