



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

### FLASH REPORT

<b>Country:</b>	Spain
<b>Title:</b>	Nullification of Article 52(d) of the Workers' Statute
<b>Date:</b>	24 February 2020
<b>Expert:</b>	Lorenzo Cachón
<b>Update of flash report nr:</b>	<a href="#">Nullity of a dismissal based on indirect discrimination for disability</a> <sup>1</sup>
<b>Context</b>	
<b>Issue at stake:</b>	Nullification of Article 52(d) of the Workers' Statute that had been qualified by the CJEU as contrary to Directive 2000/78/EC
<b>Grounds of discrimination:</b>	Disability
<b>Field of application:</b>	Employment
<b>Source:</b>	Legislation

### Content

**Policy development:** The Spanish Government has approved Royal Decree-Law 4/2020, of 18 February 2020, which repeals the objective dismissal due to absences from work established in Article 52(d) of the consolidated text of the Law of the Statute of Workers, approved by Royal Legislative Decree 2/2015, of 23 October 2015 (published in the Official Gazette of 19 February 2020 and entering into force on 21 February 2020).<sup>1</sup>

With this Royal Decree-Law, Article 52(d) of the Workers' Statute is abrogated. This provision stipulated that the work contract could be terminated 'for lack of presence at work, even justified but intermittent, that reach 20 % of the days working in 2 consecutive months provided that the total number of absences in the previous 12 months reaches 5 % of the working days, or 25 % in 4 discontinuous months within a period of 12 months (...)'.<sup>1</sup>

The Judgment of the CJEU of 18 January 2018 (C-270/16, *Ruiz Conejero v Ferroser*) had established that this Article 52(d) of the Spanish Workers' Statute was contrary to Directive 2000/78/EC, because it was considered discriminatory by reason of disability. In the words of the CJEU: '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'.

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<sup>1</sup> Real Decreto-ley 4/2020, de 18 de febrero, por el que se deroga el despido objetivo por faltas de asistencia al trabajo establecido en el artículo 52.d) del texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre (BOE, 19 February 2020).

In the Explanatory Statement of Royal Decree-Law 4/2020, the Government relies on both Directive 2000/78/EC and the CJUE ruling in *Ruiz Conejero*. The Spanish Government points out that this legal reform 'guarantees compliance with the regulations of the European Union and, specifically, of Council Directive 2000/78/EC (...), thus complying with the principle of primacy of European law. In addition, it ensures the adequate and immediate transfer to the Spanish legal system of what is established by the CJEU in its Judgment of 18 January 2018, which admits only on an exceptional, limited and conditioned basis the application of Article 52(d) of the Statute of Workers and subject to a specific analysis of adequacy and proportionality'.

It also notes that 'this law has the clear objective of preventing from occurring – because of the application of the precept that is now repealed – direct or indirect discrimination of particularly vulnerable groups that are at a high risk of professional and social exclusion (for example due to disability or gender)'.

**Key points of analysis:** Although the Judgment of the CJEU of 18 January 2018 (C-270/16, *Ruiz Conejero v Ferroser*) had clearly established that this article was contrary to European law, judicial decisions that were contradictory to each other were still being produced in Spanish courts (as the Royal Decree-Law itself says in its explanatory statement). That is why it was important and urgent that this article of the Workers' Statute be modified or annulled. The Government has opted to nullify it and to do so by way of urgency through a Royal Decree-Law that is immediately applicable, even if it must go through a parliamentary procedure for ratification.

**Internet link source:** <https://www.boe.es/boe/dias/2020/02/19/pdfs/BOE-A-2020-2381.pdf>.