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Dismissal on grounds of sickness – Discrimination on grounds of disability? (AT)

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Summary

Austrian courts have to deal with an increasing number of cases concerning dismissal on grounds of (alleged) discrimination. The particular challenge is to a draw a conclusive distinction between the concepts of disability and sickness.

Background

Pursuant to the Austrian Disability Employment Act (*Behinderteneinstellungsgesetz*), a person can apply for an official decision recognising their status as a so-called registered disabled person if the degree of disability is at least 50%. They are provided with special protection against being dismissed (Section 8). Prior to giving notice to terminate the employment relationship, the employer is required to obtain consent from the Disabled Persons Committee, established at the Ministry for Social Affairs. Consent will be provided if the employer's interests outweigh those of the registered disabled person. Thereby registered disabled persons enjoy special protection against dismissal, even if the employer wishes to terminate for a (non-discriminatory) lawful motive.

As the employee in this case was not a registered disabled person, he did not qualify for the special protection against dismissal. Nevertheless, the Disability Employment Act provides that a dismissal based on discrimination on grounds of disability has no legal effect, regardless of the degree of disability (Section 7f). Essentially, all employees are protected against discriminatory dismissals, whereas registered disabled persons are protected against all dismissals.

Judgment

The plaintiff in this case was a bus driver for a local public transport network. His employer dismissed him, observing the applicable notice period. The plaintiff challenged his dismissal in court. He claimed to suffer from a variety of health issues affecting his spine which constituted a disability pursuant to the Disability Employment Act.

The Court of First Instance as well as the Appellate Court found that the plaintiff was in very good general health although they also held that the alleged health issues were indeed accurate. However, those health issues did not limit the plaintiff's capacity to participate in professional life or perform his work as a bus driver. A disability was consequently not established. The dismissal was non-discriminatory and therefore lawful.

The Supreme Court upheld this decision. The Disability Employment Act follows the *medical approach* in defining the concept of disability. It is defined as a (not only temporary) effect on the physical, mental and psychological functions of body or senses, which hinder participation in professional life. However, the *travaux préparatoires* provide that social constructs (*stigmatization*) shall be taken into account as well (so-called *social approach*).

As the Appellate Court gave careful consideration to the impairment of the employee's bodily functions as well as his capacity to participate in professional life, the Supreme Court dismissed the plaintiff's appeal.

Commentary

At the core of this case is the distinction between the notions of *disability* and *sickness*. Whilst Directive 2000/78 (the 'Directive') does not define the *concept of disability* itself, the ECJ continuously held that it differs from the *concept of sickness*. The two concepts cannot therefore simply be treated as the same (*Chacón Navas*, C-13/05, para 44). In its settled case law, the ECJ made use of a *medical approach*, emphasising the disadvantage caused by an impairment. It held that the Directive cannot be applied to employees "*as soon as they develop any*

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type of sickness" (*Chacón Navas*, para 46). In recent years the ECJ somewhat abandoned this approach, adopting a more opaque concept of *disability*. This was primarily caused by the ratification of the *United Nations Convention on the Right of Persons with Disabilities* (the 'Convention').

It also affected Austrian employment law litigation. An increasing number of employees maintain that they are discriminated against on grounds of disability when suffering from health issues not matching the conventional understanding of a disability. The increased difficulty in predicting the court proceedings' outcome can lead to a more powerful bargaining position for a potential court settlement.

Below, a brief outline of the ECJ's case law regarding the concept of disability will be provided. It will become apparent that the ECJ adapted its concept under the influence of the one provided by the Convention. Nevertheless, it falls short of providing comprehensive protection. The concept developed by the ECJ does not fit all forms of discrimination. It relies heavily on the question of whether employees are unable to participate in professional life. While this can also apply for employees suffering from sickness it does not encompass all employees with disabilities. This can deprive employees with disabilities of the required protection, when they are not limited in their capacity to work, but nonetheless suffer from disparaging conduct in their professional life.

Directive 2000/78 personal scope

In *Chacón Navas* the ECJ held that the concept of disability requires an "*autonomous and uniform interpretation*" (C-13/05, para 40). The *concept of disability* therefore encompasses "*a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life*" (para 43). As Article 1 of the Directive exhaustively lists the grounds of discrimination, the personal scope of application cannot be extended to employees discriminated for different reasons, such as sickness (*Coleman*, C-303/06, para 46).

This approach changed when the EU ratified the Convention in November 2009. It describes a *disability* as "*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*" (Article 1). However, it can be disputed to what extent the Convention provides a legally binding definition as Article 1 provides the Convention's purpose, whereas Article 2 sets out the definitions (which again do not include a definition for the concept of *disability*). Further, the Convention states in its preamble that "*disability is an evolving concept.*" It "*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.*"

As an international agreement concluded by the EU, the Convention is binding upon its institutions and on its Member States (Article 216 para 2 TFEU). Thus, the Convention has to be taken into account when interpreting secondary EU law. According to settled ECJ case law, secondary law shall be interpreted consistently with international agreements (cf *Commission/Council*, 218/82, para 15).

In *HK Danmark* the ECJ applied this interpretation to the Directive. Therefore the concept of disability includes "a limitation which results *in particular* from 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*" (C-335/11 and C-337/11, para 38). (Words in italics in this quote show the additions made in comparison to the *Chacón Navas* decision.)

The ECJ deviated from its original position that the concept of disability is self-contained and inaccessible for an expansive interpretation. Accordingly, it abandoned the strict distinction between disability on the one hand and sickness on the other. It held that a curable or incurable illness can equate to a disability if it entails a limitation as described above (*HK Danmark*, C-335/11 and C-337/11, para 41).

Nevertheless, the ECJ's concept of disability falls short of the definition provided by the Convention. Whereas the Convention emphasises the difficult conditions of participation *in society*, the ECJ decided on a more employment-related approach and refers to participation *in professional life*. The latter approach is obviously self-contradictory as the Directive intends to protect employees with disabilities regardless if their disability impairs the ability to work. Quite to the contrary, the Directive states that it "*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*" (preamble 17). Furthermore, the ECJ held in its *Coleman* decision that it is not a prerequisite for discrimination on grounds of disability that the employees are actually disabled themselves. It would deprive the Directive of an important element of its effectiveness if the application were limited only to people who themselves are disabled (C-303/06, para 51). It is convincing that an employee is not less worthy of protection when an employer just presumes them to be disabled, even though this is not actually the case.

In *Z* the ECJ had to deal with the question of under which circumstances *professional life* may be affected (C-363/12). Ms Z, a schoolteacher and Irish citizen, did not have a uterus and could not therefore become pregnant. With her partner she decided for a surrogate pregnancy in California. According to (applicable) Californian legislation she was considered the baby's mother. However, in Ireland she was neither eligible for maternity leave (as she was never pregnant) nor for adoption leave (as she was the genetic mother). Because she did not satisfy the required prerequisites, her application for leave of absence was denied.

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Although the ECJ considered that Ms Z's condition constituted a limitation, it did not assess disability as "*the inability to have a child by conventional means does not […] prevent the […] mother from having access to, participating in or advancing in employment*" (*Z*, C-363/12, para 81). The decision was widely criticised. The concept of disability provided by the ECJ ignores the Convention's "evolving concept" that also considers "attitudinal and environmental barriers" (cf Lawson and Waddington, *The unfinished story of EU disability non-discrimination law*, Research handbook on EU labour law, 2016, p 485). Bechtolf argues that the very fact that Ms Z was denied leave of absence can be regarded as such a "barrier" (*Der Behinderungsbegriff und die Wirrungen des EuGH*, ZESAR 3/2018 p 118 [121]).

The ECJ reiterated this idea in its decisions *FOA* (C-354/13) and *Glatzel* (C-356/12). In *FOA* a Danish childminder was dismissed. In an official letter the employee was informed that his intended dismissal was due to the decrease in the number of children. However, in a preceding meeting his obesity was mentioned as well, though it was disputed to what extent it was used as a reason for the dismissal. In its preliminary ruling the ECJ again focused on the question of whether the obesity hindered his participation in professional life (C-354/13, para 59), although the employee never maintained that it did. It concluded that obesity can potentially be covered by the *concept of disability*, depending on the referring court's findings. However, the ECJ did not raise the question of whether the employee could be discriminated against if the employer (falsely) assumed a disability and therefore decided to terminate the employment relationship.

The ECJ's overemphasis on the aspect of participation in professional life becomes even more apparent in its misguided assessment in *Glatzel* (C-356/12). Mr Glatzel was denied a driving licence for certain types of vehicles on the ground that he suffered from a visual disorder. However, this disorder only affected the vision of one eye, whereas his vision with both eyes was not impaired (to a relevant extent). The case neither had a (direct) connection to an employment relationship nor any other professional activity carried out by Mr Glatzel. Nevertheless, the ECJ again presupposed a hindrance for participation in professional life (*Glatzel*, C-356/12, para 45).

Conclusion

It is important to recall that the Directive is aimed at combating discrimination and not at providing employees with disabilities with jobs they are not capable of exercising due to their impairments or maintaining such employment relationships. As indicated above, emphasising the employees' capacity to participate in professional life creates a tension towards this goal. Many people cannot participate in professional life due to a curable or incurable sickness or are at risk of losing their job. On the contrary, many employees with disabilities can exercise their tasks without limitation. Nevertheless, they face degrading behaviour by employers and co-workers. By disregarding the Convention's social approach of disability, the ECJ is (potentially) shifting required protection towards the former to the detriment of the latter.

The *concept of disability* as determined by the Austrian Disability Employment Act (Section 3) falls short of the Convention's approach as well. It resonates the concept developed by the ECJ in *Chacón Navas*. However, Austrian case law was able to adopt a broader understanding by acknowledging that discrimination can happen if the person with a disability is not impaired or is not disabled at all (see Austrian Supreme Court 9 ObA 107/15y).

Comments from other jurisdictions

United Kingdom (Richard Lister, Lewis Silkin LLP): It is fascinating to note the contrasting approaches in EU member states to the protection of disabled people in employment, notwithstanding the introduction of the Equal Treatment Framework Directive 2000/78 nearly two decades ago. The UK has nothing equivalent to the concept of a registered disabled person under Austrian law, although there used to be complex legislation (dating back to 1944) requiring employers of more than 20 workers to employ a quota of disabled persons. That scheme was repealed by the Disability Discrimination Act 1995, which introduced in its place comprehensive protection against discrimination on the ground of disability. Since 1995, discrimination law has provided the 'core' protection at work for people with disabilities in the UK.

Following the ECJ's judgment in *Chacón Navas*, highlighting the scope for discrimination claims in the context of dismissals for ill health, it has been interesting to see how the courts in certain member states such as Austria have been grappling with this alongside their existing national legislative schemes for disability protection.

The Disability Discrimination Act predated Directive 2000/78 by some years and, although certain aspects of the legislation were reformed when the UK implemented the Directive, the definition of 'disability' remained unchanged and has largely remained so ever since. This is now contained in the Equality Act 2010 which, like Austrian law, adopts a 'medical model' focusing on an individual's functional limitations. In essence, a person has a disability if they have 'a physical or mental impairment' which has a 'substantial and long-term adverse effect' on their 'ability to carry out normal day-to-day activities'. The burden of proof is on the claimant to show that they satisfy these conditions.

While the UK definition of 'disability' seems broadly consistent with the concept of disability under EU law, the ECJ's judgments in *Chacón Navas* and *HK Danmark* highlighted at least one significant difference by emphasising that disability is something that 'hinders the par-

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ticipation of the person concerned in professional life'. In contrast, UK law refers to an adverse effect on 'normal day-to-day activities', focusing on what is normal for most people rather than what is normal for the particular claimant in their profession. UK courts and tribunals were not slow to take this on board, and have been prepared to interpret day-to-day activities so as to encompass activities that are relevant to participation in professional life. For example, in *Paterson – v – Commissioner of Police of the Metropolis* [2007] ICR 1522, the Employment Appeal Tribunal (EAT) relied on *Chacón Navas* in deciding that taking examinations for the purpose of gaining promotion was a normal day-to-day activity, despite the fact that this would take place infrequently. The EAT said that 'normal day-to-day activities' should be interpreted broadly, to include irregular but predictable activities that occur in professional life. On the facts, this meant that the claimant police officer, who had dyslexia and was at a disadvantage when sitting high-pressure examinations for promotion, was disabled within the meaning of the UK definition.

Germany (Martina Ziffels, Luther Rechtsanwaltsgesellschaft mbH): German law provides extensive protection for severely disabled persons in the workplace which are regulated by various laws. The term 'severely disabled' is only used for persons with a degree of disability of at least 50 or, in the case of a degree of disability of at least 30, if the person is granted the same treatment because the person without this treatment is not able to obtain or keep a workplace position due to the disability (Sec. 2 Social Code IX).

The dismissal of a severely disabled person requires the prior consent of the Integration Office (Sec. 168 Social Code IX). This requirement applies to ordinary dismissals as well as extraordinary dismissals for good cause, and regardless of the reason for the dismissal. The decision of the Integration Office is subject to its reasonable discretion. The discretion is restricted if the dismissal is due to compelling operational requirements or if another workplace position is secured for the severely disabled person. The dismissal also requires the prior hearing of the representation of severely disabled persons (Sec. 178 Social Code IX). Such representation must be elected in a business entity in which at least five severely disabled persons are employed. Due to a recent change in the law a dismissal is invalid if the employer failed to hear the representation of severely disabled persons or if the hearing procedure failed to comply with legal requirements. There are still open questions with regard to the correct hearing procedure but it is clear that the protection against dismissal has been increased due to more and stricter formal requirements.

The fact that a person is severely disabled must also be considered when determining the reason for a dismissal as it is part of every weighing of interests between employer and employee (Sec. 1 Unlawful Dismissal Act). A severe disability becomes particularly relevant in case of a dismissal for compelling operational requirements where the employer must consider the disability as one aspect when carrying out a social selection of the employees to be dismissed. The disability or a sickness itself may constitute a reason for the dismissal according to the Unlawful Dismissal Act if a prognosis can be made regarding continuing relevant negative effects for the employment relationship in the future. The jurisdiction of German labour courts has developed a detailed case law on sickness-related dismissal. In order to avoid a discrimination when giving notice of dismissal due to sickness or a disability, the employer must apply measures in order to change the obstacle to employment resulting from the disability (*Ruiz Conejero*, C-270/16).

While social law provisions grant protection against discrimination for severely disabled persons, the General Equal Treatment Act also provides protection in the workplace and in society in general for people who suffer discrimination on grounds of disability. The term 'disability' in national law is not fully congruent with the respective EU law. Therefore, Sec. 2 Social Code IX remains applicable where it gives a broader protection. As the General Equal Treatment Act must be interpreted so as to conform with EU law accordingly it also covers sickness if the criteria of EU law are met.

Austria (Hans Laimer and Lukas Wieser, zeiler.partners Rechtsanwälte GmbH): In Austria, no maximum duration for fixed-term employment contracts, such as the two year period in Germany, applies. Thus, fixed-term employment contracts – independent of the duration – are in general valid in Austria. However, consecutive fixed-term employment contracts are only permitted for special objective reasons (e.g. economic or social reasons). Otherwise, the protective provisions against termination of employment are circumvented. Accordingly, if no such reasons are given, consecutive employment contracts are deemed to be an ineffective chain of employment contracts (*Kettenarbeitsverträge*). In this case an employment for an indefinite term, commencing on the initial start date of the first fixed-term employment contract is given. However, the general prohibition of a chain of (employment) contracts does not apply to freelancers (*freie Dienstnehmer*) pursuant to Austrian Supreme Court case law (cf OGH 9 ObA127/03x). Thus, similar to the findings of the BAG, the pre-employment as a freelancer may also under Austrian law be basically irrelevant with regard to employee protection. Years of service as a freelancer are in general not taken into account for employment relationships. Concerning the qualification as a freelancer or an employee, Austrian courts will highly likely apply the Austrian notion of employment, especially as the Framework Agreement on fixed-term work only applies to an employment contract as defined in law, collective agreements or practice in each member state (cf clause 2 para 1 Framework Agreement). Thus, without any contrary ECJ case law the national notion of employment has to be taken into account with regard to fixed-term contracts according to legal scholars in Austria (cf Rebhahn in *Neumayr/Reissner*, ZellKomm3 § 1151 ABGB Mn 100/1). However, in our view an Austrian court may

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also take the initial freelancer contracts into account in its assessment whether or not objectively justifiable reasons for consecutive employment contracts are given.

Denmark (Christian K. Clasen, Norrbom Vinding): First of all, it should be noted that the Danish Anti-Discrimination Act, which implements Directive 2000/78, does not include a provision equivalent to the section in the Austrian Disability Employment Act providing special protection against dismissal to 'registered disabled persons' in the sense that a national committee prior to any dismissal must assess whether the employer's interest outweighs the interests of the registered disabled employee.

However, under Danish law, disabled persons who due to their disability have difficulties obtaining employment in the regular labour market have a priority right as to employment with public sector employers provided that the disabled applicant is just as qualified as other applicants.

Thus, in accordance with Directive 2000/78 disabled employees in Denmark do enjoy protection against discriminatory dismissal but not – as in Austria – protection against dismissal in general.

In cases regarding whether an employee has unlawfully been discriminated against on grounds of disability, the Danish courts consider the merits of the case and assess whether the employee's impairment constitutes a disability within the meaning of the Danish Anti-Discrimination Act. As specified in our case report in this issue of EELC (EELC 2019/13), the question of drawing a line between sickness and the concept of disability has been highly relevant in several recent Danish court cases.

As described in the Austrian case report, ECJ case law has contributed considerably to the gradual development of the concept of disability, including the distinction between sickness and the concept of disability within the meaning of Directive 2000/78. Accordingly, ECJ case law has significantly influenced the Danish courts' assessment of the distinction between sickness and the concept of disability.

Thus, even though the outcome of the national courts' assessment of specific cases, as noted in the Austrian case report, may not always be entirely predictable, extensive ECJ and Danish case law on this issue constitutes a significant contribution as to drawing a line between sickness and disability at a national level in Denmark.

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Parties: Anonymous

Court: Supreme Court

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