Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

26 January 2021 *

(Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(1) and (2)(a) and (b) – 'Concept of discrimination' – Direct discrimination – Indirect discrimination – Discrimination on grounds of disability – Difference in treatment within a group of workers with disabilities – Grant of an allowance to workers with disabilities who have submitted disability certificates after a date chosen by the employer – Exclusion of workers with disabilities who have submitted their certificates before that date)

In Case C-16/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland), made by decision of 27 November 2018, received at the Court on 2 January 2019, in the proceedings

VL

v

Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan and M. Ilešič, Presidents of Chambers, E. Juhász, T. von Danwitz (Rapporteur), S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos and N. Jääskinen, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 10 March 2020,

after considering the observations submitted on behalf of:

– VL, by M. Podskalna and A.M. Niżankowska-Horodecka, adwokaci,

* Language of the case: Polish.

– Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, by A. Salamon, radca prawny,

– the Polish Government, by B. Majczyna, A. Siwek-Ślusarek and D. Lutostańska, acting as Agents,

– the Portuguese Government, by A. Pimenta, M.J. Marques and P. Barros da Costa, acting as Agents,

– the European Commission, by A. Szmytkowska and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 June 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 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 VL and Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie (Dr J. Babiński Clinical Hospital, Independent Public Healthcare Institution in Kraków, Poland), concerning the payment of an allowance.

Legal context

European Union law

3 Recitals 11 and 12 of Directive 2000/78 state:

‘(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the [FEU] 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 [European Union]. …’

4 Under Article 1 of that directive, entitled ‘Purpose’:

‘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:

'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.

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 3 of that directive, entitled 'Scope', provides:

'1. Within the limits of the areas of competence conferred on the [European Union], 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;

…

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'

Polish law

7 Article 11^3 of the Kodeks pracy (Labour Code), in the version applicable to the facts in the main proceedings, provides:

'Any discrimination in employment, whether direct or indirect, in particular on grounds of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, as well as on grounds of being employed for a fixed term or for an indefinite term or on a full-time or part-time basis, shall be prohibited.'

8 Under Article 18^{3a} of that code:

'§ 1. Workers should be treated equally with respect to the establishment and termination of an employment relationship, employment conditions and promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, and regardless of whether they are employed for a fixed term or for an indefinite term or on a full-time or part-time basis.

§ 2. Equal treatment in employment means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in § 1.

§ 3. Direct discrimination shall be taken to occur where a worker, on one or more of the grounds referred to in § 1, is, has been or would be treated less favourably than other workers in a comparable situation.

§ 4. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or action places or would place all or a considerable number of workers belonging to a particular group distinguished on one or more of the grounds referred to in § 1 at a disproportionate disadvantage, or at a particular disadvantage, in relation to the establishment and termination of an employment relationship, employment conditions, promotion conditions as well as access to training in order to improve professional qualifications, unless that provision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

…'

9 Article 18^{3b} of that code provides:

'§ 1. An employer treating a worker differently on one or more of the grounds referred to in Article 18^{3a} § 1 shall be considered to be in breach of the principle of equal treatment in employment, subject to §§ 2 to 4, where the effects of such a difference in treatment include, in particular:

(1) a refusal to enter into, or the termination of, an employment relationship;

(2) establishing disadvantageous remuneration for work or other disadvantageous terms of employment, the employee not being selected for promotion or not being granted other work-related benefits;

(3) …

– unless the difference in treatment is justified by objective considerations demonstrated by the employer.

…’

10 Article 2a(1) of the ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych (Law on Vocational and Social Rehabilitation and Employment of Persons with Disabilities) of 27 August 1997 (*Journal of Laws* (Dziennik Ustaw) No 123, item 776), in the version applicable to the facts in the main proceedings (‘the Law of 27 August 1997’), provides:

‘A person with a disability shall be considered part of the community of persons with disabilities in the workforce from the date on which he or she submits a disability certificate to his or her employer. …’

11 Under Article 21 of that law:

‘1. An employer who employs at least 25 workers in the equivalent of full-time employment shall be required … to pay monthly contributions to the [Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for the Rehabilitation of Persons with Disabilities) (PFRON)], in an amount equal to 40.65% of the average salary multiplied by the number of workers corresponding to the difference between the number of workers needed to guarantee that the target of 6% of the workforce being persons with disabilities is met and the actual number of persons with disabilities employed.

2. Where at least 6% of an employer’s workforce consists of persons with disabilities, that employer shall be exempt from payment of the contributions referred to in paragraph 1.

…’

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

12 VL was employed as a psychologist by the hospital at issue in the main proceedings, most recently from 3 October 2011 to 30 September 2016. On 8 December 2011, she obtained a disability certificate (her disability being described as moderate and permanent), which she submitted to her employer on 21 December 2011.

13 In the second half of 2013, following a meeting with the staff, the director of the hospital at issue in the main proceedings decided to grant a monthly allowance in an amount of 250 Polish zlotys (PLN) (approximately EUR 60) to workers submitting disability certificates after that meeting.

14 The measure was intended to reduce the amount of the contributions payable by the hospital at issue in the main proceedings to the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for the Rehabilitation of Persons with Disabilities) (‘the PFRON’).

15 On the basis of that decision, the allowance was granted individually to 13 workers who had submitted their disability certificates after that meeting. By contrast, 16 workers who had submitted their certificates to the employer before that meeting, including VL, did not receive that allowance.

16 VL brought an action against her employer before the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie IV Wydział Pracy i Ubezpieczeń Społecznych (District Court for Kraków-Nowa Huta in Kraków, 4th Labour and Social Insurance Division, Poland), arguing that she had been the subject of discrimination with regard to pay.

17 That court having dismissed her action, VL lodged an appeal with the referring court, the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland).

18 In her appeal, VL argues that her employer granted the allowance to a group of workers sharing a common characteristic, namely a disability, but on the condition that they submitted their disability certificates after a date chosen by the employer, which had the effect of excluding workers who had submitted their certificates before that date from receiving that allowance. VL considers that such a practice, the aim of which was to encourage workers with disabilities who had not yet submitted disability certificates to do so, in order to reduce the amount of the contributions payable by the hospital at issue in the main proceedings to the PFRON, is contrary to Directive 2000/78, which prohibits all discrimination, whether direct or indirect, on grounds of disability.

19 In that regard, the referring court questions whether indirect discrimination within the meaning of Article 2 of Directive 2000/78 may be taken to occur where a distinction is made by an employer within a group of workers defined by a protected characteristic – in this instance, disability – without the workers with disabilities in question being treated less favourably than workers who do not have disabilities.

20 In those circumstances, the Sąd Okręgowy w Krakowie (Regional Court, Kraków) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Article 2 of [Directive 2000/78] be interpreted as meaning that the differing treatment of individual members of a group distinguished by a protected characteristic (disability) amounts to a breach of the principle of equal treatment if the employer treats individual members of that group differently on the basis of an apparently neutral criterion, that criterion cannot be objectively justified by a legitimate aim, and the measures taken in order to achieve that aim are not appropriate and necessary?’

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether Article 2 of Directive 2000/78 is to be interpreted as meaning that the practice adopted by an employer and consisting in the exclusion of workers with disabilities, who have already submitted disability certificates to that employer before the date chosen by that employer for the submission of such a certificate, from receiving an allowance paid to workers with disabilities may be covered by the ‘concept of discrimination’ referred to in that provision.

22 As a preliminary point, it should be borne in mind that, pursuant to Article 3(1)(c) of Directive 2000/78, within the limits of the areas of competence conferred on the European Union, the scope of that directive extends to all persons, as regards both the public and private sectors, including public bodies, in relation to, inter alia, employment and working conditions, including dismissals and pay.

23 Regarding the concept of 'pay' for the purposes of that provision, it must be interpreted broadly and covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see, to that effect, judgment of 2 June 2016, *C*, C-122/15, EU:C:2016:391, paragraph 21 and the case-law cited).

24 Accordingly, an allowance such as that at issue in the main proceedings must be regarded as pay for the purposes of Article 3(1)(c) of Directive 2000/78.

25 In order to answer the question referred, it must first be determined whether a difference in treatment occurring within a group of persons who have disabilities may be covered by the 'concept of discrimination' referred to in Article 2 of Directive 2000/78.

26 In accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

27 Regarding, in the first place, the wording of Article 2 of Directive 2000/78, Article 2(1) of that directive defines the principle of equal treatment, for the purposes of that directive, as the principle that there should be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 thereof, one of which is disability.

28 Article 2(2)(a) of that directive provides that direct discrimination is to 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 the grounds of, inter alia, disability, and Article 2(2)(b) thereof provides that, with the exception of the cases referred to in Article 2(2)(b)(i) and (ii), indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons having, inter alia, a particular disability at a particular disadvantage compared with other persons.

29 In that last regard, it should be noted that, by referring, first, to discrimination 'on' any of the grounds referred to in Article 1 of Directive 2000/78 and, second, to less favourable treatment 'on' any of those grounds, and by using the terms 'another [person]' and 'other persons', the wording of Article 2(1) and (2) of that directive does not permit the conclusion that, regarding the protected ground of disability referred to in Article 1 thereof, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities. On the other hand, it follows from the expression 'on' that discrimination on the grounds of disability, for the purposes of that directive, cannot be said to occur unless the less favourable treatment or particular disadvantage at issue is experienced as a result of disability.

30 As regards, in the second place, the context of Article 2 of Directive 2000/78, a limitation such as that referred to in the previous paragraph is not apparent from the other provisions of that directive either. Although Article 1 and Article 3(4) of that directive, as well as recitals 11 and 12 thereof, make generic references to discrimination 'on the grounds of' or 'based on', inter alia, disability, they do not specify in any way the person or group of persons that may be used as the benchmark for assessing whether there is such discrimination.

31 In the third place, the objective of Directive 2000/78 supports an interpretation of Article 2(1) and (2) thereof whereby that directive does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of disability, for the purposes of that directive, to those who do not have disabilities.

32 In accordance with Article 1 of Directive 2000/78, and as is clear from the title thereof, and preamble thereto, as well as from its content and purpose, that directive is intended to establish a general framework for combating discrimination on the grounds, inter alia, of disability as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone with effective protection against discrimination based, in particular, on that ground (see, to that effect, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 36 and the case-law cited).

33 That directive is thus a specific expression, within the field that it covers, of the general principle of non-discrimination now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 38 and the case-law cited).

34 As the Court has previously held, the purpose of Directive 2000/78, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in that field in that directive applies not to a particular category of persons but by reference to the grounds mentioned in Article 1 thereof, which are listed exhaustively (see, to that effect, judgments of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415, paragraphs 38 and 46, and of 21 May 2015, *SCMD*, C-262/14, not published, EU:C:2015:336, paragraph 29).

35 While it is true that instances of discrimination on the grounds of disability, for the purposes of Directive 2000/78, are, as a general rule, those where persons with disabilities are subject to less favourable treatment or are at a particular disadvantage as compared with persons who do not have disabilities, the protection granted by that directive would be diminished if it were to be considered that a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the prohibition of discrimination laid down thereby solely on the ground that the difference in treatment at issue takes place as between persons with disabilities.

36 In those circumstances, and as has been argued by both the European Commission in its observations at the hearing and the Polish and Portuguese Governments in their written observations, the principle of equal treatment enshrined in Directive 2000/78 is intended to protect a worker who has a disability, for the purposes of that directive, against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities, but also as compared with other workers who have disabilities.

37 Using that finding as a starting point, it is necessary to go on to assess whether the practice adopted by an employer and consisting in the exclusion of workers with disabilities, who have already submitted disability certificates to that employer before the date chosen by that employer for the submission of such certificates, from receiving an allowance paid to workers with disabilities may be covered by the 'concept of discrimination' referred to in Article 2 of Directive 2000/78.

38 While it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether the practice at issue in the main proceedings constitutes discrimination prohibited by Directive 2000/78, the Court of Justice, which is called on to provide answers that are of use to the national court, may provide guidance, on the basis of the file in the main proceedings and the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case pending before it (see, to that effect, judgments of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 36, and of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 79).

39 Furthermore, although the referring court made reference, in its question, to a difference in treatment based on an apparently neutral criterion, namely the date on which the disability certificate was submitted, according to settled case-law, that fact alone does not mean that the Court of Justice may not provide the referring court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court of Justice to extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 33 and the case-law cited).

40 According to Article 2(1) thereof, read in conjunction with Article 1 thereof, Directive 2000/78 prohibits, inter alia, any direct or indirect discrimination on grounds of disability.

41 As regards, in the first place, the question whether a practice such as that at issue in the main proceedings may constitute direct discrimination on the grounds of disability, it is apparent from Article 2(2)(a) of Directive 2000/78, as recalled in paragraph 28 above, that such discrimination is to 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 the grounds of disability.

42 It should be noted, first, that the question whether the requirement that situations must be comparable for the purpose of determining whether there is a breach of the principle of equal treatment has been met must be assessed in the light of all the elements which characterise them (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 42 and the case-law cited).

43 More specifically, it is not required that the situations be identical, but only that they be comparable, and the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner, in the light of the benefit concerned (see, to that effect, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 43 and the case-law cited).

44 Second, it cannot be held that a provision or practice establishes a difference in treatment directly based on disability, for the purposes of the combined provisions of Article 1 and Article 2(2)(a) of that directive, where it is based on a criterion that is not inextricably linked to disability (see, to that effect, judgments of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 42 and the case-law cited, and of 18 January 2018, *Ruiz Conejero*, C-270/16, EU:C:2018:17, paragraph 37).

45 In that regard, concerning grounds other than disability referred to in Article 1 of that directive, the Court has held that a difference in treatment based on workers' marital status and not expressly on their sexual orientation was still direct discrimination on the basis of that orientation because, in the Member States concerned, at the time of the facts under consideration, only persons of different sexes could marry and it was therefore impossible for homosexual workers to satisfy the condition necessary for obtaining the benefit claimed. In such a situation, marital status could not be regarded as an apparently neutral criterion (see, to that effect, judgments of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 73; of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraphs 49 and 52; and of 12 December 2013, *Hay*, C-267/12, EU:C:2013:823, paragraphs 41, 44 and 47).

46 The Court has also held that a difference in treatment of workers based on entitlement to an old-age pension and not expressly on age, in granting a severance allowance, constituted direct discrimination in so far as, that entitlement being subject to a minimum age requirement, that difference in treatment was based on a criterion which was inextricably linked to age (judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraphs 23 and 24).

47 In the same vein, the Court has held that national rules which permitted an employer to dismiss employees who had acquired the right to draw a retirement pension constituted direct discrimination on the grounds of sex, as the right to draw such a pension was acquired by women at a younger age than the age at which it was acquired by men (see, to that effect, judgment of 18 November 2010, *Kleist*, C-356/09, EU:C:2010:703, paragraph 46).

48 It follows that, where an employer treats a worker less favourably than another of his or her workers is, has been or would be treated in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on a criterion which is inextricably linked to that disability, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78.

49 In the present case, it is, first of all, not disputed that the practice at issue in the main proceedings has given rise to a difference in treatment, since the workers with disabilities who had submitted their disability certificates to the hospital at issue in the main proceedings before the date of the meeting referred to in paragraph 13 above, a group which includes VL, were treated less favourably than the workers with disabilities who, on that date, had not yet submitted their certificates, given that only the latter group were given the opportunity to receive the allowance offered by their employer by providing that employer, from that date, with disability certificates. It is apparent from the file before the Court that the employer does not appear to have given workers with disabilities who had already submitted their certificates the opportunity to resubmit their certificates, or to file new ones, in order to receive such an allowance.

50 It should next be noted that, having regard to the intended purpose of that allowance, which was introduced in order to reduce the amount of the contributions payable by the hospital at issue in the main proceedings to the PFRON by encouraging, as can be seen from the file before the Court, workers with disabilities already employed by that hospital who had not yet submitted their disability certificates to do so, those two categories of workers with disabilities were in a comparable situation. As was noted, in essence, by the Advocate General in point 84 of his Opinion, those workers had already entered the service of the hospital at issue in the main

proceedings at the time that hospital decided to introduce such an allowance and they all contributed to the saving sought by that employer, regardless of the date on which they submitted their disability certificates.

51 Lastly, it is for the referring court to determine, having regard to all the relevant circumstances of the case, in particular the national legislation, the interpretation of which falls within its jurisdiction alone, whether the temporal condition imposed by the employer for receiving the allowance at issue in the main proceedings, namely the submission of the disability certificate after a date chosen by that employer, constitutes a criterion which is inextricably linked to the disability of the workers who were refused that allowance, in which case a finding of direct discrimination on the grounds of that disability would be necessary.

52 One of the indicia which are particularly significant for the purposes of that assessment is the fact, highlighted by VL, that, according to national legislation, the disability certificate gives rise to specific rights which may be relied on by the worker against the employer, which are directly derived from that worker's status as a worker with a disability.

53 In addition, in so far as the employer does not seem to have provided workers with disabilities who had already submitted their certificates with the opportunity of resubmitting their certificates or of filing new ones, the practice at issue in the main proceedings, for which no provision was made by the Law of 27 August 1997 and for which no transparent criterion seems to have been set in advance with a view to the grant or refusal of the allowance at issue in the main proceedings, could have been such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced – those workers having previously formalised that status by submitting disability certificates – to satisfy that temporal condition.

54 Should the referring court conclude that there is direct discrimination, such discrimination cannot be justified except on one of the grounds referred to in Article 2(5) of Directive 2000/78 (see, to that effect, judgment of 12 December 2013, *Hay*, C-267/12, EU:C:2013:823, paragraph 45).

55 Regarding, in the second place, the question whether a practice such as that at issue in the main proceedings constitutes indirect discrimination for the purposes of Article 2(2)(b) of Directive 2000/78, it is apparent from the case-law of the Court that such discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that persons possessing that characteristic are put at a particular disadvantage (see, to that effect, judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 94, and of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 43 and the case-law cited).

56 In the present case, should the referring court, ultimately, find that the difference in treatment at issue in the main proceedings stems from an apparently neutral practice, it will still need to ascertain whether that difference in treatment has had the effect of placing persons who have certain disabilities at a particular disadvantage as compared with persons who have other disabilities. Directive 2000/78 refers to disability in general and thus, without distinction or limitation, to all disabilities, for the purposes of that directive (see, to that effect, judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 42 and the case-law cited).

57 In particular, it will be for that court to investigate whether, by having made receipt of the allowance conditional upon submitting the disability certificate after a date chosen by the employer, the practice introduced by the hospital at issue in the main proceedings had the effect of putting certain workers with disabilities at a disadvantage because of the particular nature of their disabilities, including the fact that such disabilities were visible or required reasonable adjustments to be made, such as adapted workstations or working hours.

58 Subject to verification by the referring court, it could be held that it was primarily workers who have such disabilities who were, in practice, obliged, before the date chosen by the hospital at issue in the main proceedings, to make their state of health formally known to their employer, by submitting disability certificates, whereas other workers who have disabilities of a different nature, for example because those disabilities are less serious or do not immediately require reasonable adjustments, such as those referred to in the previous paragraph, to be made, still had a choice as to whether or not to take that step.

59 According to Article 2(2)(b)(i) of Directive 2000/78, a difference in treatment leading, in fact, to a particular disadvantage for persons who have disabilities which are visible or which require reasonable adjustments to be made cannot however constitute indirect discrimination where it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In the present case, it seems to be apparent from the intended purpose of the practice at issue in the main proceedings, which is to save money, that the conditions for such justification are not satisfied, which it is for the referring court to verify, where appropriate.

60 In the light of the foregoing, the answer to the question referred is that Article 2 of Directive 2000/78 must be interpreted as meaning that:

– the practice adopted by an employer and consisting in the payment of an allowance to workers with disabilities who have submitted their disability certificates after a date chosen by that employer, and not to workers with disabilities who have submitted those certificates before that date, may constitute direct discrimination if it is established that that practice is based on a criterion that is inextricably linked to disability, inasmuch as it is such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced, to satisfy that temporal condition;

– that practice, although apparently neutral, may constitute discrimination indirectly based on disability if it is established that, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities, including whether they are visible or require reasonable adjustments to be made to working conditions.

Costs

61 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 (Grand Chamber) hereby rules:

Article 2 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 meaning that:

– **the practice adopted by an employer and consisting in the payment of an allowance to workers with disabilities who have submitted their disability certificates after a date chosen by that employer, and not to workers with disabilities who have submitted those certificates before that date, may constitute direct discrimination if it is established that that practice is based on a criterion that is inextricably linked to disability, inasmuch as it is such as to make it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced, to satisfy that temporal condition;**

– **that practice, although apparently neutral, may constitute discrimination indirectly based on disability if it is established that, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities, including whether they are visible or require reasonable adjustments to be made to working conditions.**

[Signatures]