



European network of legal experts in gender equality and non-discrimination

NEWS REPORT

Country:	Spain
Title:	Temporary incapacity for work as disability
Date:	21 February 2017
Expert:	Lorenzo Cachón
Issue at stake:	Temporary incapacity for work can be considered as disability, as a 'long-term' limitation at the time of the allegedly discriminatory act
Ground of discrimination:	Disability
Source:	National court decision (Social Court 33, Barcelona, Spain) and CJEU (C-395/15, <i>Daouidi</i> case)
Field:	Employment

Content

Case law:

The claimant was fired by his employer when he had been on leave for more than a month for "temporary incapacity for work accident" after suffering an accident while working in the kitchen of a restaurant in Barcelona. In the communication of the dismissal, the company argued that the dismissal was because the worker "did not meet the expectations of the undertaking or perform at the level the undertaking considers appropriate or suitable for the discharge of [his] duties in the workplace".

In December 2014, the claimant brought an action before the Juzgado de lo Social No 33 de Barcelona (Social Court No 33, Barcelona, Spain) against the company Bootes Plus SL seeking a declaration that his dismissal was null and void. Among other things, the claimant stated that the dismissal was discriminatory on the ground that the real reason behind it was his being temporarily unable to work as result of his work accident and that he was therefore covered by the concept of 'disability', within the meaning of Directive 2000/78. The judge pointed out that there was sufficient evidence on which to take the view that the true reason for the dismissal was the claimant's temporary inability to work for an indeterminate period of time as a result of the accident at work.

The jurisprudence established in Spain does not accept that an incapacity to work can be considered disability and, therefore, that the dismissal can be considered null. For that reason, the judge decided to submit a preliminary ruling before the CJUE. It raised four questions concerning the interpretation of various articles of the Charter of Fundamental Rights of the EU and an additional concerning the interpretation of the concept of disability in the Directive 2000/78 / EC. This last question was:

"Would the decision of an employer to dismiss a worker, previously well regarded professionally, merely because he was subject to temporary incapacity — of uncertain duration — by reason of an accident at work, be caught by the term

“direct discrimination on grounds of disability” as one of the grounds of discrimination envisaged in Articles 1, 2 and 3 of Directive 2000/78?”

On 1 December 2016, the CJEU delivered judgment on this case (C-395/15, Daouidi case), declaring that it does not have jurisdiction to answer the first four questions about the articles of the Charter of Fundamental Rights of the EU, but responding to the question on the interpretation of the Directive 2000/78.

The court's argument begins by remembering that, “following the ratification by the EU of the UN Convention [on the Rights of Persons with Disabilities], the Court took the view that the concept of ‘disability’ within the meaning of Directive 2000/78 must be understood as referring to a limitation 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” (para. 42) (and refers to previous cases: C-335/11 and C-337/11; C-363/12; and C-354/13).

In the synthesis of the answer to the final question of the Spanish judge the Court established “that Directive 2000/78 must be interpreted as meaning that:

- the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person’s capacity can be classified as being ‘long-term’, within the meaning of the definition of ‘disability’ laid down by that directive, read in the light of the UN Convention;
- the evidence which makes it possible to find that such a limitation 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; and
- in the context of the verification of that ‘long-term’ nature, the referring court must base its decision on all of the objective evidence in its possession” (para. 59).

With regard to the sentence that the Spanish judge should dictate, the CJEU clarifies three additional questions: first, the Court noted that it is necessary to determine whether the claimant’s limitation is ‘long-term’ within the meaning of the CJEU’s case-law. Second, the ‘long-term’ nature of the limitation must be assessed in relation to the claimant’s condition of incapacity, as such, at the time of the allegedly discriminatory act. Finally, if the limitation is found to be ‘long-term’ the Court recalled that ‘unfavourable treatment on grounds of disability undermines the protection provided for by [the Directive] only in so far as it constitutes discrimination within the meaning of Article 2(1) of that Directive’ (para 58).

Decision of the Court:

After the decision of the CJEU, the Social Court 33 of Barcelona issued a judgment on 23 December 2016 (case 1219/2014) and declared the claimant’s dismissal null and void for discrimination on the ground of disability. For this, the judge ruled that:

- 1) at the time of the allegedly discriminatory act (on the date of dismissal) the claimant’s incapacity did not display a clearly defined prognosis as regards short-term progress and thus constituted a long-term limitation. Therefore, his “temporal incapacity” must be regarded as a disability protected by Directive 2000/78.

- 2) After examining the facts presented in the court, the judge considers that the claimant's dismissal occurred due to his condition as a person with disability and, therefore, must be declared null by discrimination: "The dismissal of the injured worker, almost two months after the accident, when he was still on sick leave and had reported that his reinstatement would not be in the short term, constitutes direct discrimination on the grounds of disability" (para.XI.10).

Additionally, the judge examined several issues raised by the claimant that are of great relevance in Spanish domestic law in relation to the Charter of Fundamental Rights of the EU.

Key points of analysis:

To consider that a person in a situation of "temporary incapacity" could be considered with long-term limitation, and therefore with 'disability', it is necessary 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"; and it is the national courts that must value it on all of the objective evidence in its possession.

National courts should also assess whether there has been an unfavourable treatment on grounds of disability.