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NEWS REPORT

Country:	Spain
Title:	Nullity of a dismissal based on indirect discrimination for disability
Date:	11 April 2018
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<u>Context</u>	
Issue at stake:	National legislation permitting the dismissal of an employee by reason of absences from work resulting from illnesses linked to his disability produce indirect discrimination
Ground of discrimination:	Disability
Source:	National court decision (Social Court 1, Cuenca, Spain) and CJEU (C-270-16, Case Ruiz Conejero v Ferroser)
Field:	Employment

Content

Case law: The claimant was employed as a cleaner in “Ferroser Servicios Auxiliares SA” since 1993. He was dismissed in 2015 by his employer following several periods of sickness absences from work (in 2014 and 2015). In 2014 the claimant had been recognised by the competent authority as having a disability (the degree of his incapacity was set at 37%, of which 32% related to physical disability, characterised by disease of the endocrine-metabolic system, i.e. obesity, and functional limitation of the spine, the other 5% being made up of additional social factors.). The claimant has never informed his employer of this fact. According to the diagnosis of the Public Health Medical Services, specifically presented at the oral trial (November 2015), these health problems which led to the recognition of the claimant’s disability were the cause of his absences from work. The claimant does not dispute the truth or the accuracy of his absences, but he claims that there is a direct link between those absences and his disability (despite the fact that his employer was not aware of his disability). He seeks annulment of his dismissal on the ground that it constitutes discrimination based on disability.

The Spanish Workers’ Statute (Article 52), which concerns termination of the contract on objective grounds, provides that the labour contract may be terminated “for absences from work, albeit justified but intermittent, that amount to 20% of working hours in two consecutive months provided that total absences in the previous 12 months amount to 5% of working hours, or 25% of working hours in four non-continuous months within a 12-month period” (paragraph d).

The Social Court No 1, Cuenca, Spain (Juzgado de lo Social No 1 de Cuenca), decided to submit a preliminary ruling to the CJEU. The question was:

“Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work, even if justified, which amount to 20% of

the employee's working hours in two consecutive months, provided that the total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-consecutive months within a 12-month period, in the case of an employee who must be treated as disabled within the meaning of the directive when his absence from work was caused by his disability?"

The Social Court 1 of Cuenca said that workers with disabilities are more exposed to the risk of being dismissed under Article 52.d of the Workers' Statute than other workers, whether the employer has knowledge of the disability or not. There is a difference in treatment involving indirect discrimination based on disability within the meaning of Article 2(2)(b) of Directive 2000/78 and that difference in treatment cannot be objectively justified by a legitimate aim (unlike the interpretation given by the CJEU in cases C-335/11 and C-337/11, HK Danmark, in 2013, where the Danish legislation formed part of a policy for the integration of workers with disabilities). The referring court therefore considers that Article 52(d) of the Spanish Workers' Statute is contrary to Directive 2000/78 and that this provision should, therefore, be amended in order to take account of disabilities.

The Judgment of the CJEU of 18 January 2018 (C-270/16, Ruiz Conejero v Ferrosur) has answered the question raised by the Court of the Social 1 of Cuenca and upheld the approach of the Spanish judge. The Court (Third Chamber) has established:

"Article 2(2)(b)(i) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess".

Decision of the Court: After the decision of the CJEU, the Social Court 1 of Cuenca issued a judgment on 7 March 2018 (case 171/2018) and declared the claimant's dismissal null and void for discrimination on the ground of disability. For this, the judge ruled that:

1) "The dismissal of the claimant must be qualified as null and void". The judge considers that, in this case, there is indirect discrimination against the claimant, as an apparently neutral business decision -such as the use of the Article 52.d of the Workers' Statute that allows the dismissal of a worker due to for absences from work- causes a situation of particular disadvantage to a person with disability with respect to other workers, because the absences from work are due to illnesses derived from his officially recognized disability.

The fundamental argumentation of the judge is that the labour absences that have caused the dismissal of the claimant have occurred, "exclusively and precisely, for diseases attributable to his disability", even if the employer was not aware of it.

2) In addition, the Spanish judge, following the Judgment of the CJEU, "considers that there is an evident collision between the Spanish norm and the EU norm, and that, unlike the Danish case, there is no legislative integration element or objective, so a response from the Spanish legislator would be necessary to include in national law (...) and, specifically, in article 52.d) of the Workers' Statute (...), the exception of its application, for the purposes of computing the days of absences from work, to workers who have a recognized disability status, when

said temporary disability processes derive from or are linked to the diseases causing the recognition of their disability. "

Key points of analysis: This case is important for two reasons. In the first place, for having led the CJEU to adopt a judgment that clarifies the application of Directive 2000/78 in the field of indirect discrimination. And secondly, because the Spanish parliament should modify article 52.d of Workers' Statute to adapt it to Directive 2000/78 and avoid the indirect discrimination that may occur against workers with disabilities.

Internet link source: <http://ignasibeltran.com/wp-content/uploads/2018/03/SJS-1-Cuenca-7.3.18-Ruiz-Conejero..pdf>.