ECLI:EU:C:2018:17

JUDGMENT OF THE COURT (Third Chamber)

18 January 2018 (*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(2)(b)(i) — Prohibition of discrimination based on disability — National legislation permitting, subject to certain conditions, the dismissal of an employee by reason of intermittent absences, even where justified — Worker's absences resulting from illnesses linked to his disability — Difference in treatment based on disability — Indirect discrimination — Whether justified — Combating absenteeism in the workplace — Whether appropriate — Whether proportionate)

In Case C-270/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 1 de Cuenca (Social Court No 1, Cuenca, Spain), made by decision of 5 May 2016, received at the Court on 13 May 2016, in the proceedings

Carlos Enrique Ruiz Conejero

v

Ferroser Servicios Auxiliares SA,

Ministerio Fiscal,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan (Rapporteur), D. Šváby and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 March 2017,

after considering the observations submitted on behalf of:

– Mr Ruiz Conejero, by J. Martínez Guijarro and M. de la Rocha Rubí, abogados,

– Ferroser Servicios Auxiliares SA, by J.A. Gallardo Cubero, abogado,

– the Spanish Government, by A. Rubio González and V. Ester Casas, acting as Agents,

– the European Commission, by D. Martin and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between, on the one hand, Mr Carlos Enrique Ruiz Conejero and, on the other hand, Ferroser Servicios Auxiliares SA and the Ministerio Fiscal (Public Prosecution Service, Spain), concerning the lawfulness of Mr Ruiz Conejero's dismissal following legitimate absences from work.

Legal context

EU law

3 According to recitals 11, 12, 16, 17, 20 and 21 of Directive 2000/78:

'(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. …

…

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

…

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) In order to determine whether the measures in question give rise to a disproportionate burden, particular account should be taken of the financial and other cost involved, of the size and turnover of the organisation or undertaking and of the availability of public funding or any other assistance.'

4 Article 1 of that directive, entitled 'Purpose', states:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2 of that directive, entitled 'Concept of discrimination', provides, in paragraphs 1 and 2:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur 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.'

6 Article 3 of that directive, entitled 'Scope', provides, in paragraph 1(c):

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay'.

Spanish law

7 According to Article 14 of the Spanish Constitution:

‘Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.’

8 Article 4 of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers’ Statute) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), in its version applicable at the time of the facts in the main proceedings (‘the Workers’ Statute’), concerning the rights of workers, states in paragraph 2(c):

‘Workers have the right, in their employment:

…

(c) not to be discriminated against directly or indirectly, when seeking employment or once in employment, on the basis of sex, marital status, age within the limits laid down by this Law, racial or ethnic origin, social status, religion or beliefs, political ideas, sexual orientation, membership or lack of membership of a trade union or on the basis of their language on Spanish territory.

Nor may workers be discriminated against on the basis of disability, provided that they are capable of carrying out the work or job in question.’

9 Article 52 of the Workers’ Statute, which concerns termination of the contract on objective grounds provides in paragraph (d):

‘The contract may be terminated:

…

(d) 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.

The following shall not be counted as absences from work for the purposes of the previous paragraph: absences due to industrial action for the duration of that action, acting as a workers’ representative, industrial accident, maternity, pregnancy and breastfeeding, illnesses caused by pregnancy, birth or breastfeeding, paternity, leave and holidays, non-industrial illness or accident where absence has been agreed by the official health services and is for more than 20 consecutive days or where absence is caused by the physical or psychological situation resulting from gender-based violence, certified by the social care services or health services, as appropriate.

Nor shall absences for medical treatment for cancer or serious illness be counted.’

10 Article 2 of Real Decreto Legislativo 1/2013, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social (Royal Legislative Decree 1/2013 laying down a consolidated version of the law on the rights of persons

with disabilities and their social inclusion) of 29 November 2013 (BOE No 289 of 3 December 2013, p. 95635) contains the following definitions:

‘For the purposes of this Law:

(a) Disability refers to the situation of persons with long-term impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

…

(d) Indirect discrimination exists if a legal or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, a criterion or practice, or an environment, product or service, ostensibly neutral, is liable to create a particular disadvantage for one person compared with others on grounds of or by reason of disability, provided that, objectively, it does not satisfy a legitimate aim and the means of achieving that aim are not appropriate and necessary.’

11 Article 40 of that law, which concerns the adoption of measures intended to prevent or compensate for disadvantages caused by disability as a guarantee of full equality at work, provides:

‘1. In order to guarantee full equality in the workplace, the principle of equal treatment does not prevent the maintenance or adoption of specific measures intended to prevent or to compensate for the disadvantages caused by disability.

2. Employers shall take appropriate measures to adapt the workplace and enhance the accessibility of the workplace having regard to the needs arising in each individual case in order to allow persons with a disability to have access to employment, to carry out their work, to be promoted and to have access to training, unless such measures would place an excessive burden on the employer.

In order to determine whether a burden is excessive, it is necessary to consider whether it is restricted to a sufficient degree by the measures, assistance and subsidies applying to disabled persons and to take account of the financial and other costs entailed by those measures and the scale of the undertaking or organisation and its overall turnover.’

The dispute in the main proceedings and the question referred for a preliminary ruling

12 On 2 July 1993, Mr Ruiz Conejero was hired to work as a cleaning agent in a hospital in Cuenca (Spain), which is in the region of Castile-La Mancha (Spain). He was last employed in that post by the cleaning company Ferroser Servicios Auxiliares.

13 Mr Ruiz Conejero had worked for this company without incident, as he had for the companies that had employed him previously. He never had any work-related problems nor had he been disciplined.

14 It is clear from the wording of the order for reference that, by decision of 15 September 2014, the Cuenca office of the Consejería de Salud y Asuntos Sociales de la Junta de Comunidades de Castilla-La Mancha (Ministry of Health and Social Affairs of the Castile-La Mancha Autonomous Government) recognised that Mr Ruiz Conejero had 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 (obesity) and functional limitation of the spine, the other 5% being made up of additional social factors.

15 Between 2014 and 2015, Mr Ruiz Conejero was unfit for work during the following periods:

– from 1 to 17 March 2014 for acute pain requiring hospitalisation from 26 February to 1 March 2014;

– from 26 to 31 March 2014 for dizziness/nausea;

– from 26 June to 11 July 2014 for lumbago;

– from 9 to 12 March 2015 for lumbago;

– from 24 March to 7 April 2015 for lumbago; and

– from 20 to 23 April 2015 for dizziness/nausea.

16 According to the diagnosis of the Servicios Médicos de la Sanidad Pública (Public Health Medical Services), these health problems were caused by degenerative joint disease and polyarthrosis, aggravated by Mr Ruiz Conejero's obesity. The medical services concluded that those problems were the result of the diseases which led to the recognition of Mr Ruiz Conejero's disability.

17 Mr Ruiz Conejero informed his employer, within the period and in the manner prescribed, of all the absences mentioned in paragraph 15, by providing the relevant medical certificates confirming the reason for, and duration of, those absences.

18 By letter of 7 July 2015, Ferroser Servicios Auxiliares informed Mr Ruiz Conejero of his dismissal under Article 52(d) of the Workers' Statute on the ground that the cumulative duration of his absences, albeit justified, had exceeded the limits laid down in that provision, namely, 20% of working time during March and April 2015, and that during the previous 12 months he had been absent for 5% of working time.

19 Mr Ruiz Conejero challenged the dismissal decision before the Juzgado de lo Social No 1 de Cuenca (Social Court No 1, Cuenca, Spain).

20 Mr Ruiz Conejero does not dispute the truth or the accuracy of those absences from work or what they amount to in percentage terms. However, he claims that there is a direct link between those absences and his disability. He seeks annulment of his dismissal on the ground that it constitutes discrimination based on disability.

21 The referring court notes that Mr Ruiz Conejero of his own free will refused the periodic medical examinations organised by the employer's mutual insurance company, with the result that his employer did not know that Mr Ruiz Conejero had a disability at the time he was dismissed.

22 According to the referring court, 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, therefore, 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 as required by Article 2(2)(b)(i).

23 The referring court states that it seeks guidance on the interpretation of Directive 2000/78 on account of the interpretation of that directive given by the Court in the judgment of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222). It notes that, in the case which gave rise to that judgment, the Danish legislation formed part of a policy for the integration of workers with disabilities and its aim was to encourage employers to hire employees with a particular risk of having to take sick leave repeatedly. That was not the situation in the case in the main proceedings, in which there was no legislative objective of integration of workers with disabilities. The referring court therefore considers that Article 52(d) of the Workers' Statute is contrary to Directive 2000/78 and that this provision should, therefore, be amended in order to take account of disabilities.

24 In those circumstances, the Juzgado de lo Social No 1 de Cuenca (Social Court No 1, Cuenca) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'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?'

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 must be interpreted as precluding national legislation which provides that an employer may dismiss a worker on the grounds of intermittent absences from work, even if justified, even in a situation where those absences are the consequence of illnesses attributed to that worker's disability.

26 By that question, the referring court seeks guidance on the interpretation of Article 2(2)(b)(i) of Directive 2000/78, in the light of the judgment of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222), and on whether Article 52(d) of the Workers' Statute is compatible with EU law.

27 It must be noted, as a preliminary remark, that, as is apparent from Article 1, 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, within the limits of the areas of competence conferred on the European Union, to all persons, in both the public and private sectors, in relation to, inter alia, the conditions governing dismissal.

28 According to the Court's case-law, the concept of 'disability' within the meaning of Directive 2000/78 has to be understood as referring to a limitation of capacity 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 (judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 36 and the case-law cited).

29 In that regard, in the event that, in given circumstances, the obesity of the worker concerned entails a limitation of capacity such as that referred to in the preceding paragraph of this judgment, such a state is covered by the concept of 'disability' within the meaning of Directive 2000/78 (see to that effect, judgment of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paragraph 59).

30 Such would be the case, in particular, if the obesity of the worker concerned hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him carrying out his work or causing discomfort when carrying out his professional activity (judgment of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paragraph 60).

31 In the present case, the referring court states that Mr Ruiz Conejero was recognised as having a disability, within the meaning of national law, before his dismissal. In that regard, the court notes that he suffers from a disease of the endocrine-metabolic system, namely, obesity, and from functional limitation of the spine.

32 However, it should be clarified that the fact that Mr Ruiz Conejero is recognised as having a disability within the meaning of national law does not necessarily indicate that he has a disability within the meaning of Directive 2000/78.

33 In that regard, in order to establish whether, in the case in the main proceedings, Mr Ruiz Conejero's situation falls within the scope of Directive 2000/78, it is for the referring court to determine whether his limitation in capacity must be regarded as a disability within the meaning of that directive, as defined in paragraph 28 of the present judgment.

34 Next, it must be noted that, according to Article 2(1) of Directive 2000/78, the 'principle of equal treatment' is to be understood as 'no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1'.

35 In the present case, Article 52(d) of the Workers' Statute provides that an employment contract may be terminated on the ground of intermittent absences, even if justified, which 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.

36 It should be noted that unfavourable treatment on grounds of disability does not run counter to the protection provided for by Directive 2000/78 unless it constitutes discrimination within the meaning of Article 2(1) of that directive. A worker with a disability covered by that directive must be protected against all discrimination in relation to a worker not so covered. The question thus arises whether the national legislation at issue in the main proceedings is liable to produce discrimination against persons with disabilities (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 71).

37 In that regard, Article 52(d) of the Workers' Statute applies in the same way to persons with disabilities as to persons without disabilities who have been absent from work. In those circumstances, it cannot be held that that provision establishes a difference of treatment directly based on disability, within the meaning of the combined provisions of Article 1 and Article 2(2)(a) of Directive 2000/78, since it uses a criterion that is not inseparably linked to disability (see, to that effect, judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 72 and 74, and of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 42).

38 On the question whether Article 52(d) of the Workers' Statute is liable to entail a difference of treatment indirectly based on disability, it must be observed that taking account of days of absence because of illness linked to disability in the calculation of days of absence because of illness amounts to assimilating illness linked with disability to the general concept of illness. However, as stated by the Court in paragraph 44 of the judgment of 11 July 2006, *Chacón Navas* (C-13/05, EU:C:2006:456), the concepts of 'disability' and 'sickness' cannot simply be treated as being the same (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 75).

39 It should be noted in that respect that a worker with a disability is, in principle, more exposed to the risk of being dismissed under Article 52(d) of the Workers' Statute than a worker without a disability. Compared with such a worker, a worker with a disability has the additional risk of being absent by reason of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence because of illness, and consequently of reaching the limits laid down in Article 52(d) of the Workers' Statute. It is thus apparent that the rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78 (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 76).

40 In accordance with Article 2(2)(b)(i) of Directive 2000/78, it is necessary to establish whether the difference in treatment between workers with disabilities and workers without disabilities deriving from Article 52(d) of the Workers' Statute is objectively justified by a legitimate aim, whether the measures implemented to achieve that aim are appropriate and whether they do not go beyond what is necessary to achieve the aim pursued by the Spanish legislature.

41 As regards the objective of Article 52(d) of the Workers' Statute, the Spanish Government states in its written observations that, in order to increase productivity and efficiency at work, absenteeism at work, taking the form of short-term intermittent periods of sick leave, has for a long time been considered by the Spanish legislature as a basis for terminating an employment relationship in order to avoid an unjustified increase in the cost of labour for companies.

42 In that regard, according to the Spanish Government, as a result of such *excesiva morbilidad intermitente* (excessive intermittent sickness absence), not only do companies have to bear the direct cost of the absence from work by paying a social security benefit for temporary incapacity, which cannot be claimed back from the Social Security Treasury, during the first 15 days of inactivity, to which the costs of replacement are added, but must also bear the indirect cost of the particular difficulty of covering short-term absences.

43 It should be recalled that the Member States have broad discretion not only in choosing to pursue a particular aim in the field of social and employment policy but also in defining measures to implement it (judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 81 and the case-law cited).

44 In the present case, it must be considered that combating absenteeism at work may be regarded as a legitimate aim, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, since it concerns a measure of employment policy (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 82).

45 It must, however, be ascertained whether the measures implemented by the national legislation in order to achieve that aim are appropriate and do not go beyond what is necessary in order to attain that aim.

46 In that regard, first, in assessing the appropriateness of the measures implemented, it is for the referring court to examine whether the figures provided for in Article 52(d) of the Workers' Statute are actually designed to meet the objective of combating absenteeism from work, without extending to merely occasional and sporadic absences.

47 The referring court must also take account of all other factors relevant to that assessment, including the direct and indirect costs that must be borne by companies as a result of absenteeism from the workplace.

48 It is also for the referring court to ascertain whether, by providing the right to dismiss workers intermittently absent because of illness for a particular number of days, Article 52(d) of the Workers' Statute has the effect, for employers, of encouraging recruitment and maintenance in employment (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 88).

49 Second, in order to examine whether the measures provided for in Article 52(d) of the Workers' Statute go beyond what is necessary to achieve the aim pursued, that provision must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 89 and the case-law cited).

50 For that purpose, it is for the referring court to examine whether the Spanish legislature omitted to take account of relevant factors relating, in particular, to workers with disabilities (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 90).

51 In assessing whether the measures provided for by Article 52(d) of the Workers' Statute are proportionate, the risks run by persons with disabilities, who generally face greater difficulties than persons without disabilities in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 91).

52 In that regard, it must be noted that, according to Article 52(d) of the Workers' Statute, absences due to non-industrial illness or accident when absence has been agreed by the official health services and is for more than 20 consecutive days are, inter alia, not considered to be intermittent absences from work on the grounds of which an employment contract may be terminated. Nor are absences for medical treatment for cancer or serious illness counted.

53 According to the Spanish Government, the national legislature intended thereby to maintain a balance between the interests of the company and the protection and security of workers, while preventing the measure from giving rise to unfair situations or adverse effects. That is why certain absences, such as those due to the illnesses described in the preceding paragraph of the present judgment, may not form the basis of a decision to dismiss on the ground of intermittent absences from work. During 2012, the Spanish legislature added absences for medical treatment for cancer or serious illness to the list of absences that may not constitute a ground for dismissal. Workers with disabilities generally fall within some of these cases, so that, in those cases, absences attributable to disability are not taken into account for the purposes of dismissal on the ground of intermittent absences from work.

54 It should be noted that, although Article 52(d) of the Workers' Statute provides that certain absences may not be considered repeated absences from work on the basis of which the contract

may be terminated, absences from work based on a worker's illness do not cover all the cases of 'disability' within the meaning of Directive 2000/78.

55 As the Spanish Government has observed, among the factors to be taken into account in the assessment referred to in paragraph 49 of the present judgment is the existence, in the Spanish legal system, of provisions aimed at specifically protecting persons with disabilities, including Article 40 of legislative Decree 1/2013, cited in paragraph 11 of the present judgment. Such provisions are capable of preventing or compensating for the disadvantages caused by a disability, including the possibility of suffering an illnesses linked to the disability.

56 In the light of those factors, it is for the referring court to assess, with respect to persons with disabilities, whether the measures provided for in Article 52(d) of the Workers' Statute go beyond what is necessary to attain the aim pursued.

57 Having regard to all the foregoing, the answer to the question referred is that Article 2(2)(b)(i) of Directive 2000/78 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.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

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.

[Signatures]

* Language of the case: Spanish.