Court of Justice of the European Union
PRESS RELEASE No 42/13
Luxembourg, 11 April 2013

Press and Information

Judgment in Joined Cases C-335/11 and C-337/11
Ring and Skouboe Werge

A curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability

A reduction in working hours may be regarded as an accommodation measure which the employer must take in order to enable a person with a disability to work

The directive on equal treatment in employment and occupation[1] creates a general framework for combating, in particular, discrimination on grounds of disability.

The directive was transposed by the Danish legislation on the prohibition of discrimination in the labour market. In addition, Danish employment law provides that an employer may terminate the employment contract with a 'shortened period of notice' of one month if the employee concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months.

In the present cases, HK Danmark, a Danish trade union, brought two actions for compensation on behalf of Ms Ring and Ms Skouboe Werge, because of their dismissal with a shortened notice period. HK Danmark claims that because those two employees were suffering from a disability, their respective employers were required to offer them a reduction in working hours. The trade union also argues that the national legislation on the shortened notice period cannot apply to those two workers, since their absences because of illness were caused by their disability.

The *Sø- og Handelsret* (Maritime and Commercial Court, Denmark), which is hearing the two cases, asks the Court of Justice to clarify the concept of disability. The questions also arise whether a reduction in working hours may be regarded as a reasonable accommodation measure, and whether the Danish legislation on the shortened notice period for dismissal is contrary to EU law.

As disability is not defined in the directive, the Court gave a definition of that concept in its judgment in *Chacón Navas*[2]*.* It held that the concept is distinct from illness and must be understood as referring to a long-term limitation which results in particular from physical, mental or psychological impairments and hinders the participation of the person concerned in professional life.

After that judgment was delivered, the EU ratified the United Nations Convention on the Rights of Persons with Disabilities[3]. It follows that the directive must be interpreted, as far as possible, in a manner consistent with that convention.

By its judgment of today, the Court starts by explaining that **the concept of 'disability'** must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable, if 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

[1] 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] Case C-13/05 *Sonia Chacón Navas* v *Eurest Colectividades SA*, see also Press Release No 55/2006.
[3] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 L 23, p. 35).

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 Court observes that, contrary to the arguments of the employers in the two cases, the concept of 'disability' does not necessarily imply complete exclusion from work or professional life. **In addition, a finding that there is a disability does not depend on the nature of the accommodation measures to be taken by the employer, such as the use of special equipment.** It will be for the national court to assess whether, in the present cases, the workers were persons with a disability.

The Court then recalls that the directive requires the employer to take **appropriate and reasonable accommodation measures** in particular to enable a person with a disability to have access to, participate in, or advance in employment. The Court observes that, even if it were not covered by the concept of 'pattern of working time' expressly mentioned in the directive, **a reduction in working hours** may be regarded as an appropriate accommodation measure in a case in which the reduction makes it possible for the worker to continue in his employment.

It is, however, for the national court to assess whether, in the present cases, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers.

The Court then states that the directive precludes national legislation under which an employer can terminate the employment contract with a **shortened 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 appropriate and reasonable accommodation measures in order to enable the disabled person to work.

The Court, finally, rules on whether the national legislation concerning the shortened notice period is liable to produce discrimination against persons with a disability. Direct discrimination occurs where one person is treated less favourably than another, in a comparable situation, on grounds of disability. Indirect discrimination occurs where an apparently neutral provision, criterion or practice is liable to put disabled persons at a particular disadvantage compared with other persons, unless this is justifiable.

The Court notes that the national legislation applies in the same way to disabled and non-disabled persons who have been absent for more than 120 days because of illness. That legislation cannot therefore be regarded as establishing a difference of treatment based directly on disability. But the Court finds that a worker with a disability is more exposed to the risk of application of the shortened notice period than a worker without a disability, since he has the additional risk of contracting an illness connected with his disability. **It is therefore apparent that that legislation is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability.**

The Court answers that the directive precludes such national legislation, unless the legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the national court to assess. In this respect, having regard to the discretion enjoyed by the Member States in social and employment policy, **it is for the national 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**.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgment is published on the CURIA website on the day of delivery.

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