



## **EDF ANALYSIS OF THE FIRST DECISION OF THE EUROPEAN COURT OF JUSTICE ON THE DISABILITY PROVISIONS OF THE FRAMEWORK EMPLOYMENT DIRECTIVE<sup>1</sup>**

**Case C-13/05 Chacon Navas v Eurest Colectividades SA, 11  
July 2006<sup>2</sup>**

*EDF 06-14 – December 2006*

*"States should recognise the rights of organisations of persons with disabilities to represent persons with disabilities at national, regional and local levels. States should also recognise the advisory role of organisations of persons with disabilities in decision-making on disability matters."*

***Rule 18 of the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities***

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<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2.12.2000, O. J. L303/16.

<sup>2</sup> Available via the homepage of the Court in many different languages:  
<http://curia.europa.eu/>

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### **DOC EDF 06/14 EN**

#### **EDF analysis OF the first decision of the European Court of Justice on the disability provisions of the Framework Employment Directive**

The document is available in English, and on diskette or in large-print upon demand from the EDF Secretariat, and on the EDF Website at: [www.edf-feph.org](http://www.edf-feph.org)

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## 1. Background

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On 11 July 2006 the European Court of Justice (ECJ), which is the only body which can give a definitive interpretation of EC law, gave its first judgment in a case relating to disability and the Framework Employment Directive. The judgment is important because:

1. It includes a definition of disability for the purposes of the Directive.
2. It establishes that a person who has a sickness is not covered by the Directive.
3. It confirms that an employer cannot dismiss a disabled employee when that employee is capable of carrying out the essential functions of a job if a reasonable accommodation is made.

The purpose of this note is to examine and comment on the judgment and to identify Member States which might be in breach of the judgment (and Directive).

## 2. Facts of the Case

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Ms. Chacon Navas worked for a Spanish firm. As a result of a sickness she was not able to work for some time and she was dismissed. The exact nature of her sickness was not specified – however, she was awaiting an operation and it was not expected that she could return to work in the short-term.

She challenged her dismissal before the Spanish courts arguing, amongst other things, that it was incompatible with the Directive. She therefore argued that someone with a sickness was protected by the Directive and her dismissal was a prohibited form of discrimination.

The Spanish Court which had to decide on this issue made a preliminary reference to the European Court of Justice. In essence this involves a national court asking the ECJ a question or series of questions to establish the meaning of a particular provision of EC law. The answers then enable the national court to decide if the national law is compatible with EC law – in which case the national law remains unchanged – or if the national law is incompatible with EC law – in which case it is not applied in the case at issue and it can be expected that the Member State will amend the law.

*The questions which the Spanish court asked the ECJ were:*

a. The Framework Employment Directive prohibits discrimination on the grounds of disability – does this include discrimination on the grounds of sickness? (i.e. should sickness be regarded as a form of disability in some instances?)

b. If sickness is not a form of disability for the purposes of the Directive, does the Directive prohibit discrimination on the grounds of sickness separately? (i.e. could sickness be added to the list of protected grounds explicitly mentioned in the Directive?)

## 3. The Judgment

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### 3.1. A Definition of Disability which does not include Sickness

The concept of disability is not defined in the Directive – the Court therefore felt obliged to develop a definition of disability.

The Court stated that the Directive is designed to combat employment discrimination and defined disability in that context as:

“a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” (paragraph 43.)

for any “limitation” to be regarded as a “disability”, “it must be probable that it will last for a long time”. (paragraph 45)

In addition, the Court held for the purposes of the Directive, “disability” is different from “sickness”. (paragraph. 44)

Furthermore there is nothing in the Directive “to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness”.

It is worth noting that in deciding this, the Court failed to follow the advice of its Advocate General (a lawyer who advises the Court how it should decide a case). The Advocate General advised that:

- a sickness which may cause a disability in the future was not the same as a disability, and was not covered by the Directive.
- however, an exception would exist where the sickness caused long-term or permanent limitations which had to be regarded as disabilities. Individuals with such sicknesses / limitations would be regarded as disabled and fall under the Directive.

The Court's definition is "autonomous and uniform".

This means that it is not dependent on definitions in national law – but is a separate EC definition ("autonomous").

It also means that the definition applies across the EU ("uniform"). The consequences of this are, with regard to disability, the only people protected by the Framework Employment Directive are those who have a disability which complies with the above definition. This means that Member States are not *obliged* to adopt disability employment non-discrimination law which protects people who do not fall under this definition, e.g. people who are chronically ill. However, Member States *may* adopt national employment non-discrimination law which covers other people, and many Member States have done this, e.g. in the UK and the Netherlands people with many types of chronic illness are protected from employment discrimination by legislation. As a result of this case it is clear that this is a matter of purely national law, and EC law is not relevant with regard to this group.

### **3.2. Sickness is not covered separately by the Directive**

The Court also held that sickness could not be added to the list of grounds covered by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty. (paragraph. 55-57)

As a consequence of the above two elements of the judgment, the Directive did not prohibit the dismissal of a worker on the grounds that he or she had a sickness.

### **3.3. Protection of Disabled Persons as Regards Dismissal – Obligation to Make a Reasonable Accommodation**

The Court also recalled that Article 5 of the Directive required employers to make reasonable accommodations for disabled persons.

"That provision states that this means that employers are to 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, unless such measures would impose a disproportionate burden on the employer." (para. 50)

The Court also recalled that the Directive prohibits dismissal on the grounds of disability.

And concluded that under the Directive an employer cannot dismiss an employee on the grounds of disability where the employee would be able to do the job (be "competent, capable and available to perform the essential

functions of his post”) if a reasonable accommodation were made. (paragraph 52)

## 4. Comments

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### 4.1. A definition based on the medical model of disability

The definition of disability developed by the Court is based on the medical or individual model of disability. According to the definition the cause of the disadvantage (or the “limitation”) is the “impairment”, and it is the “impairment” which hinders participation in professional life. Therefore, the problem lies in the individual, and not in the reaction of society to the impairment or the organisation of society which excludes (or creates) disabled individuals.

This model can be contrasted with a social model of disability. The social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. The argument here is that it is discrimination, in the physical and attitudinal environment, prejudice, stigmatisation, segregation and a general history of disadvantage, which is the major problem.

Both the Commission and the Council recognised the need to base policy on the social model of disability as early as 1996. In July of that year the Commission adopted a Communication on Equality of Opportunity for People with Disabilities.<sup>3</sup> The Communication notes that the way in which society is organised serves to exclude disabled citizens,<sup>4</sup> and speaks of the evolution towards ‘an equal opportunities model in the field of disability policy’ within the Member States of the EU.<sup>5</sup> The Communication states:

‘The core value of equality – rendered here as equal opportunities – is now seen as the central benchmark against which economic and social structures must be assessed. It forms the essence of the rights-based approach to disability. The equal opportunities ideal is of course broader than that, but nevertheless subsumes the principle of non-discrimination.’<sup>6</sup>

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<sup>3</sup> Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 final.

<sup>4</sup> Ibid, par.2.

<sup>5</sup> Ibid, par.20.

<sup>6</sup> Ibid, par.18.

In December of the same year, the Council also approved a Resolution on Equality of Opportunity for People with Disabilities.<sup>7</sup> In this document, the Council, like the Commission, reaffirmed its commitment to the principles and values of the United Nations Standard Rules and the principles of equality of opportunity and eliminating negative discrimination on the sole grounds of disability.

The Community institutions continue to regularly refer to the philosophical underpinning of disability policy and stress the commitment to the social model of disability. In 2003, for example, the European Commission reiterated its commitment to the model by stating:

‘The EU’s long-standing commitment towards its disabled citizens goes hand in hand with a new approach to disability: from seeing people with disabilities as the passive recipients of compensation, society has come to recognise their legitimate demands for equal rights and to realise that participation relates directly to insertion.’<sup>8</sup>

It is questionable how a definition of disability exclusively based on the medical model and which determines access to one of the key EC human rights instrument which regard to disabled people, fits into this bigger picture. At the very least, it could have been expected of the Court that it would refer to the position of the other EU institutions in its judgment and recognised the importance of the social model of disability.

## 4.2 A definition which does not recognise the social model of disability

The definition does not recognise that, as noted above, an impairment may not “hinder” participation in professional life, but that the reaction of others, or the organisation of society may result in such a hindrance (i.e. be discrimination). Therefore no account is taken of the social model of disability.

4.3 The focus of the definition is on the health status / disability of the individual and not on the act of discrimination

The focus should be on the act of discrimination and not on the health status or disability of an individual. However, in the definition chosen by the ECJ the focus is on the health status or disability, and not the discrimination.

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<sup>7</sup> Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, *Official Journal* C 12, 13 January 1997, 1.

<sup>8</sup> EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan, COM (2003) 650 final), 4.

As a result, individuals will first have to establish that they are “disabled” in order to be entitled to bring a claim of disability discrimination

The danger with the Court’s definition is that individuals will find that they first have to prove that they meet the criteria set in the definition, i.e. that they qualify as “disabled”, before they can begin to argue that they have been the victim of discrimination. If they cannot meet this first hurdle, they will not qualify for protection under the law. This has been the experience in the UK and the US, where many individuals have not met this first hurdle before the Courts, and have therefore been denied the chance to argue that they have experienced discrimination. Furthermore, experience tells us that applying such a definition is an unpredictable process, which borders on arbitrariness when it comes to deciding whether any specific individual qualifies as “disabled” or not.

A second problem with such an approach is that individuals must “*prove*” that they are disabled. This may necessitate the provision of extensive medical evidence to demonstrate that the individual is disabled in the eyes of the law so that an individual can subsequently bring a case. This may well consume a lot of time and resources. In addition, an individual is required to first prove what s/he cannot do (that s/he has an impairment which hinders professional activity) in order to be allowed to later argue that they are qualified for a job or position and able to carry out the essential functions, and should not be discriminated against. This rather contradictory approach makes applying the law all the harder. Instead, the key question should be whether discrimination has occurred, and not whether an individual is ‘disabled enough’ to qualify for protection under the Directive.

#### 4.3 Exclusion of people with (long-lasting/chronic) illnesses from the protection of the Directive

In paragraph 46 the Court states: “There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop *any type of sickness*”.

However, for some types of “sicknesses” it is clear from the beginning that the effects will be long lasting (e.g. MS, depression, diabetes, cancer (assuming those conditions are regarded as “sicknesses” – but see following comments)). The judgment makes no distinction between conditions which, by definition are long lasting and this is known as soon as a diagnosis is made, (which could potentially be covered by the Directive if they were redefined as disabilities), and conditions which may develop into long lasting illnesses (which could be redefined as disabilities where it has been established that they are long lasting) and conditions which are never long lasting (which will never be covered). It is worth noting in this respect that there are many examples of



domestic law that define a disability as a condition which has lasted, or which is expected to last for, a minimum of 12 months (or some other period), e.g. UK Disability Discrimination Act. These definitions can cover recently diagnosed conditions where it is known that the condition will be long lasting – and, in principle and sometimes in practice, many long lasting illnesses do fall under the UK Disability Discrimination Act.

Following on from the above, and in contrast to the judgment of the ECJ, certain chronic illnesses (“sicknesses”) should be defined as disabilities for the purposes of the Directive.

#### **4.4 The Difference between Disability and Illness – bringing the concept of chronic illness within the concept of the disability for the purposes of the Directive**

In essence I think the difference between disability and illness is quantitative rather than qualitative. The impact of, for example, an illness such as flu will be far greater on an individual at a given moment than will be the impact of a long standing disability such as blindness, inability to walk, or the loss of a limb. However, the reason why flu is not classified as a disability is because it is expected to be of limited duration.

The difference between disability and illness is, I believe, quantitative. By this I mean that illnesses that are of only a limited duration do not meet the requirements which are necessary in order to be classified as a disability. A disability is a condition which is permanent, or, at the very least, long term. This raises the question, whether an illness, which is also permanent or long term, can be regarded as a disability. The answer is, I think clearly yes. Illnesses such as heart disease, diabetes, kidney failure, asthma, eczema and mental health illnesses such as depression or schizophrenia, would all seem to meet the criteria necessary to be classified as a disability, as well as being “a physical, mental or psychological impairment”.

There is some authority for this proposition in the legislation and case law of the Member States (see earlier point). This approach is also in line with the requirement of the ECJ that any condition must be long-lasting in order to be a disability.

#### **4.5 Definition fails to include other people who might be the victim of discrimination on the grounds of disability**

The ECJ definition fails to explicitly include individuals who are discriminated against on the grounds that they have a history of disability, or are falsely assumed to have a disability, or may have a future disability or genetic predisposition. However, strictly speaking it was not necessary for the Court to address these issues in its judgment, so not much can be read into this absence. Nevertheless, the fact that the Court has embraced a medical model of disability might suggest that it would be less willing to afford protection to the groups mentioned above.

#### **4.6. Sickness is not covered separately by the Directive**

It is argued that the Court was correct in reaching this conclusion. Sickness, Illness or Chronic Illness is not explicitly mentioned in the Directive or in Article 13 EC (its legal basis or inspiration). However, as argued above, the concept of disability should be interpreted as including long-term / chronic illnesses.

#### **4.7. Protection of Disabled Persons as Regards Dismissal – Obligation to make a Reasonable Accommodation**

This is clearly a positive development and completely in line with the Directive. Since the judgment was made in the context of a dismissal, it is only of relevance to employed persons. In practice this means that it is of relevance to the following two groups:

- individuals who already have a disability and that disability changes so making it impossible for them to carry out the work in the standard way or in the manner that they previously carried it out, e.g. individuals with conditions that are prone to deterioration.
- individuals who previously did not have a disability but become disabled as a result of an illness or accident (although, where the cause is illness, the individual will have to prove that they are not (just) sick, but also disabled).

The judgment clarifies that, with regard to these two groups, employers are not entitled to dismiss such workers where they could carry out the job if a reasonable accommodation were made. Specifically, where an accommodation is possible which would enable the individual to carry out the work (i.e. make them “competent, capable and available to perform the essential functions of his post”), and the employer still dismisses the worker on the grounds of disability, that dismissal amounts to unjustified disability discrimination. In essence therefore, the Court is saying that employers must make a reasonable accommodation for a disabled worker who is already in employment (unless, of course, the employer could rely on the disproportionate burden defence).

## 5. Impact at the National Level

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As noted above, this definition of disability (for the purposes of the Directive) is now “uniform” throughout the EU. This means that national implementation legislation and all national court cases based on that legislation must, at a minimum, recognise a definition of disability which meets the standards set by the ECJ definition and compatible with the requirement regarding the making of a reasonable accommodation.

What follows is a preliminary identification of the legal systems where this might not be the case, or where problems may arise, or where special account will have to be taken. It should certainly not be excluded that issues may also exist in Member States which are not mentioned below.

### 5.1. Definition of Disability

#### **a) Member States where the status of disabled person is dependent on certification by an administrative body**

(e.g. Czech Republic, Slovenia, Germany)

Arguably the administrative bodies, in as far as their certification is of relevance for a claim under the disability employment non-discrimination law, must, as a minimum, apply the definition developed by the Court. These bodies could also apply more “generous” certification procedures, which recognise a greater group of people as disabled.

However, it is probably more correct to state that disabled individuals who wish to claim rights under the disability employment non-discrimination law do not need to obtain certification by an administrative body in order to do so. Neither the Directive nor the Court’s definition refer to a certification requirement, and Member States are probably in breach of the Directive if they require such certification prior to lodging a claim.

**b) Member States where only people defined as “severely disabled” are protected from discrimination**

(e.g. Germany)

The definition developed by the Court is wide enough to cover more than only those people who are classified as severely disabled. Indeed, the Directive itself also does not make such a limitation. This means that it is a breach of the Directive to limit protection in this way, and protection must be extended to cover all disabled people who fall within the definition of the ECJ.

**c) Member States where there is no definition of disability / disability discrimination**

(e.g. Greece, Latvia, Slovenia)

Courts in these Member States must now apply the definition of disability developed by the ECJ, even in the absence of any specific guidance in the relevant national legislation.

**5.2. Protection of Disabled Persons as Regards Dismissal – Obligation to make a Reasonable Accommodation**

**a) Member States where there is no clear duty to make a reasonable accommodation**

(e.g. Estonia, Italy, Poland)

Clearly such Member States are already in breach of the Directive. This judgment reinforces the obligation on Member States to impose a duty on employers to make a reasonable accommodation for existing employees, and further clarifies that those Member States which fail to do this are in breach of the Directive.

## **6. Advice to NGOs which think that their national legislation is not in line with the Directive, and specifically not compatible with the ECJ's judgment**

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1. Obtain legal advice – or work with existing legal advisers regarding the matter.
2. Seek to arrange a meeting with the government ministry responsible for implementing the Directive. If that does not result in an appropriate response:
3. Try to bring a test case before a national court and argue that the national legislation is not compatible with the Directive / ECJ judgment and that either:
  - a. the Court should adopt an interpretation in line with the Directive / ECJ judgment; or
  - b. make a preliminary reference (ask one or more questions) to the ECJ to determine the correct interpretation of the Directive and the compatibility of national law with the Directive. Any court – even the lowest court – is entitled to make a reference, and it should not be necessary to take the case to e.g. the appeal court or constitutional court, before a reference is made.