Broadening the comparator group in the context of discrimination based on disability

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Case:
Case C-16/19 VL/Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie ECLI:EU:C:2021:64.

Provisions:
Art 2(1), 2(2)(a) and (b) Directive 2000/78/EC

Keywords
Definition of discrimination, comparable group, direct or indirect discrimination

1. Factual background and the CJEU’s ruling

In 2013, the director of a Polish hospital decided, with the sole purpose of obtaining an economic advantage in the form of a reduction in contributions to the State Fund for the Rehabilitation of Persons with Disabilities, to pay monthly contributions to 13 employees who submitted their disability certificate after a specific date determined by the employer. Those who had already submitted their disability certificate, like the applicant in this case and 15 other workers, were excluded from this benefit and were not given another opportunity to submit the same certificate or a new certificate proving their disability. Arguing that this would be contrary to Directive 2000/78/EC, VL brought an action against her employer before the District Court. Having dismissed VL’s action, she lodged an appeal to the Regional Court which referred a preliminary question to the CJEU, aimed at clarifying whether Article 2 of Directive 2000/78/EC is to be interpreted as meaning that the employer’s practice (excluding workers who already submitted their disability certificates 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 the above-mentioned provision. Essentially, the CJEU ruled that it is possible to make a comparison within the group of workers sharing the same protected characteristic, i.e., disability. Following the CJEU, the practice adopted by the employer may be considered to be direct discrimination where that practice is inextricably linked to disability or the practice may be indirectly discriminatory where it puts workers with disabilities at a particular disadvantage. Ultimately, the CJEU left it to the national court to decide.

2. Defining the comparator group and establishing direct or indirect discrimination

This case is important, for the CJEU adopted a deliberately broad view on the notion discrimination, while at the same time blurring the lines between direct and indirect discrimination. Notably, the CJEU decided that the Directive’s scope allows a comparison of situations within the group of disabled workers, without the need to find a comparator group lacking a disability. In the past, the Court ruled that Directive 2000/78/EC does not apply to a particular category of persons but by reference to the grounds mentioned in Article 1 of Directive 2000/78/EC.1

In the underlying case, the CJEU emphasised that Directive 2000/78/EC applies “on” any of the grounds referred to in Article 1’.2 This is supplemented by the Court stating that the wording of Article 2(1) and (2) ‘does not permit the conclusion that, regarding the protected ground of disability …, the prohibition of discrimination … is limited only to differences in treatment between persons who have disabilities and persons who do not have a disability’.3 Consequently, the Directive itself does not provide a benchmark to be used for assessing whether there is a discrimination.4 With a view to the Directive’s purpose, there is no limit to the group of persons with whom a comparison has to be made. Any other interpretation would limit the effectiveness of the Directive.5 However, the Court’s interpretation seems to be restricted to discrimination based on disability and, so far at least, would not apply to other protected grounds.

Thus, the group of workers who submitted their disability certificate before the date specified by the employer could be compared with the group of workers who could submit their certificate after that specific date. Yet, the crucial question seems to be whether ‘a provision or practice establishes a difference in treatment directly based on disability’, i.e., where it is based on a criterion that is inextricably linked to disability6 and therefore could be considered to be direct discriminatory.7 According to the CJEU, giving workers with a disability who submitted their disability certificate after a specific date decided by the employer an allowance while denying such an allowance to those workers who submitted a certificate before that date amounts to a difference in treatment. This is particularly so where the latter group has not been offered another possibility to submit the

1. Case C-303/06 Coleman ECLI:EU:C:2008:415; Case C-262/14 SCMD ECLI:EU:C:2015:336.
2. Case C-16/19 VL/Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie ECLI:EU:C:2021:64, para 29.
3. ibid, para 20.
4. ibid, para 30.
5. ibid, para 35.
6. ibid, para 44, with reference to Case C-406/15 Milkova ECLI:EU:C:2017:198 and Case C-270/16 Ruiz Conejero ECLI:EU:C:2018:17.
7. VL, para 48.
certificate again. Moreover, given that the employer’s intention was to reduce the amount of the contributions payable by the hospital to the Fund, the two categories of workers were in a comparable situation.8

For the Court, the fact that the employer stipulated a date after which the disability certificate that gives rise to specific rights should be submitted, ‘constitutes a criterion which is inextricably linked to the disability of the workers who were refused such an allowance’.9 No such linkage was found in the Milkova case, where the applicant, employed on a civil service employment, could not benefit from the advance authorisation to dismiss someone with a disability applicable to an employment contract.10 In that case, the difference in treatment was not based on the ground of disability but on the different legal statuses of the work relationships as established in the national laws.11 While Advocate General Pitruzzella clearly encouraged the Court to adopt a broad interpretation by allowing a comparison within the group of workers with a disability, he did so by arguing this to be a situation of indirect discrimination, seeing the submission date determined by the employer as an ‘apparently neutral’ criterion. However, the Advocate General’s phrasing in this context was unfortunate, when he stated that direct discrimination refers to a situation where there is ‘one person’ by comparison with ‘another … in a comparable situation’ (as can be found in Article 2(2)(1)) while in the case at hand there was unfavourable treatment of a ‘group of persons’ (Article 2(2)(2)), and that therefore there would be no direct connection between the employer’s measure and the protected characteristic.12 As the employer’s intention was to reduce costs, there is reason to argue that inviting only a limited group of workers to submit their disability certificate is not neutral, but clearly and thus directly linked to the protected ground and therefore directly discriminatory.

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8. ibid, para 50.
9. ibid, para 51.
10. Milkova, para 41.
11. ibid, para 42.
12. VL, Opinion of AG Pitruzzella, paras 76–77.