



Key Issues:	Equal Treatment – Disability – Indirect Discrimination - Preliminary Ruling
Case:	DW v Nobel Plastiques Iberica SA
Reference:	Case C-397/18, CJEU (First Chamber), 11 September 2019
Legislation:	Directive 2000/78/EC

Background

On 1 July 2004, DW was employed by Nobel Plastiques Ibérica. Assigned to the processes of assembly and shaping of plastics pipes, she was granted a reduction in working hours on the basis that she had custody of young children. DW worked a 35-hour week and worked the morning and night shifts.

DW suffered from epicondylitis, which was diagnosed on 12 September 2011 and for which she had surgery on 18 January 2012. That injury was classified as an ‘occupational disease’ and DW was temporarily unable to work for several periods between September 2011 and April 2014, and, because she had been diagnosed with an anxiety disorder, from 4 September 2015 to 31 March 2016, and from 6 to 20 May 2016.

With effect from 15 December 2011, DW was categorised as being among ‘workers particularly susceptible to occupational risks’ within the meaning of Article 25 of Law No 31/1995, a status which she thereafter retained. Between April 2016 and August 2016, DW attended the company’s medical centre on several occasions complaining of elbow pain and sent various letters to that medical centre and to her employer requesting that her workplace be adapted to her physical condition. DW was also temporarily unable to work during a number of periods from 31 August 2016 as a result of a workplace accident owing to her epicondylitis.

Following the date on which she was diagnosed with epicondylitis, DW underwent a medical assessment after each return to work. At the end of each of those assessments, she was declared ‘fit with limitations’ for her job or to perform the tasks of ‘steam shaping’. As a result, during the periods in which she worked in 2016, DW was assigned, in priority over other workers, to posts involving the handling of small pipes in which the risks to her health were lower than in posts requiring the handling of large pipes.

With a view to carrying out dismissals on objective grounds within the undertaking, Nobel Plásticos Ibérica adopted the following four selection criteria, applicable for 2016: being assigned to the processes of assembly and shaping of plastic pipes, having productivity below 95%, a low level of multi-skilling in the undertaking's posts, and a high rate of absenteeism.

Nobel Plásticos Ibérica considered that, over the course of 2016, DW fulfilled those four selection criteria since she was assigned to the processes of assembly and shaping of plastic pipes, had a weighted average productivity of 59.82%, a very low level of multi-skilling in the essential tasks associated with her post and a rate of absenteeism of 69.55%.

Consequently, on 22 March 2017, while DW was temporarily unable to work, Nobel Plásticos Ibérica issued her with a letter of dismissal on objective grounds, citing economic, technical, production and organisational reasons. Nine other persons working within the undertaking were also dismissed on the same date.

On 21 April 2017, DW challenged that dismissal decision before the referring court, the Social Court of Barcelona. DW sought to obtain a declaration that the dismissal was null and void or, in the alternative, unfair. In the circumstances, the Social Court decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

The purpose of Directive 2000/78 is to lay down a general framework for combating, as regards employment and occupation, discrimination based on any of the grounds referred to in that article, which include disability. In accordance with Article 3(1)(c) of that directive, the latter applies to all persons, in both the public and private sectors, in relation to the conditions governing dismissal.

In the present case, the referring court seeks to ascertain whether the state of health of DW, who was dismissed once she was categorised as being a worker particularly susceptible to occupational risks, within the meaning of national law, falls within the concept of 'disability', within the meaning of that directive.

The concept of 'disability' must be understood as referring to a hindrance to the exercise of professional activity, not to the impossibility of exercising such 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'.

The 'long-term' nature of the limitation must be assessed in relation to the condition of incapacity, as such, of the person concerned at the time of the alleged discriminatory act adopted against him.

The evidence which makes it possible to find that a limitation of capacity is 'long term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.

In addition, a finding that the person concerned has a '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 that directive. According to recital 16 of that directive, such measures are intended to accommodate the needs of disabled persons and they are therefore the consequence of the finding that there is a 'disability'.

Under Article 2(1) of that directive, the 'principle of equal treatment' means that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive, which include, inter alia, disability.

As regards the existence of indirect discrimination on grounds of disability, selection criteria consisting of having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, in order to determine the persons to be dismissed as part of a dismissal for objective reasons, are ostensibly neutral.

However, under Article 2(2)(b)(ii) of Directive 2000/78, indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons having, inter alia, a particular disability, at a particular disadvantage compared with other persons, unless the employer is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 of that directive in order to eliminate disadvantages entailed by such provision, criterion or practice.

The CJEU held that:

- 1. Council Directive 2000/78/EC of 27 November 2000 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.**

2. **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.**

Why is this decision important?

As we have observed on numerous occasions, employers must take care (and legal advice) when making any decision which relates to an employee (or job applicant) with a disability. An employer must consider the employee's disability and take reasonable steps to accommodate the employee first. Only then, should an employer begin to apply criteria in order to select employees for redundancy.

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