Case C-5/24 [Pauni] [i]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

5 January 2024

Referring court:

Tribunale ordinario di Ravenna (Italy)

Date of the decision to refer:

4 January 2024

Applicant:

P.M.

Defendant:

S.

Subject matter of the main proceedings

Application for reinstatement in post by worker dismissed for exceeding permitted period of absence for reasons of illness.

Subject matter and legal basis of the request

Interpretation 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).

Questions referred for a preliminary ruling

1. Does Directive 2000/78 preclude national legislation which, by providing for the right to retain the post in the event of illness for 180 paid days, in the

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

period from 1 January to 31 December of each year, in addition to a further 120 days of unpaid leave (which can be taken only once) at the worker's request, does not provide for different rules between workers who can be classified as disabled and workers who cannot?

2. If the national legislation described in the grounds were to be regarded in the abstract as constituting indirect discrimination, is the legislation itself nevertheless objectively justified by a legitimate aim and are the means of achieving that aim appropriate and necessary?

3. Can the provision of unpaid leave, at the worker's request, following the end of the 120 days of sick leave, which is capable of preventing dismissal until its expiry amount to suitable and sufficient reasonable accommodation for avoiding discrimination?

4. Can an accommodation consisting of the employer's duty to grant – on the expiry of the period of 180 days of paid sick leave – a further period fully paid by it, without obtaining consideration for work, be regarded as reasonable?

5. For the purposes of assessing the discriminatory conduct of the employer, can (for the purposes of establishing the lawfulness or otherwise of the dismissal) the fact that even a possible further period of stability in the relationship paid for by the employer would not have enabled the disabled person to return to work, given his or her continuing illness, be taken into account?

Provisions of European Union law relied on

Directive 2000/78 (recitals 11, 12, 16, 17, 20 and 21; and Articles 1, 2(1) and (2), and 3(1)(c).

Judgments of the Court of Justice of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222); 18 January 2018, *Ruiz Conejero* (C-270/16, EU:C:2018:17); and 1 December 2016, *Daouidi* (C-395/15, EU:C:2016:917).

Provisions of national law relied on

First and second paragraphs of Article 2110 of the codice civile (Civil Code):

'In the event of an accident, illness, pregnancy or recent childbirth, where the law [does not lay down] equivalent forms of welfare or assistance, remuneration or an allowance is payable to the employee to the extent and for the period determined by special laws […], practice or equity.

In the cases referred to in the preceding paragraph, the business has the right to terminate the contract […], on expiry of the period established by law, […] practice or equity'.

Article 5 of legge n. 300 – Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento (Law No 300 relating to rules on the protection of the freedom and dignity of workers, freedom of association and trade union activity in the workplace, as well as regulations on employment) of 20 May 1970) ('the Workers' Statute') (GURI, General Series No 131 of 27 May 1970):

'The employer is prohibited from assessing the fitness and infirmity resulting from an illness or accident of the employee.

Checks on absences resulting from infirmity can only be carried out by the inspection services of the competent social security institutions, which are required to do so when the employer so requests'.

Various provisions of the national collective labour agreement for employees of businesses in the tourism sector ('the CCNL'), in particular Article 173 (retention of the post for 180 days in the event of illness or accident of the worker), Article 174 (unpaid leave for the 120 days following the abovementioned retention period of 180 days) and Article 175 (derogation from the above provisions in favour of workers suffering from oncological illnesses).

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant, P.M., was hired as a waitress on a fixed-term contract on 1 September 2021. That relationship was converted for an indefinite duration from 1 January 2022.

2 The employer, company S., employs, on average, 7 employees and carries out catering activities.

3 From 18 June 2022, P.M. was absent from her post, having suffered, according to the first medical certificate submitted, which was drawn up in Thai and translated into Italian, a 'ruptured aneurysm'. That certificate justified the absence from 18 June to 8 August 2022.

4 Since the absence from the post continued without interruption until 8 January 2023, the employer dismissed S. after 180 days of her absence, that is to say on 19 December 2022.

5 Italian law provides, in the event of illness or accident of the worker, for a so-called 'periodo di comporto' (protected period), that is to say, a period of paid absence of 180 days during which the employer cannot proceed with dismissal. That period may be increased by a further 120 (unpaid) days, one time only, at the request of the worker. After that period, however, dismissal may take place, except in the case of oncological illnesses.

6 During the same period, in particular on 4 November 2022, P.M. applied administratively for recognition of her invalidity. That recognition was obtained on 17 February 2023, in the amount of 35%. P.M. was also declared disabled under the Italian legislation at issue.

7 S. was not aware of that administrative procedure, which, moreover, was concluded two months after the dismissal. The only document informing employer S. of the causes of the worker P.M.'s absence was the certificate in Thai mentioned in paragraph 3 above.

8 The illness also continued during 2023, as is apparent from the additional medical certificates produced, the last of which is dated August 2023.

9 In the light of the foregoing, by an action brought on 16 October 2023, P.M. challenged the dismissal of 19 December 2022, requesting, in addition to being reinstated in the post (or to obtaining, in the alternative, payment of 15 months' salary), compensation in the amount of the monthly salary payments not received from the date of the dismissal up to the date of delivery of the judgment, payment of social security contributions not paid for the same period and compensation for non-material damage for an amount equal to EUR 10 000.

10 S. did not enter an appearance and did not submit a defence.

The essential arguments of the parties in the main proceedings

11 P.M. relies on a single argument, which essentially relates to the discriminatory nature of her dismissal, given that the protected period provided for by the Italian legislation applies to all workers and does not take into account disability.

Succinct presentation of the reasoning in the request for a preliminary ruling

12 After referring to the two judgments of the Court, *HK Danmark* and *Ruiz Conejero*, the referring court notes that the first concerned a question relating to the extent of the notice period, and not to the existence or otherwise of the employer's right to end the employment relationship, while the second concerned a provision of Spanish law intended to combat absenteeism at work and, therefore, short-term and intermittent, albeit legitimate, absences, by providing for a possibility of withdrawal in favour of the employer. By contrast, the case pending before the referring court concerns the employer's right to proceed with dismissal for long-term absences.

13 In both of the above cases, there was no need for the Court to address the principle contained in recital 17 of Directive 2000/78, according to which that 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'.

14 As regards the first question, the referring court asks whether the Italian legislation is compatible with the prohibition of indirect discrimination in so far as it provides for the same period of continuation of the employment relationship for all workers, irrespective of the existence of a disability.

15 The Italian legislation provides for a protected period of 180 days (with a further 120 days of unpaid, *one-off*, leave, at the worker's request) for all categories of workers, with the exception of those suffering from oncological illnesses (for whom there are no time limitations), and does not provide for expressly different treatment for disabled people. That 180-day period is calculated for the calendar year (from 1 January to 31 December) and restarts from zero on 1 January of the following year.

16 However, there may be no discrimination, in so far as, first, the protected period is so long that it protects precisely the worker with the greatest risk of illness (that is to say, the disabled person) and, secondly, illness which entails a long-term limitation 'can be covered by the concept of 'disability' within the meaning of Directive 2000/78' (*HK Danmark*, paragraph 41).

17 According to the referring court, the protected period laid down by the Italian legislation is so long that it can be used almost exclusively to protect absences attributable to disability and not to merely 'ordinary' illness.

18 Lastly, after considering that EU law does not prescribe a specific duration for the protected period for the disabled person, and that the Italian legislature therefore enjoys wide discretion in the matter, the referring court points out the very serious consequences which would arise if indirect discrimination of the disabled worker were to be found in such a case: in essence, all dismissals would be null and void and even small business entities would have to be ordered to pay 25 to 30 months' salary, which would, in general, lead to the closure of the activity.

19 As regards the second question, should indirect discrimination be found to exist, the referring court asks the Court to rule on the more or less justified nature of that discrimination, in the light of a legitimate aim, consisting in a compromise which protects, on the one hand, the worker suffering from illness, by retaining his or her post for a long period, and, on the other hand, the employer, by allowing the latter to end an employment relationship which does not allow for productive performance.

20 As regards the appropriateness of the means employed, it is noted that the Italian legislation on sickness appears above all to protect the disabled person, since it guarantees a number of absences on grounds of illness which, in general, only the disabled person can accrue.

21 It is only once the protected period has been exceeded that the employer's economic and organisational interests can prevail.

22 As regards the necessity of the means employed, it is noted that the Italian legislation provides for the possibility of dismissal where the employment relationship is objectively manifestly inefficient (that is to say, where, during a calendar year, the time spent on sick leave exceeds that not on sick leave).

23 According to the referring court, the national legislation is the result of a compromise between business organisation and the worker's interest in retaining employment even during an illness, but it is also the result of the need to guarantee the privacy of the disabled person, who is not required to disclose to the employer his or her state of disability and the reasons for his or her absences on grounds of illness. The employer is expressly prohibited (Article 5 of the Workers' Statute) from carrying out its own health checks on the worker.

24 In accordance with national legislation, therefore, the employer is not aware of the reason for the worker's absence, by not receiving certificates with a diagnosis (that is to say, the cause of the illness) but only with a prognosis.

25 It follows that, where the employer makes use of the possibility of dismissing the worker following long-term absences, it does so without knowing the reasons for the absences on grounds of illness and is not in a position to make specific assumptions as to the existence or otherwise of disability, since that would require a complete presentation of all the patient's health documentation.

26 Since what matters is not the illness as such, but the possible interaction with the working environment which it entails, an interaction represented in the present case exclusively by the prolonged absence, in order to know whether that limitation is prolonged – and, therefore, whether the worker is disabled – it is necessary to know the specific cause of a number of interconnected absences, such as to supplement the 'limitation of long duration'.

27 Therefore, the assertion that the employer may – in disputes such as the one at issue – be aware of a 'worker's disability' makes no sense, since the disabled person could be absent from work for ordinary reasons.

28 From that point of view, the requirements of disability protection through the application of a hypothetical differentiated advantage regime and the requirements of the protection of the disabled person's medical privacy might appear to be irreconcilable.

29 Furthermore, if the employer were accused of misconduct, it would in fact, as a general rule, not be at fault, since (in view of the lack of knowledge of the absence diagnoses) a subjective element of intent or negligence is missing.

30 Moreover, since the national legislation in the field of employment law does not provide for the possibility of compensation for damage without the existence of a

subjective element of the party which caused the damage, it would appear excessively burdensome to base such liability solely on the objective level of indirect (moreover, hypothetical) discrimination.

31 The referring court then points out that the Italian legislation (in particular legge n. 68 – Norme per il diritto al lavoro dei disabili (Law No 68 concerning the rules on disabled persons' right to work) of 12 March 1999) also protects the disabled person outside the employment relationship and more generally in the labour market: employers employing more than 14 employees must reserve a variable quota of posts for disabled persons, who are recruited from special lists and after verifying disability status.

32 Lastly, there is the risk that, if the limits for the application of a legitimate right to withdraw from the contract (at the end of the protected period) become unjustifiably uncertain, this could make withdrawal excessively risky and costly, which would lead to a sort of de facto revocation of withdrawal, thereby seriously jeopardising the management of the business or activity.

33 Ultimately, according to the referring court, potential indirect discrimination could nevertheless meet the requirements of legitimacy, appropriateness and necessity.

34 As regards the third question, the referring court raises the issue of the adjustments that could be adopted in the abstract. In its view, the potential absence of possible reasonable adjustments other than those already provided for by the legislation would confirm the necessary nature of that legislation and, therefore, the lawfulness of the dismissal.

35 Among the adjustments provided for by the Italian legal system, it points out first of all that, contained in the CCNL, of unpaid leave, at the worker's request, and asks the Court to assess whether it is reasonable and sufficient in order to avoid discriminatory treatment.

36 The circumstance that such leave must be requested by the worker clearly arises from the fact that the latter is the only one in possession of the necessary documentation and aware of his or her disability status, if any. Moreover, the worker is certainly the person concerned in obtaining a possible extension of the employment relationship.

37 On the other hand, even possible awareness (as in the present case), of the employer, of some of the reasons for the absences could hardly be taken into consideration for the purpose of introducing an obligation on the part of that employer, especially where the worker directly concerned has decided not to make use of that option.

38 As regards the fourth question, the referring court mentions two other theoretically usable measures, which might nevertheless appear to be problematic in application and therefore potentially unreasonable.

39 The first consists of excluding from the calculation of the protected period absences due to disability. According to the referring court, however, that measure would be contrary to recital 17 of Directive 2000/78, since it could prevent the termination of an employment relationship of a worker who is permanently unable to work, resulting in absences for a potentially unlimited period of time then being permissible.

40 The second consists of the allocation of a paid period of retention of the post for the disabled person of a longer duration, clearly different from the unpaid leave of 120 days already provided for by the CCNL. The referring court considers, however, that that measure would be subject to the uncertainty as to the setting of a time limit by the employer, which is not aware of the worker's health documentation. That would undermine legal certainty and the lawfulness of the dismissal, as the court subsequently seized could regard the additional period allocated by the employer as too short. Moreover, this second measure could also run counter to the protection required in recital 17.

41 It is also necessary to ask whether it is reasonable that the employer has to incur an (even significant) economic cost that is not intended for the worker's performance of the consideration, but completely unrelated to it.

42 As regards the fifth question, the referring court asks the Court to assess, in the light of the causal link between failure to adopt reasonable adjustments and dismissal, the possibility of verifying whether the possible grant to the disabled person of a further period of suspension of the employment relationship would actually have enabled the return to work and therefore avoided dismissal.

43 In the present case, even after 20 days after the 180 days had been exceeded, P.M. was categorised as 'on sick leave'. Moreover, even several months after the dismissal, P.M. was in a state of health that was such as to prevent her from returning to work. The referring court asks whether that element – albeit subsequent to the dismissal – may or must be taken into consideration for the purposes of assessing possible discriminatory conduct on the part of the employer. Indeed, to penalise, with serious consequences in terms of compensation, the employer, even a small or non-entrepreneur employer, which has dismissed the worker on the basis of the existing legislation – which already protects long-term absences – for not having granted the worker a further (paid) period of retention of the post, in a situation where the latter would not in any event have been able to return to work even in a later period, might be excessive.

44 In conclusion, the referring court has doubts as to whether, in the light of the Italian legislation, it is possible to make a timely and partial adjustment, by way of indirect discrimination, which does not entail significant harm for the other interests involved, thereby jeopardising the general approach of the system – characterised by the identification of the maximum period of suspension of the relationship, the protection of the privacy of the disabled person, the protection of the employer as regards the subjective element at the time of the dismissal and the

functioning of the social security system – which is left to the discretion of the legislature. Consequently, legislation in force might be necessary on this point.

45 Lastly, the referring court requests that the case be determined pursuant to an expedited procedure, in accordance with Article 105(1) of the Rules of Procedure of the Court of Justice. To that end, it relies on the principle of reasonable duration of proceedings and on the need to guarantee to the worker the necessary speed of reinstatement in the post and that the employer does not have to bear, in the event of it being unsuccessful, an excessive amount of compensation, since that amount would be linked to the date of delivery of the judgment.