Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 September 2019*

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment in employment and occupation — Article 2(2)(b)(ii) and Article 5 — Prohibition of any discrimination based on a disability — Worker particularly susceptible to occupational risks within the meaning of national law — Existence of a 'disability' — Dismissal for objective reasons based on criteria of productivity, multi-skilling in the undertaking's posts and absenteeism — Particular disadvantage for disabled persons — Indirect discrimination — Reasonable accommodation — Individual who is not competent, capable and available to perform the essential functions of the post concerned)

In Case C-397/18,

REQUEST for a preliminary ruling pursuant to Article 267 TFEU from the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona, Spain), made by decision of 30 May 2018, received at the Court on 15 June 2018, in the proceedings

DW

v

Nobel Plastiques Ibérica SA,

intervener:

Fondo de Garantía Salarial (Fogasa),

Ministerio Fiscal,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– DW, by J. Pérez Jiménez, abogado,

* Language of the case: Spanish.

– Nobel Plastiques Ibérica SA, by D. Sanahuja Cambra, abogada,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the European Commission, by D. Martin and P. Němečková, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

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 reference has been made in proceedings between DW and Nobel Plastiques Ibérica SA concerning the lawfulness of DW's dismissal on objective grounds.

Legal context

International law

3 The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), states, in recital (e) of its preamble:

'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'

4 Under Article 1 of that convention, headed 'Purpose':

'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.'

5 Article 2 of that convention, headed 'Definitions', provides:

'For the purposes of the present Convention:

…

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

…'

EU law

6 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. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

…

(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) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.'

7 Article 1 of that directive, headed '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.'

8 Article 2 of that directive, headed '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.'

9 Article 3 of that directive, headed 'Scope', provides, in paragraph 1:

'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;

…'

10 Article 5 of Directive 2000/78, headed 'Reasonable accommodation for disabled persons', reads as follows:

'In order to guarantee compliance with the principle of equal treatment for persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

Spanish law

11 Article 25 of Ley 31/1995 de Prevención de Riesgos Laborales (Law 31/1995 on the Prevention of Occupational Risks) of 8 November 1995 (BOE No 269 of 10 November 1995, p. 32590), headed 'Protection of workers particularly susceptible to certain risks', provides, in paragraph 1:

'The employer shall specifically guarantee the protection of workers who, by reason of their own personal characteristics or a known biological condition, including workers with a recognised physical, mental or sensory disability, are particularly susceptible to occupational risks. To that end, it shall take into account those factors in assessing the risks and, in the light of those risks, adopt the necessary preventive and protective measures.

Workers shall not be assigned to posts which may, by reason of their own personal characteristics, a biological condition or a recognised physical, mental or sensory disability, place them, other workers or other persons associated with the undertaking in situations of danger; in general, they shall not be assigned to such posts where it is evident that they are in a temporary state or condition which does not meet the physical and mental requirements necessary to occupy the posts in question.'

12 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 impairments that are likely to be permanent and that, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

…

(c) "Direct discrimination" refers to the situation in which a person with a disability is treated less favourably than another person in a comparable situation on grounds of or by reason of disability.

(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.

…'

13 Article 4 of that Royal Legislative Decree, headed 'Rights holders', provides, in paragraph 1:

'"Persons with disabilities" refers to persons with physical, mental, intellectual or sensory impairments that are likely to be permanent and that, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.'

14 Article 35 of that Royal Legislative Decree, headed 'Guarantees of the right to occupation', reads as follows:

'1. Persons with disabilities shall enjoy the right to work under conditions guaranteeing the application of the principle of equal treatment and the principle of non-discrimination.

2. The guarantee and effectiveness of the right to equal treatment and the right to equal opportunities enjoyed by persons with disabilities are governed by this Chapter and the specific legislation concerning access to employment as well as to self-employment or to occupation, working conditions, including pay and dismissal, promotion, vocational and continuing training, employment training, affiliation and membership of an organisation representing workers or employers and the incorporation and membership of any organisation whose members are engaged in a specific occupation.

3. Direct discrimination exists where a person with a disability is treated less favourably than another person in a comparable situation on grounds of disability.

4. Indirect discrimination exists if a legal or regulatory provision, a clause in an agreement or contract, an individual agreement or a unilateral decision by an employer, ostensibly neutral, is liable to put persons with a disability at a particular disadvantage compared with other persons and does not objectively correspond to any legitimate aim and the means of achieving that aim are not appropriate and necessary, unless the employer is obliged to take appropriate measures, where needed in each particular case and in accordance with Article 40, to eliminate the disadvantage entailed by that provision, clause, agreement or decision.

5. Regulatory provisions, clauses in collective agreements, individual agreements and unilateral decisions by the employer, which give rise to situations of direct or indirect discrimination on grounds of disability in the field of employment, remuneration, working time and other working conditions, shall be deemed to be null and devoid of all effect.

…'

15 Article 40 of that Royal Legislative Decree, headed 'Adoption of measures to prevent, or to 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 undertaking 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 mitigated to a sufficient degree by the measures, assistance and public subsidies applying to disabled persons, and to take account of the financial and other costs entailed by those measures, the scale of the undertaking or organisation and its overall turnover.'

16 The Estatuto de los Trabajadores (Workers' Statute) results from Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Workers' Statute) of 23 October 2015 (BOE

No 255 of 24 October 2015, p. 100224). In the version applicable at the time of the facts in the main proceedings, Article 53 of that statute, headed 'Form and effects of termination on objective grounds', provides, in paragraph 4:

'When the employer's decision to terminate the employment contract is motivated by any of the grounds of discrimination prohibited by the Constitution or by law, or was adopted in breach of the worker's fundamental rights and public freedoms, the dismissal decision shall be invalid, in which event it shall be for the judicial authority to make a declaration to that effect, *ex officio*.

…'

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

17 On 1 July 2004, DW was employed by Nobel Plastiques Ibérica. Assigned to the processes of assembly and shaping of plastics pipes, she was granted a reduction in working hours on the basis that she had custody of young children. DW worked a 35-hour week and worked the morning and night shifts.

18 DW suffered from epicondylitis, which was diagnosed on 12 September 2011 and for which she had surgery on 18 January 2012.

19 That injury was classified as an 'occupational disease' and DW was temporarily unable to work for several periods between September 2011 and April 2014, and, because she had been diagnosed with an anxiety disorder, from 4 September 2015 to 31 March 2016, and from 6 to 20 May 2016.

20 With effect from 15 December 2011, DW was categorised as being among 'workers particularly susceptible to occupational risks' within the meaning of Article 25 of Law No 31/1995, a status which she thereafter retained.

21 Between April 2016 and August 2016, DW attended the company's medical centre on several occasions complaining of elbow pain and sent various letters to that medical centre and to her employer requesting that her workplace be adapted to her physical condition.

22 DW was also temporarily unable to work during a number of periods from 31 August 2016 as a result of a workplace accident owing to her epicondylitis.

23 Following the date on which she was diagnosed with epicondylitis, DW underwent a medical assessment after each return to work. At the end of each of those assessments, she was declared 'fit with limitations' for her job or to perform the tasks of 'steam shaping'. As a result, during the periods in which she worked in 2016, DW was assigned, in priority over other workers, to posts involving the handling of small pipes in which the risks to her health were lower than in posts requiring the handling of large pipes.

24 With a view to carrying out a dismissal on objective grounds within the undertaking, Nobel Plastiques Ibérica adopted the following four selection criteria, applicable for 2016: being assigned to the processes of assembly and shaping of plastic pipes, having productivity below 95%, a low level of multi-skilling in the undertaking's posts, and a high rate of absenteeism.

25 Nobel Plastiques Ibérica considered that, over the course of 2016, DW fulfilled those four selection criteria since she was assigned to the processes of assembly and shaping of plastic pipes, had a weighted average productivity of 59.82%, a very low level of multi-skilling in the essential tasks associated with her post and a rate of absenteeism of 69.55%.

26 Consequently, on 22 March 2017, while DW was temporarily unable to work, Nobel Plastiques Ibérica issued her with a letter of dismissal on objective grounds, citing economic, technical, production and organisational reasons. Nine other persons working within the undertaking were also dismissed on the same date.

27 On 21 April 2017, DW challenged that dismissal decision before the referring court, the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona, Spain). DW sought to obtain a declaration that the dismissal was null and void or, in the alternative, unfair.

28 On 4 August 2017, the Employment Inspectorate proposed that Nobel Plastiques Ibérica be penalised for having committed two failings consisting of, first, having exposed DW to the ergonomic risks which led to her condition, thereby creating a serious risk to her physical safety or health and, second, maintaining the conditions in which she carried out her tasks after it had become aware of her epicondylitis, that is to say, by assigning her to posts the conditions of which were incompatible with her state of health. In its report, the Employment Inspectorate noted that DW had occupied various posts in rotation, but that all of those posts required handling that entailed ergonomic risks and damage to the musculoskeletal system for the upper limbs. Nobel Plastiques Ibérica did not take measures to adapt DW's workplace to ensure that it was compatible with her state of health.

29 The referring court is uncertain as to whether the concept of 'workers particularly susceptible to certain risks', within the meaning of Article 25 of Law 31/1995, is equivalent to the concept of 'disability' within the meaning of Directive 2000/78, as interpreted by the Court. The answer to that question is required in order to determine, first, whether the selection criteria used to dismiss DW infringe, directly or indirectly, the right to equal treatment of disabled persons recognised by Directive 2000/78 and, second, whether the obligation to provide reasonable accommodation set out in Article 5 of that directive requires that the selection criteria connected with DW's disability and used to dismiss her be set aside.

30 The referring court considers that, aside from the fact that persons particularly susceptible to occupational risks may receive specific treatment to protect them against certain occupational risks, they are to be regarded as falling within the concept of 'disabled persons', within the meaning of Directive 2000/78, where their physical impairments are long term at the time when the allegedly discriminatory act is taken against them and arise as a result of the work performed.

31 As regards the four selection criteria used to determine the persons to be dismissed, referred to in paragraph 24 above, the first of those criteria, namely being allocated to the processes of assembly and shaping of plastic pipes, is objective and neutral. However, the remaining three criteria are liable to be discriminatory in relation to DW if she is regarded as having a disability within the meaning of Directive 2000/78.

32 As regards the second selection criterion, namely having productivity below 95% during 2016, it is clear that DW's physical impairment had a direct link with her weighted average productivity rate of 59.82%. However, Nobel Plastiques Ibérica merely furnished DW's annually calculated productivity data without indicating the posts and the specific tasks in relation to which the productivity rate had been measured.

33 With regard to the third selection criterion, namely that of multi-skilling in the undertaking's posts, it was established that, since 2011, DW had been declared 'fit with limitations' by the medical centre, on the ground that she had been diagnosed as being particularly susceptible to occupational risks. The result was that she was unable to perform all the tasks required by the various posts, which is the reason why her score was low in relation to that criterion.

34 Finally, as regards the last selection criterion, DW's rate of absenteeism of 69.55% was calculated by taking into account the periods of sick leave she had taken in 2016. Those periods of sick leave included all of the periods occasioned by her physical impairment. The simple fact that those periods were taken into account means that DW was liable to be treated less favourably than other workers.

35 In those circumstances, the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must workers who are categorised as "particularly susceptible to certain risks" be regarded as persons with a disability for the purposes of the application of Directive 2000/78, as interpreted by the case-law of the Court, where, owing to their own personal characteristics or known biological condition, those workers are particularly susceptible to occupational risks and, for that reason, are unable to perform certain jobs on the ground that such jobs would entail a risk to their own health or to other individuals?

If the answer to the first question is in the affirmative, the following questions are referred:

(2) Does the decision to dismiss a worker on economic, technical, organisational and production grounds constitute an act of direct or indirect discrimination, within the meaning of Article 2(2)(b) of Directive 2000/78, if the person concerned has a recognised disability, in that she is particularly susceptible when it comes to performing certain jobs on account of her physical impairments, and therefore has difficulties achieving the productivity levels required in order to avoid being put forward for dismissal?

(3) Does the decision to dismiss a worker on economic, technical, organisational and production grounds constitute an act of direct or indirect discrimination, within the meaning of Article 2(2)(b) of Directive 2000/78, if the person concerned has a recognised disability, in that she has been recognised as being particularly susceptible when it comes to performing certain jobs on account of her physical impairments, and the decision is taken, among other selection criteria, on the basis of multi-skilling in all jobs, including those which the disabled person is unable to perform?

(4) Does the decision to dismiss a worker on economic, technical, organisational and production grounds constitute an act of indirect discrimination, as defined in Article 2(2)(b) of Directive 2000/78, if the person concerned has a recognised disability and has therefore been recognised as being particularly susceptible when it comes to performing certain jobs on account of her physical impairments, which have resulted in long periods of absence or sick leave prior to the dismissal, and the decision is taken, among other selection criteria, on the basis of that worker's absenteeism?'

Consideration of the questions referred

The first question

36 By its first question, the referring court asks, in essence, whether Directive 2000/78 must be interpreted as meaning that the state of health of a worker who is categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, falls within the concept of 'disability' within the meaning of that directive.

37 As is clear 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.

38 In the present case, the referring court seeks to ascertain whether the state of health of DW, who was dismissed once she was categorised as being a worker particularly susceptible to occupational risks, within the meaning of national law, falls within the concept of 'disability', within the meaning of that directive.

39 In that regard, it must be recalled that the European Union approved the UN Convention by way of Decision 2010/48. The provisions of the convention are thus, from the time of that decision's entry into force, an integral part of the European Union legal order. Moreover, according to the appendix to Annex II to that decision, in the field of independent living and social inclusion, work and employment, Directive 2000/78 is one of the European Union acts which refers to matters governed by the convention (judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 30 and 31, and of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 40).

40 It follows that the UN Convention may be relied on for the purposes of interpreting that directive, which must, as far as possible, be interpreted in a manner consistent with the convention (judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 32, and of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 41).

41 It is for that reason that, following the European Union's approval of the UN Convention, 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 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 (judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 38, and of 18 January 2018, *Ruiz Conejero*, C-270/16, EU:C:2018:17, paragraph 28).

42 It does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. It would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 40).

43 The concept of 'disability' must be understood as referring to a hindrance to the exercise of professional activity, not to the impossibility of exercising such activity. The state of health of a person with a disability who is fit to work, albeit only part time, is thus capable of being covered by the concept of 'disability' (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 44).

44 The 'long-term' nature of the limitation must be assessed in relation to the condition of incapacity, as such, of the person concerned at the time of the alleged discriminatory act adopted against him (judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 53 and the case-law cited).

45 The evidence which makes it possible to find that a limitation of capacity 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 (judgment of 1 December 2016, *Daouidi*, C-395/15, EU:C:2016:917, paragraph 56).

46 In addition, a finding that the person concerned has a 'disability', within the meaning of Article 1 of Directive 2000/78, comes before the determination and assessment of the appropriate accommodation measures referred to in Article 5 of that directive. According to recital 16 of that directive, such measures are intended to accommodate the needs of disabled persons and they are therefore the consequence of the finding that there is a 'disability' (see, to that effect, judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 45 and 46, and of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paragraph 57).

47 In the present case, it is apparent from the order for reference that the questions referred for a preliminary ruling concern a worker who, owing to a medical condition, suffered a limitation of her capacity to work, arising as a result of physical impairments, over a long period of time.

48 In view of her state of health, DW was categorised, with effect from 15 December 2011, as being among 'workers particularly susceptible to occupational risks' within the meaning of Article 25 of Law 31/1995. Pursuant to that article, such workers are not to be assigned to posts in which they may, owing to their own personal characteristics, a biological condition or a recognised physical, mental or sensory disability, place them, other workers or other persons associated with the undertaking in situations of danger.

49 The sole fact that a person is categorised as a worker particularly susceptible to occupational risks, within the meaning of national law, does not of itself mean that that person has a 'disability' within the meaning of Directive 2000/78. It is clear from the order for reference that the definition of the concept of 'worker particularly susceptible to occupational risks', within the meaning of Article 25 of Law 31/1995, is based on conditions that are different from those referred to in paragraph 41 of this judgment. Thus it cannot be held that that concept corresponds to the concept of 'disabled person', within the meaning of the directive.

50 It is for the referring court to determine whether, in the case in the main proceedings, DW's state of health led to a limitation of her capacity which satisfied the conditions referred to in paragraph 41 above. If that issue is resolved in the affirmative, DW must therefore be regarded as having been a disabled person, within the meaning of Directive 2000/78, as at the date of her dismissal.

51 In those circumstances, the answer to the first question referred is that Directive 2000/78 must be interpreted as meaning that the state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of 'disability', within the meaning of that directive, where that state of health leads to a limitation of capacity arising as a result of, inter alia, 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 their professional life on an equal basis with other workers. It is for the national court to determine whether, in the case in the main proceedings, those conditions are satisfied.

Questions 2 to 4

52 By its second to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that dismissal of a disabled worker for 'objective reasons' on the basis that he or she satisfies the selection criteria taken into account by the employer to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes direct or indirect discrimination on grounds of disability, within the meaning of that provision.

53 In the present case, it is clear from the order for reference that, to determine the persons to be dismissed as part of a dismissal for economic, technical, organisational and production grounds, Nobel Plastiques Ibérica adopted, inter alia, the following three selection criteria, applicable for 2016: having productivity below 95%, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism. DW, who had been categorised as being particularly susceptible to occupational risks, within the meaning of national law, was considered as meeting those three criteria and was consequently dismissed, together with nine other persons working within the undertaking.

54 The referring court is uncertain as to whether, on the assumption that DW is a disabled person within the meaning of Directive 2000/78, which it is for the referring court to determine as is made clear by the answer given to the first question, DW, in the application of those three selection criteria, was discriminated against on grounds of disability, within the meaning of that directive.

55 Under Article 2(1) of that directive, the 'principle of equal treatment' means that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive, which include, inter alia, disability.

56 As to whether there is direct discrimination, Article 2(2)(a) of Directive 2000/78 provides that such discrimination occurs where one person is treated less favourably than another person in a comparable situation on any of the grounds listed in Article 1 of that directive.

57 In that regard, selection criteria such as productivity rate, level of multi-skilling in the undertaking's posts and rate of absenteeism apply in the same way to disabled persons and to non-disabled persons. Accordingly, those criteria cannot be regarded as establishing a difference of treatment based directly on disability, within the meaning of Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78, since they are not inseparably linked to disability (see, by analogy, judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 72 and 74, and of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 48).

58 As regards the existence of indirect discrimination on grounds of disability, selection criteria consisting of having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, in order to determine the persons to be dismissed as part of a dismissal for objective reasons, are ostensibly neutral.

59 However, as regards more specifically the selection criterion relating to the rate of absenteeism, a disabled worker is, in principle, more exposed to the risk of having a high rate of absenteeism as compared to a worker without a disability, since he is exposed to the additional risk of being absent owing to an illness connected with his disability. It is thus apparent that the selection criterion consisting of having a high rate of absenteeism during the course of one year is liable to place disabled workers at a disadvantage, where the absence from work is connected with a disability, 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, judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 76, and of 18 January 2018, *Ruiz Conejero*, C-270/16, EU:C:2018:17, paragraph 39).

60 In the same way, as regards the selection criteria for effecting a dismissal consisting of having productivity below a given rate and a low level of multi-skilling in the undertaking's posts, a disabled worker is, in principle, owing to the limitation of his or her capacity, less likely to obtain a good score than a worker without a disability. Such criteria are therefore also such as to give rise to a difference of treatment resulting indirectly from a disability, within the meaning of Article 2(2)(b) of Directive 2000/78.

61 Nevertheless, unfavourable treatment resulting indirectly from a disability undermines the protection provided for by Directive 2000/78 only in so far as it constitutes discrimination within the meaning of Article 2(1) of that directive (see, to that effect, judgments of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 48, and of 18 January 2018, *Ruiz Conejero*, C-270/16, EU:C:2018:17, paragraph 36).

62 Under Article 2(2)(b)(ii) of Directive 2000/78, 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, unless the employer or any person or organisation to whom that directive applies is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 of that directive in order to eliminate disadvantages entailed by such provision, criterion or practice.

63 According to the first sentence of Article 5 of that directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation is to be provided. The second sentence of Article 5 of that directive provides that employers must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

64 In that regard, the Court has held that the concept of 'reasonable accommodation' must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers (judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 54, and of 4 July 2013, *Commission* v *Italy*, C-312/11, not published, EU:C:2013:446, paragraph 59).

65 As set out in recitals 20 and 21 of Directive 2000/78, the employer must take appropriate measures, i.e. effective and practical measures to adapt the workplace to the disability, for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources, without imposing a disproportionate burden on the employer, taking account, in particular, of the financial and other costs entailed, the scale and financial resources of the undertaking and the possibility of obtaining public funding or any other assistance.

66 In the present case, it is apparent from the order for reference that Royal Legislative Decree 1/2013, and in particular Article 40 thereof, provides that the employer must take measures to prevent, or to compensate for, the disadvantages caused by disability as a guarantee of full equality at work.

67 In that regard, the referring court states that DW's workplace was adapted after DW was categorised as a worker particularly susceptible to occupational risks, within the meaning of Article 25 of Law 31/1995.

68 Thus, it is apparent from the order for reference that DW was assigned, in priority over other workers, to posts involving the handling of small pipes, thereby exposing her to fewer risks to her health than those created by posts requiring the handling of large pipes.

69 It is for the referring court to determine whether those adjustments were sufficient to be regarded as reasonable accommodation, within the meaning of Article 5 of Directive 2000/78.

70 As part of that determination, the referring court must take into account all the information available to it, including the Employment Inspectorate's report to which it refers in its order for reference, mentioned in paragraph 28 above.

71 If the referring court were to conclude that, prior to DW's dismissal, DW's employer did not take appropriate measures, referred to in paragraph 65 of this judgment, and that, therefore, it did not provide reasonable accommodation, within the meaning of Article 5 of Directive 2000/78, it must be held that, in a case such as that in the main proceedings, the dismissal of a disabled worker on the ground that he or she fulfilled selection criteria consisting of having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism constitutes indirect discrimination on grounds of disability within the meaning of Article 2(2)(b)(ii) of that directive (see, by analogy, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 68).

72 In that regard, it must be borne in mind that, under Article 2 of the UN Convention, discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation.

73 Conversely, if the referring court were to conclude that DW's employer adopted appropriate measures and therefore provided reasonable accommodation, within the meaning of Article 5 of Directive 2000/78, it cannot be held that a dismissal based on such selection criteria constitutes indirect discrimination within the meaning of Article 2(2)(b)(ii) of that directive.

74 In that regard, recital 17 makes clear that that directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

75 In the light of the foregoing considerations, the answer to the second to fourth questions referred is that Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that dismissal for 'objective reasons' of a disabled worker on the ground that he or she meets the selection criteria taken into account to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on grounds of disability within the meaning of that provision, unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of Article 5 of that directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to determine.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. **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 state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of 'disability', within the meaning of that directive, where that state leads to a limitation of capacity arising from, inter alia, 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 their professional life on an equal basis with other workers. It is for the national court to determine whether those conditions are satisfied in the main proceedings.

2. **Article 2(2)(b)(ii) of Directive 2000/78 must be interpreted as meaning that dismissal for 'objective reasons' of a disabled worker on the ground that he or she meets the selection criteria taken into account by the employer to determine the persons to be dismissed, namely having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, constitutes indirect discrimination on grounds of disability within the meaning of that provision, unless the employer has beforehand provided that worker with reasonable accommodation, within the meaning of Article 5 of that directive, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, which it is for the national court to determine.**

[Signatures]