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DISCRIMINATION BASED ON DISABILITY: COMMENT ON *HK DANMARK V. DANSK ALMENNYTTIGT BOLIGSELSKAB AND DANSK ARBEJDSGIVERFORENING* (CASES C-335/11 AND C-337/11)*

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1. Introduction

European Union law contains specific regulations on disability discrimination. First of all, Article 10 of the Treaty on the functioning of the European Union (TFEU) declares that "…in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". This means that all EU institutions and organs should take into account the situation of the disabled and seek to ensure their equal treatment even when framing policies which do not at first glance seem important for this group of people. Such *mainstreaming strategy* requires not only practical but also legal activities. However, it may transpire that the EU lacks sufficient competence to act. Therefore, the

* Judgment of 11.4.2013, not yet published.

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EU institutions often adopt non-binding acts which foresee actions to be undertaken by both the EU and its Member States, such as the European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe.[1]

Another important provision is Article 19 TFEU which provides the legislative basis "…to take appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Such actions include legal acts unanimously adopted by the Council (having obtaining the consent of the European Parliament) "…without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union". The most important piece of legislation which refers to the status of the disabled in the field of employment is Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation.[2] However, the substantive provisions of the Directive are quite general and therefore require further interpretation by the Court of Justice of the EU. The most important of the CJEU's judgments were delivered by the Court in three cases – *Coleman*,[3] *Chacón Navas*[4] and *Odar*.[5] The first concerned the issue of discrimination on the grounds of association with a disabled person, the second dealt with the concept of disability and the obligation to provide reasonable accommodation for people with disabilities and the third discussed discrimination based on a combination of age and disability. The judgment subject to analysis in this article may be treated as a continuation and development of the reasoning adopted in the *Chacón Navas* case. However, in the present case the Court extends the concept of disability by taking into account the provisions of the

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15.11.2010 – European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final.

[2] O.J. 2.12.2000, L 303, p. 16.

[3] S. Coleman v. Attridge Law and Steve Law, Case no C-303/06, Judgment of 17.7.2008, E.C.R. 2008, p. I-5603.

[4] Sonia Chacón Navas v. Eurest Colectividades S.A., Case no C-13/05, Judgment of 11.7.2006, E.C.R. 2006, p. I-6467.

[5] Johann Odar v. Baxter Deutschland GmbH, Case no C-152/11, Judgment of 6.12.2012, not yet published.

United Nations Convention on the Rights of Persons with Disabilities, as ratified by the European Union in Council Decision 2010/48/EC of 26.11.2009.[6] Moreover, an interpretation is provided of the provisions of Directive 2000/78/EC concerning reasonable accommodation and indirect discrimination based on disability.

2. Facts and Main Proceedings

From 1996 Ms Ring was employed in Lyngby (Denmark) by the housing association Boligorganisationen Samvirke and then from 17.7.2000 by DAB, which took over Boligorganisationen Samvirke. She was absent on several occasions from 6.6.2005 to 24.11.2005 because she suffered from constant and untreatable lumbar pain. The DAB sent a letter on 24.11.2005, dismissing Ms Ring in accordance with the relevant national law provisions. However, following her dismissal, the working area was altered and *inter alia* 'adjustable-height desks' were installed. On 1.2.2006 Ms Ring began a new job as a receptionist for ADRA Danmark, working for 20 hours a week. The parties to the main proceedings in Case C-335/11 agreed that her workstation was a normal workstation including an adjustable-height desk.

Ms Skouboe Werge commenced work for Pro Display in 1998 as an office assistant/management secretary. On 19.12.2003 she was the victim of a road accident, in consequence of which she suffered whiplash injuries. She then remained on sick leave for a period of about three weeks. She was subsequently absent from work, albeit only for a few days, because of her illness. On 4.11.2004 the director of accounts of Pro Display sent the staff an e-mail informing them that, by agreement, Ms Skouboe Werge would be on part-time sick leave for four weeks, during which she would work for about four hours a day. Pro Display was reimbursed that part of Ms Skouboe Werge's pay which corresponded to the amount paid to her as daily sickness allowances. On Monday 10.1.2005 Ms Skouboe Werge went on full-time sick leave. By email of 14.1.2005 she informed Pro Display's managing director that she was still very poorly and was to consult a specialist that same day. The doctor considered that that her

[6] O.J. 27.1.2010, L 23, p. 35.

unfitness for work would last for a further month. In a medical report of 23.2.2005, the same doctor said that he could not give an opinion on the likely duration of her unfitness for work. By letter of 21.4.2005 Ms Skouboe Werge was dismissed with one month's notice, expiring on 31.5.2005. She underwent an assessment procedure at Jobcenter Randers, which concluded that she was capable of working for about eight hours a week, albeit at a slow pace.

The trade union HK, acting on behalf of the two applicants in the main proceedings, initiated proceedings against their employers in the Sø- og Handelsret (Maritime and Commercial Court), seeking compensation on the basis of the national Anti-Discrimination Law. HK submits that both employees suffered from a disability and that their employers were required to offer them reduced working hours, by virtue of the obligation to provide accommodation pursuant to Article 5 of Directive 2000/78. In both of the main proceedings, the employers disputed that the applicants' state of health fell within the scope of the concept of 'disability' within the meaning of Directive 2000/78, since the only incapacity affecting them was that they were unable to work full-time. They also disputed that reduced working hours were among the measures contemplated by Article 5 of the Directive.

In those circumstances, the national court decided to stay the proceedings and to refer several questions concerning interpretation of the concept of disability and reasonable accommodation for people with disabilities, as laid down in Article 5 of Directive 2000/78/EC (including the issue as to whether or not a reduction in working hours is amongst the measures envisaged by this provision). The referring court also asked if the Directive precludes

> [t]he application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of illness for a total of 120 days within a period of 12 consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the directive, where
> (a) the absence is caused by the disability, or
> (b) the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work?

3. Opinion of the Advocate General

The opinion of the Advocate General J. Kokott, delivered on 6.12.2012 is divided into three parts. The first part refers to the definition of the concept of disability. The Advocate General offered a reminder that the Court of Justice had already interpreted this concept in the *Chacón Navas* case as amounting 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; it must also be probable that it will last for a long time". However, such definition could not take into account the provisions of the United Nations Convention on the Rights of Persons with Disabilities, since it was only ratified by the EU subsequently to the handing down of the *Chacón Navas* judgment. The Advocate General stressed that the provisions of Directive 2000/78, including the concept of disability, must be interpreted in a manner consistent with the UN provisions. She came to the following conclusion:

> [t]he concept of disability covers a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. It is immaterial to the definition of disability that the impairment was caused by an illness; the only decisive factor is whether the limitation lasts for a long time. Even a long-term reduction in functional capacity which does not entail a need for special aids but means only or essentially that the person concerned is not capable of working full-time is to be regarded as a disability within the meaning of Directive 2000/78.[7]

As regards the purpose of Article 5 of Directive 2000/78/EC, the Advocate General stated that it was intended to enforce the equal status of the disabled and thus to enable them to participate in employment. In her opinion, a reduction in working hours might be covered by the explicit example given in recital 20 of the preamble to Directive 2000/78/EC which refers to "...adapting patterns of working time". Moreover,

[7] Opinion, at para. 46.

Article 5 is framed broadly but it imposes an obligation on an employer provided that the measures do not impose a disproportionate burden on him. Therefore, the Advocate General concluded that a reduction in working hours may be a measure falling within the scope of Article 5 of Directive 2000/78, but that it was ultimately for the relevant national court to determine whether or not such a measure would impose a disproportionate burden on the employer.

The next issues she considered were connected with the fourth question asked by the national court i.e.: whether a national provision allowing a period of notice to be shortened on account of absences due to sickness is in conformity with European Union law. The Advocate General underlined that, at first sight, such a provision appears to be neutral, since it applies to all employees who have been absent on account of sickness for more than 120 days. However, in her opinion, the provision indirectly puts employees with a disability at a disadvantage when compared with non-disabled employees.[8] Such indirect discrimination can be justified on the basis of Directive 2000/78/EC where it pursues a legitimate aim and the means of achieving that aim are appropriate and necessary. The national court made no reference to any legitimate aims. Accordingly, the Advocate General left the national court with the task of definitively assessing whether the provision at issue was justified or not. However, if an employer fails to take such appropriate measures as he may be expected to take, in other words if he fails to comply with his obligation under Article 5 of the Directive, the employer must not gain any legal advantage by virtue of his own omission. Therefore, any employee absences which are due to the employer's failure to undertake a measure cannot justify the shortening of a period of notice. Consequently, the Advocate General concluded:

> Directive 2000/78 must be interpreted as precluding a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. This does not apply where the disadvantage is objectively justified by a legitimate aim in accordance with Article 2(2)(b)(i) of Directive 2000/78 and the measures taken are

[8] See opinion, at para. 67.

appropriate and necessary for achieving that aim. However, the application of a shortened period of notice on account of absences on the part of the employee which were due to the fact that the employer did not take any appropriate measures in accordance with Article 5 of Directive 2000/78 constitutes an unjustifiable disadvantage[9].

4. Judgment of the Court of Justice

The Court of Justice generally followed the legal reasoning of the Advocate General. It commenced by discussing the concept of disability and referred to its judgment in the *Chacón Navas* case and to the aforementioned UN Convention. The Court also noted that the origins of a disability do not seem to be important, nor is the fact that the person concerned can work only to a limited extent. Consequently, it came to the following conclusion:

> [t]he concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where 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 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 nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.[10]

The next part of the judgment concentrated on the interpretation of Article 5 of Directive 2000/78. In this regard, the Court of Justice noted that this provision and recital 20 of the preamble to the Directive do not directly mention reduced working hours. However, the concept of "...patterns of working time..." mentioned in that recital does not seem to exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time to work part-time. The Court also

[9] Opinion, at para. 80.

[10] Judgment, at para. 47.

referred to the definition of reasonable accommodation, as envisaged in the second paragraph of Article 2 of the UN Convention according to which this concept includes: "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Consequently, the CJEU concluded that "...with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers".[11] Moreover, the list of appropriate measures to adapt the workplace to the disability in recital 20 of the preamble to Directive 2000/78 is not exhaustive and, consequently, even if it were not covered by the concept of "...pattern of working time...", a reduction in working hours could be regarded as amounting to an accommodation measure within the meaning of Article 5 of the Directive where reduced working hours make it possible for a worker to continue employment. However, this provision also requires that such measures must be reasonable, in the sense that they may not constitute a disproportionate burden on the employer. It is for the national court to assess whether a reduction in working hours represents such a disproportionate burden, but the Court provided certain directions to guide the national court in this assessment.

In relation to the fourth question the Court reached the same conclusion as the Advocate General. Thus, it stated that:

> Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness (...) where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.[12]

In the situation when such national legislation is applied to a disabled person following their absence on grounds of illness attributable wholly

[11] See judgment, at para. 51.

[12] Judgment, at para. 68.

or partly to their disability, as opposed to being attributable to the employer's failure to take appropriate measures, such national legislation can place disabled workers at a disadvantage and result in a difference of treatment indirectly based on disability. The further part of the judgment concentrated on the question whether such indirect discrimination is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve that aim. The Court concluded that:

> [d]irective 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced 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 his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess".[13]

5. Comments

5.1. Concept of Disability

Directive 2000/78/EC does not contain a definition of disability but it is important for determining the scope of the prohibition of discrimination based on this criterion.[14] The Court of Justice had already held in *Chacón Navas* case that "...the concept of disability for the purpose of Directive 2000/78 must (...) be given an autonomous and uniform interpretation".[15] However, its definition of this concept related only to professional life. Moreover, the Court was unable to take into account the provisions of the United Nations Convention on the Rights of Persons with Disabilities,

[13] Judgment, at para. 92.

[14] J. Maliszewska-Nienartowicz, *Dyskryminacja ze względu na religię, niepełnosprawność, wiek lub orientację seksualną. Dyrektywa 2000/78 i orzecznictwo TS UE. Komentarz* [*Discrimination Based on Religion, Disability, Age or Sexual Orientation. Directive 2000/78 and Case-law of the Court of Justice of the EU. Commentary*], Warszawa 2013, p. 60.

[15] Sonia Chacón Navas v. Eurest Colectividades S.A., Case no C-13/05, Judgment of 11.7.2006, E.C.R. 2006, p. I-6467, para. 42.

since this was only ratified by the European Union in Council Decision 2010/48/EC of 26.11.2009. In the case analyzed here, both Advocate General J. Kokott and the Court of Justice referred to the UN Convention act and stressed that Directive 2000/78/EC should be interpreted in the light of the provisions contained therein. Accordingly, it should be noticed that the UN Convention refers to persons with disabilities as "…those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1). It also emphasizes that "…disability is an evolving concept" (recital e of the preamble). The reasons for various impairments are unimportant, with emphasis being placed rather on their negative effect on ensuring the full and effective participation of the disabled in society.

A similar approach was taken by both the Advocate General and the Court. J. Kokott stated that it is immaterial to the definition of disability whether or not the impairment was caused by an illness. The Court arrived at a similar conclusion, albeit that it phrased this conclusion in a broader manner – *the Court stated that disability includes a condition caused by an illness medically diagnosed as curable or incurable where it entails a long--term limitation resulting in particular from 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*. This is an important new element added to the definition formulated in the *Chacón Navas* case, where the Court did not refer to the reason for the disability. It is obvious that disabilities may be caused not only by accidents but also by various illnesses. If such illnesses give rise to long-term limitations, they are covered by Directive 2000/78/EC.

Moreover, both the Advocate General and the Court underlined that it is unnecessary for a disabled person to be completely excluded from professional life before they are able to seek protection from the aforementioned provisions. In the opinion of the Court, the concept of disability is connected with a hindrance to the exercise of a professional activity, and is not limited to situations where the exercising of such an activity is impossible. Consequently, a person with a disability who is fit to work, albeit only on a part-time basis, can be protected by the provisions of Directive 2000/78/EC. It is also important to note that, in the Court's

view "...a finding that there is a disability does not depend on the nature of the accommodation measures".[16] In other words, such measures cannot constitute a decisive element in concluding whether or not a worker is a person with a disability.

On the whole, it can be seen that the provisions of the UN Convention have had a positive effect on the interpretation of the concept of disability within Directive 2000/78. Putting the emphasis not on the origin of the disability but, rather, on the effect of various physical, mental or psychological impairments is the correct solution which can result in greater protection for people with disabilities. It should also be noticed that the Court of Justice still limits its definition of disability to the sphere of professional life, whereas the UN Convention's definition is broader in scope and refers to "...impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". This, however, can be explained by the fact that, at least at the present time, EU law only protects the disabled against discrimination in the sphere of employment[17]. Accordingly, the European Commission has prepared draft legislation which would extend the scope of protection against discrimination based on religion or belief, disability, age or sexual orientation to include other areas of life such as social protection, including social security and healthcare; social advantages; education and access to and supply of goods and other services which are available to the public, including housing.[18] However, this proposal is still the subject of legislative discussions, since the Member States are

[16] See commented judgment in joined cases 335/11 and 337/11, at para. 45.

[17] According to Article 3 (1) of Directive 2000/78/EC it applies to: "all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organizations".

[18] See proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426, Brussels, 2.7.2008.

unable to agree on many issues. Therefore, a definition of disability which is confined to the sphere of professional life reflects the current state of EU law.

5.2. Reasonable Accommodation

Article 5 of Directive 2000/78/EC provides an obligation for employers to:

> [t]ake appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Appropriate measures are further defined in recital 20 of the preamble to Directive 2000/78 as those which are "...effective and practical to adapt the workplace to the disability". This provision of the preamble also gives examples of such measures: adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. Both the Advocate General and the Court of Justice correctly stressed that this list is not exhaustive and that it also includes a reduction in working hours. The Court also referred to the definition of reasonable accommodation envisaged in the UN Convention and concluded that: "...this concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers".[19]

Thus, reasonableness in the context of Article 5 of Directive 2000/78/EC denotes the effectiveness of the measure in removing barriers to employment.[20] Moreover, the duty to accommodate is generally framed

[19] See commented judgment, at para. 51, emphasis added.

[20] K. Wells, *The Impact of the Framework Employment Directive on UK Disability Discrimination Law*, 'Industrial Law Journal' 2003, vol. 32, no 4, p. 253, at p. 264.

in terms of an individual right – individuals are entitled to require that an accommodation takes account of their specific needs.[21] In other words, the concept of reasonable accommodation "...recognises that disability can sometimes affect an individual's ability to perform tasks in a conventional way and that adaptations are required to provide for equality of opportunity and eliminate discrimination".[22]

However, Article 5 of Directive also stipulates when an employer will be exempt from this obligation – i.e. in situations where the measures necessary to accommodate a disabled person would impose a disproportionate burden on him. Recital 21 of the preamble to the Directive explains further that, in order "...to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance". Thus, the financial costs of accommodation should also be taken into account. In fact, the application of Article 5 of Directive 2000/78/EC requires a specific balancing of the effectiveness of the accommodation in enabling the disabled person to access employment, on the one hand, and the financial cost of the accommodation for the employer, on the other hand[23]. This regulation is, however, quite general and as such may give rise lead to varied interpretations. Therefore, scholarly writings have noticed that "...the lack of detail in the directive leaves scope for judicial development of the concept of reasonable accommodation and the destiny of this concept lies to a great extent in the hands of the European Court of Justice".[24]

[21] A. Hendriks, L. Waddington, *The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination,* 'The International Journal of Comparative Labour Law and Industrial Relations' 2002, vol. 18, no 3, p. 403, at p. 414. See also opinion of the Advocate General, at para. 58: "directive calls for individually agreed measures on equal treatment and thus improved participation of people with disabilities in professional life. The decisive factor must therefore be whether a particular measure is capable of enabling a person with a disability to take up a profession or to continue to exercise his profession".

[22] L. Waddington, *Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive*, 'Industrial Law Journal' 2000, vol. 29, no 2, p. 176, at p. 177.

[23] K. Wells, *supra* 20, at p. 264.

[24] *Ibid.*, at p. 266.

Other authors have pointed out that Article 5 can be interpreted in such a way as to permit the Member States to retain competence to address the problem of burden-sharing via policies of their choice and that the Court can take the view that subsidiarity should govern the determination of levels of accommodation: in other words, what is to be deemed reasonable or proportionate must be determined within each state in the light of its particular social policies.[25]

The judgment analyzed herein demonstrates that both the Advocate General and the Court of Justice chose the second of these options, whilst simultaneously attempting to interpret the concepts of 'reasonable accommodation' and 'disproportionate burden'. As regards the latter, J. Kokott stated that "…the directive requires an appropriate balance to be struck between the interest of the disabled employee in benefiting from measures to support him and that of the employer in not being compelled to accept interferences with the organisation of his business and economic losses without further consideration".[26] However, the ultimate decision as to whether, in the circumstances of the main proceedings, a reduction of working hours imposed a disproportionate burden on the employer was left to the national court.

The Court adopted a similar position but at least provided the referring court with certain guidance. Firstly, it noted that immediately following the dismissal of Ms Ring, DAB advertised a position for an office worker to work part-time, 22 hours a week. There was nothing in the documents before the Court to indicate that Ms Ring was incapable of occupying that part-time post or explaining why it was not offered to her. Secondly, the Court stated that soon after her dismissal, Ms Ring commenced a new job as a receptionist with another company and her actual working time was 20 hours a week.[27] Finally, "…as the Danish Government pointed out at the hearing, Danish law makes it possible to grant public assistance to undertakings for accommodation measures whose purpose is to facilitate the access to the labour market of persons

[25] Por. D. Mabbett, *The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights*, 'Journal of Common Market Studies' 2005, vol. 43, no 1, p. 97, at pp. 111–112.

[26] See opinion, at para. 59.

[27] See judgment, at para. 62.

with disabilities (...)".[28] In other words, although the Court of Justice left it to the national court to assess whether a reduction of working hours imposed a disproportionate burden on the employer, its guidance suggests that in the circumstances of the main proceedings the rights of the disabled person should be given greater weight. The facts indicate that the employer was able to offer part-time work and that one of the claimants was able to perform such work at another company. Moreover, Article 5 of Directive 2000/78/EC refers to "...measures existing within the framework of the disability policy of the Member State concerned" and Danish law makes it possible to grant public assistance to undertakings for accommodation measures. Accordingly, the national court's decision should go in one direction i.e. stating that employers have failed to fulfil their obligation to provide reasonable accommodation by introducing a reduction of working hours.

5.3. Indirect Discrimination Based on Disability

According to Article 2 (2) (b) of Directive 2000/78/EC, indirect discrimination occurs:

> (...) where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
> (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Thus, indirect discrimination is based on purportedly neutral criteria which are formally not prohibited. Nevertheless, the practical effect of this purportedly neutral provision, criterion or practice is such that an individual belonging to the protected group (e.g. a disabled person) is

[28] Judgment, at para. 63.

disadvantaged in comparison with persons falling outside that group (e.g. persons without disabilities). Indirect discrimination is an effect-related concept and, as such, it is a useful tool in combating covert forms of discrimination.

It should also be noticed that indirect discrimination can be justified with reference to legitimate aims which are not even mentioned in the provisions of Directive 2000/78/EC. On the contrary, the possible justifications for indirect discrimination are framed in very general terms. According to the case-law of the Court of Justice, this concept allows account to be taken of any potentially acceptable, legitimate aims which are not related to grounds for discrimination. Moreover, such justification may not be of a purely economic nature (e.g. budgetary considerations in relation to the Member States activities) and the measures undertaken to achieve such aims must be proportionate.[29]

Thus, indirect discrimination is characterised by two basic elements: one relating to the nature of the prohibited measure (i.e. the effects-based nature of the concept) and one to the legitimacy of any justification (i.e. objective justification).[30] In the case analyzed herein, both the Advocate General and the Court of Justice concluded that a national provision allowing a period of notice to be shortened by virtue of absences due to sickness could give rise to indirect discrimination based on disability. Although formulated in a neutral way, it places employees with a disability at a disadvantage when compared with non-disabled employees. Therefore, the question arises as to whether such a provision can be justified by a legitimate aim. Both the Advocate General and the Court noted that, according to the CJEU's case law on discrimination, in particular age-based discrimination, the Member States have a broad discretion not only in choosing to pursue a particular aim in the field of social and

[29] J. Maliszewska-Nienartowicz, *Direct and Indirect Discrimination in European Union law: How to Draw a Dividing Line?* [in:] Ladislav Chmela (ed.), '6th International Academic Conference, Conference proceedings', Bergen, Norway, June 23–26, 2013, p. 314, at p. 317, available at: http://www.iises.net/wp-content/uploads/Proceedings-Bergen8.pdf (last accessed on 27.11.2013).

[30] Ch. Tobler, *Limits and Potential of the Concept of Indirect Discrimination,* European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G2, Luxembourg: Office for Official Publications of the European Communities 2008, p. 29.

employment policy but also in defining measures to implement such aim.[31] The Court of Justice referred to the legitimate aims indicated by the Danish government and noted that case-law has already recognized that the encouragement of recruitment constitutes a legitimate aim of social or employment policy of the Member States. Similarly, a measure taken to promote flexibility within the labour market may be regarded as a measure of employment policy.

Therefore, the further part of the judgment focused on assessing whether the means used to achieve those aims were appropriate and necessary and did not extend beyond what was necessary to achieve them. In this regard, the Court came to conclusion that it "...does not appear unreasonable for the Member States to consider that the measure in question might be appropriate for achieving the aims mentioned above".[32] It should be noticed that similar a formula ("does not appear unreasonable") was applied in the case-law concerning age-based discrimination.[33] It indicates that the Court does not carry out a thorough assessment of the appropriateness of the applied measure. Conversely, an examination as to whether or not the measure extended beyond what was necessary to achieve the legitimate aims is quite detailed. The Court underlined that the provision at issue must be placed in its context and that the adverse effects it is liable to cause for the persons concerned must be considered.[34] It suggested that the referring court should clarify whether all of the relevant factors relating in particular to workers with disabilities had been taken into account. "In this respect, the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs

[31] See opinion, at para. 71 and judgment, at para. 81.

[32] Judgment, at para. 87.

[33] See e.g. Félix Palacios de la Villa v. Cortefiel Servicios SA, Case no C-411/05, Judgment of 16.10.2007, E.C.R. 2007, p. I-8531; Gisela Rosenbladt v. Oellerking Gebäudereinigungsges. MbH, Case no C-45/09, Judgment of 12.10.2010, E.C.R. 2010, p. I-9391; Wasił Iwanow Georgiev v. Techniczeski uniwersitet – Sofija, filiał Płowdiw, Cases no C-250 and 268/09, Judgment of 18.11.2010, E.C.R. 2010, p. I-11869, Gerhard Fuchs and Peter Köhler v. Land Hessen, Cases no C-159 i 160/10, Judgment of 21.7.2011, E.C.R. 2011, p. I-6919.

[34] See commented judgment, at para. 89.

in connection with the protection their condition requires, should not be overlooked".[35]

Thus, the Court of Justice tried to take into account the genuine needs of the disabled and the fact that the provision at issue can have an excessive adverse effect on them. Therefore, although it left to the national court the task of assessing the necessity of the applied measure, it seems that in the Court's opinion the measure went beyond what was necessary in order to achieve the legitimate aims indicated by the Danish government. In other words, national legislation pursuant to which an employer is entitled to terminate an employment contract with a reduced period of notice if a the disabled worker concerned has been absent because of illness, where those absences are the consequence of his disability, appears to be incompatible with the provisions of Directive 2000/78/EC prohibiting indirect discrimination. It should be added that the Court directly endorsed a similar conclusion in relation to the situation where the absences of disabled workers were the consequence of the employer's failure to take appropriate measures in accordance with the obligation to provide reasonable accommodation, as laid down in Article 5 of that Directive.[36]

6. Conclusion

The judgment of the Court of Justice analyzed herein is beneficial to both claimants and to the disabled in general. The definition of the concept of disability has been extended in comparison with previous case-law. According to the judgment discussed herein, a disability also includes a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a long-term limitation. Such an interpretation is compatible with the United Nations Convention on the Rights of Persons with Disabilities ratified by the European Union.

[35] *Ibid.*, para. 91.

[36] See commented judgment, at para. 67 where the Court of Justice states: „Should the national court find that the absences of the workers are attributable (...) to the employer's failure to adopt appropriate accommodation measures, Directive 2000/78 would preclude the application of a provision of national law such as that at issue".

The concept of reasonable accommodation regulated in Article 5 of Directive 2000/78/EC was also interpreted. According to the Court, this involves the elimination of various barriers which hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. However, the list of appropriate measures which should be undertaken in order to eliminate such barriers is open and includes various solutions (e.g. a reduction in working hours). As regards the assessment of whether or not this measure constituted a disproportionate burden on the employer, the Court of Justice took a traditional approach and remitted this for consideration by the referring national court. Nevertheless, it decided to provide certain guidance which generally indicates that, in its opinion, a reduction in working hours does not seem to entail excessive financial costs for the employer, especially since Danish law makes it possible to grant public assistance to undertakings that have adopted accommodation measures.

As regards the potential objective justification of indirect discrimination based on disability, the Court confirmed that, in the field of social and employment policy, the Member States enjoy a broad discretion not only in choosing a particular aim but also in defining the measures necessary to implement it. Therefore, its assessment of whether the means used to achieve those aims were appropriate was lacking in detail – it referred to the formula that the measure "...does not appear unreasonable..." which had already been applied in case-law concerning age-based discrimination. Nevertheless, the Court tried to take into account the interests of the disabled when assessing whether the measure went beyond what was necessary to achieve such legitimate aims. It left it to the referring national court to provide the ultimate assessment of the proportionality of the national provision at issue but its guidance seems to indicate that Danish legislature fails to take sufficient account of relevant factors relating in particular to workers with disabilities.