A new cause of dismissal in the Portuguese Labour Code: employee's disability? – European and comparative analysis

I. Introduction

The past years, mainly from 2012 onwards[1], have been times of deep changes for the Portuguese Labour Law. In this context, Statute 23/2012, enacted on June 25th, is fairly seen as the most significant vehicle for these amendments. Apart from several other subjects, especially concerning the organization of working time, Statute 23/2012 carried out very relevant changes as far as the termination of the employment contract is concerned, which is actually quite understandable, since that part of Labour Law is considered to be its cornerstone and the one with the most dire economic impact. We can easily assert that the Portuguese framework of employment contract termination has been significantly reversed, in such terms that it is not very clear if its new features comply with the Portuguese Constitution. Meanwhile, it seems fairly obvious that new challenges present themselves to jurists, if they focus on ensuring coherence between the Portuguese system and the European Law, namely the Council Directive 2000/78/EC. We believe we can relieve this burden by taking a look at neighbouring countries' legal frameworks, since similar problems have already been faced there.

II. The Portuguese framework of employment contract termination

1. Before Statute 23/2012

Traditionally, we used to introduce the Portuguese system of employment contract termination causes as follows: 1) expiry; 2) mutual agreement to terminate the contract; 3) termination of the contract by the employee; 4) termination of the contract by the employer (*dismissal*).

At this point, two aspects shall be clarified. The first one is the difference between the *expiry* and *dismissal* phenomena: there is a dismissal when the employer

[1] Which is due to the intervention of the *Troika* and the subscription of the *Memorandum of Understanding* as a set of tools for struggling with the economic crisis.

decides to terminate the contract, a decision that, obviously, is not legal unless there is a fair cause of dismissal; on contrast, the contract expires when it *naturally* comes to an end, because its function is accomplished (fixed term contracts) or because it turns to be *absolutely impossible* to keep it from then on (employee's death or *absolute inability*); in this case, it is not about any employer's decision, maintenance of the contract is objectively impossible[2];

The second aspect concerns dismissal, within which we used to tell two different types apart – the former due to *subjective/disciplinary causes*; the latter due to *economic reasons*, both stemming from market factors and business running decisions.

According to this schematic overview, we traditionally recognized four different kinds of dismissal: dismissal due to a subjective/disciplinary cause (*despedimento por justa causa*[3]), and, within the second type previously referred to: collective dismissal (*despedimento colectivo*[4]), dismissal due to the elimination of the job (*despedimento por extinção do posto de trabalho*[5]) and dismissal due to the employee's unsuitability to new requirements of the position (*despedimento por inadaptação*[6]).

It is very important to highlight that, pursuant to this framework, one could not be dismissed on the grounds of their inability unless a change (*e. g*., technological) in their position had been carried out. In other words, employees' inability was not in itself a fair cause of dismissal, but only if it was due to wrongful lack of diligence (subjective or disciplinary dismissal) or in case of unsuitability to the new conditions of the position (*despedimento por inadaptação*, in the mentioned sense). We must therefore conclude that if an employee became incapable of accomplishing his/her job functions, the only possibility for terminating the contract was expiry; the employer

[2] Beyond these diagrammatic terms, we must admit that an inescapable sense of incoherence appears in the view of the Portuguese Labour Code. In fact, the shutdown of the undertaking is legally put as a cause of expiry (unless a transfer of undertaking, business or part of undertaking or business occurs), as set forth in article 346 of the Labour Code, although we can easily see that, strictly speaking, it depends on a decision taken by the employer – unless we accept the argument that he decides the shutdown and then it becomes *naturally* impossible to receive employee's work…

[3] Articles 351 to 358.

[4] Articles 359 to 366.

[5] Articles 367 to 373.

[6] Articles 374 to 380, before Statute 23/2012 amendments.

should thus make the necessary arrangements in pursuance of the statement of that inability, namely by the occupational health services, so the expiry could take place[7].

2. After Statute 23/2012

With Statute 23/2012, the last kind of dismissal mentioned above – *despedimento por inadaptação* – became a twofold concept. Under the same wording, we can presently identify two different situations, one of them being completely unknown within the Portuguese Labour Law before that amendment was set out. In fact, while it is still possible to dismiss an employee when his/her position has been changed and, after training and a period for personal adjustment, he/she does not succeed in getting well suited to the new work conditions, currently the Labour Code also allows the employer to dismiss in case of inability to perform contractual duties, regardless of any position new conditions (article 375, section 2). Actually, in a terminological sense, it is extremely inappropriate to use the term *inadaptação*, for, strictly speaking, it means the incapacity to adapt to new conditions, to a situation that becomes different from what it was before. On contrast, if an employee becomes incapable of performing contractual duties regardless of any change, the term *inaptidão* (inability; incapacity) would fit better[8].

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[7] We have to mention a Portuguese very well known judicial case (rulings by Lisbon Appeals Court, 29th May 2007, and also Supreme Court, 24th September 2008), concerning a cook that was identified by the occupational physician as HIV-positive and whose contract was considered expired by the employer, a position which ended being confirmed by the courts. These rulings are in fact very dubious, since we can hardly say that being HIV-positive entails any objective and absolute inability to perform job functions, even if the employee is a cook, known that the means of infection are very strict and medically identified. If we consider that it was not an expiry situation, because, in fact, no absolute and objective physical impossibility occurred, we must therefore conclude that a dismissal has taken place – illegally, because, at the time, employees' inability was not a lawful cause of dismissal.

See, on this subject, JOANA NUNES VICENTE/MILENA SILVA ROUXINOL, "VIH/SIDA e contrato de trabalho", in *Nos 20 anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Xavier*, Coimbra Editora, Coimbra, 2007, II, p. 759-847 [840], and "Entre o direito à saúde e o direito a estar doente – comentário ao Acórdão do Tribunal da Relação de Lisboa de 29 de Maio de 2007", *Questões Laborais*, year XV, no. 31, 2008, p. 89-114 [90] (also on *Lex Medicinae – Revista Portuguesa de Direito da Saúde*, year 5, no. 10, 2008, p. 181-198).

[8] As Portuguese jurists have already noted. See JOÃO LEAL AMADO, "O despedimento e a revisão do Código do Trabalho: primeiras notas sobre a Lei n.º 23/2012, de 25 de Junho", *Revista de Legislação e de Jurisprudência*, no. 3974, p. 297-309 [305].

First of all, we have to point out that this legal change entails a dramatic reversal of the policy behind dismissal regulation, in such terms that, as mentioned above, according to some authors' opinion, the Portuguese Constitution has possibly been infringed with the amendment set forth in Statute 23/2012. Indeed, article 53 of the Constitution states that no dismissal without a fair cause (*justa causa*) is admitted and, although it is now clear that, besides disciplinary issues, also economic reasons are covered, according to some jurists' point of view when the dismissal cause is related to employees' behaviour it is not accepted unless it has the characteristics of a disciplinary cause (a wrongful breaching of contractual duties)[9].

At this point, it is worth highlighting that, although several neighbouring legislations provide that employees may be dismissed in case of inability to accomplish their job functions, we shall be very cautious when we examine the Portuguese employment regulation and compare it to others. In fact, the Portuguese Constitution seems to be very singularly protective in what concerns employment stability[10].

In any case, it is now permitted for a dismissal to take place if the employee shows to be incapable of performing contractually assigned job tasks, which may be indicated, according to the Labour Code (article 374, section 1), by the following evidence: decreasing productivity; damages to working tools; risk of injury to the employee him/herself or to third parties (namely other employees).

Whereas in article 374, section 4, it is set out that the employer may not dismiss if these issues stem from lack of security and health conditions he is meant to provide, it is not so clear, as we intend to explain, how that kind of dismissal is in agreement with the prohibition of discrimination on the grounds of health status and disability. In fact, we must admit that those telltale signs of inability are more likely to occur if a disabled employee is concerned and we can hardly distinguish between dismissal on the grounds of inability to perform contractual job tasks and a dismissal on the grounds of the disabled employees' condition. It would be unfair to consider that such aspect was far from Portuguese legislative bodies' concerns, for article 374, section 3, states that

[9] This point is widely discussed, since it is linked to the wider problem of determining the meaning of the constitutional concept of fair cause for dismissal. See J. GOMES CANOTILHO/JORGE LEITE, "A inconstitucionalidade da lei dos despedimentos", *Boletim da Faculdade de Direito da Universidade de Coimbra (Estudos em Homenagem ao Prof. Doutor Ferrer-Correia*), III, Coimbra, 1991, p. 501-580 [521], ANTÓNIO MONTEIRO FERNANDES, "A 'reforma laboral' de 2012: observações em torno da Lei 23/2012", *Revista da Ordem dos Advogados*, year 72, April-September 2012, p. 545-573 [573], and the Constitutional Court ruling no. 602/2013.

[10] J. J. GOMES CANOTILHO/JORGE LEITE, "A inconstitucionalidade da lei dos despedimentos", *cit.*, p. 521.

inability and the evaluation of its evidence shall not disregard legal prescriptions on disabled, sick or less capable employees' special protection, which are provided for in articles 85 to 88 of the Labour Code. But the complete and exact substantive content of these prescriptions is yet to be determined…

III. The prohibition of discrimination on the grounds of disability under Council Directive 2000/78/EC

1. General features

At EU level disability was not covered by discrimination concerns until 2000, with the Directive 2000/78/EC, enacted on November 27th, establishing a general framework for equal treatment in employment and occupation (generally called Employment Directive)[11], which lays down a general framework for combating discrimination on the grounds of religion or belief, *disability*, age or sexual orientation in the employment an occupation field, and starts prescribing that there shall be no direct or indirect discrimination on those grounds.

One of the most important features of the prohibition of discrimination under EU Law is the fact that both *direct* and *indirect* discrimination are included. Therefore, discrimination occurs not only when one person is treated less favourably than another is, has been or would be treated in a comparable situation (on any of the grounds mentioned on article 1), but also when 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 (article 2, section 1)[12].

Obviously, if a legal provision allows the employer to dismiss an employee because of his/her revealed inability, we shall not say that this provision *intends* to put disabled employees in a less favourable situation compared to the others. But it is also very clear that it may easily lead to that result, because employees having a disability

[11] For a historical analysis, Philippa Watson, EU Social and Employment Law, Oxford University, Oxford, 2014, 2nd edition, 7.02 to 7.45.

[12] A deep analysis of the concept of indirect discrimination is carried out by SANDRA FREDMAN, *Discrimination Law*, Oxford University, Oxford, 2011, 2nd edition, p. 177.

will probably be the ones with the most unsatisfactory results, which induces decreasing incomes.

However, we must pay attention to the circumstances under which discrimination, mostly indirect, shall be excused or justified. Pursuant to the Employment Directive, indirect discrimination will be justified if the exclusionary provision, criterion or practise is objectively required by a legitimate aim and the means of achieving that aim are appropriate and necessary (article 2, section 2, subsection *b)*). But a particular provision addresses (indirect) discrimination on the grounds of disability: in this case, justification will be accepted if "the employer or any person or organization 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".

At this point we have to stress two aspects, which will enable a more profitable approach to the Portuguese case.

To begin with, it is important to point out that discrimination justification implicates the person who carries it out. We are actually addressing the question of the burden of proof. According to the Directive, article 10, Member States are obliged to ensure that persons who consider themselves discriminated against do not have to prove such discrimination before a court or other competent authority; on contrast, it is intended that they only have to prove the facts from which it may be presumed that there has been discrimination and, consequently, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment, namely, that discrimination is to be considered justified[13]. In fact, it so happens in Portugal, being set forth in article 25, section 5, of the Labour Code that the claimant shall only point out the employee or employees before who he/she finds him/herself to be discriminated against, and it is for the defendant to prove that the different treatment is not based on any of the discrimination grounds previously referred to. This means that, if the discriminatory treatment is to be justified, it is the defendant who bears the burden of proof of such justification. If the employer is sued for discrimination on the grounds of disability, so he shall demonstrate he has adopted the *appropriate accommodation measures* mentioned in article 2, section 2, subsection *b)*, and in article 5 of the

[13] For further developments, see, in Portuguese, TERESA COELHO MOREIRA, "O ónus da prova em casos de discriminação", in *Igualdade e não discriminação – Estudos de Direito do Trabalho*, Almedina, Coimbra, 2013, p. 79-127.

Directive. In fact, we don't believe it is enough to prove he *is obliged* to adopt these measures. Whereas the proof of their legal prescription may be appropriate when we refer to each Member State's behaviour before Employment Directive's objectives, it is obviously not enough if we address an employer's conduct. Otherwise, the extent of that second criterion of justification would let discriminatory behaviours go too far and the forbiddance of indirect discrimination on the grounds of disability would turn out to be very weak… As SANDRA FREDMAN [14] argues:

> "The respondent should need to show that the practise is necessary to achieve a legitimate aim and that there are no other less discriminatory alternatives, which should themselves include possible ways of accommodating the complainant".

Secondly, an insight into the concept of *reasonable accommodation measures*, as provided for on article 5 of the Directive, has to be carefully given[15]. It seems, in fact, that this is the key for understanding the meaning of article 2, section 2, subsection *b)*, § *ii*, and the concept of wrongful discrimination, for it has been consistently argued that a new kind of discrimination shall be recognized if reasonable accommodation measures are not adopted, even if it is not so clear in light of the Directive, mainly in comparison with the United Nations Convention on the Rights of Persons with Disabilities or the American Disability Act, for instance.[16]

Based, certainly, on the relevance of the idea of *impairment* – treating a disabled person the same way a person without disability is treated will lead, in reality, to

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[14] *Discrimination Law*, *cit*., p. 183. See as well TERESA COELHO MOREIRA, "O ónus da prova…", *cit*., p. 123-124 and VANESSA CORDERO GORDILLO, *Igualdad y no discriminación de las personas con discapacidad en el Mercado de trabajo*, Tirant lo Blanch, Valencia, 2011, p. 153-154.

[15] See, among many others, VANESSA CORDERO GORDILLO, *Igualdad y no discriminación…*, *cit*., p. 133. See also LISA WADDINGTON, *EU Disability Anti-Discrimination Law: the UN CRPD, reasonable accommodation and CJEU Case* Law, and *The concepts of disability and reasonable accommodation*, OLIVER TOLMEIN, *Reasonable accommodation and disability – the new EC-anti-discrimination-law*, and AART HENDRIKS, *Disability and reasonable Accommodation*, and *Reasonable accommodation – a new concept?*, all in www.era.int.

Considering US Law, MICHAEL ZIMMER/CHARLES SULLIVAN/REBECCA HANNER WHITE, *Cases and materials on employment discrimination*, Wolters Kluwer, New York, 2013, p. 563-564.

[16] VANESSA CORDERO GORDILLO, *Igualdad…*, *cit*., p. 151, AART HENDRIKS, *Reasonable accommodation…*, *cit*., DAVIDE CASALE, "Malattia, inidoneità psicofisica e handicap nella novella del 2012 sui licenciamenti", *Argomenti di Diritto del Lavoro*, year XIX, no. 2, 2014, p. 401-423 [410], and PASCAL LOKIEC, "Le licenciement pour insuffisance proféssionnelle", *Droit Social*, no. 1, 2014, p. 38 -43 [40, 41].

inequality –, neither the Employment Directive nor any other legal text defines clearly, as far as we know, what the concept of *reasonable accommodation* shall include. Nevertheless, by reading article 5[17], together with some recitals of the Directive[18] and in line with the United Nations Convention on the Rights of Persons with Disabilities (article 2)[19], we conclude that two elements are essential for determining the meaning of such legal expression: *(i) reasonableness* and *(ii) disproportionate burden*. As for the former, accommodation measures are to be considered reasonable if there is a logical relationship between an employee's special needs, the adjustment and its aims, obviously linked to employee's contractual tasks; the employee shall become effectively able to accomplish job functions. The latter expresses a balance between disabled employees' rights and employers' economic interests and supposes a *gains and losses analysis*, which shall cover aspects such as the level of disability and real impairment, accommodation costs and the employer's real possibilities to afford it, its effects on other employees' working conditions, etc. Despite this uncertainty[20], measures such as

[17] "In order to guarantee compliance with the principle of equal treatment in relation to 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"

[18] (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;

(18)This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those service;

(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, notice should be taken of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance.

[19] "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".

[20] MAURIZIO CINELLI, "Insufficiente per la Corte di Giustizia la tutela che l'Italia assicura ai lavoratori disabli: una condanna realmente meritata?", *Rivista Italiana di Diritto del Lavoro*, year XXXII, 2013, p. 935- 938.

workplace, premises and equipment adaptations, working time arrangements (e. g., a shift to working part-time, as suggested in the *Jette Ring* ruling), tasks redistribution, or specific training provision, are undoubtedly included in the concept of reasonable accommodation measures[21]. As for other kind of measures, namely the attempt to offer the employee a different job which is available, the answer is maybe more clouded… Anyway, we agree with VANESSA CORDERO GORDILLO[22], for whom the exception of unreasonableness has to be seen restrictively, according to the relevance of the interests involved; otherwise, the duty of providing accommodation measures risks to be understood as if it did not require more than negligible and minor actions.

2. The meaning of disability according to the European Union Court of Justice (EUCJ)

This overview of the EU Law concerning discrimination on the grounds of disability would not be complete if we did not notice the impressive evolution of the concept of disability itself as raised by the ruling of EUCJ.

The first ruling usually mentioned in this respect is *Chacón Navas*[23], in which the EUCJ adopted a very strict concept of disability:

> "The concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairment and which hinders the participation of the person concerned in professional life". (§43)
>
> "However, by using the concept of 'disability' in Article 1 of that directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same". (§44)
>
> "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". (§46)
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[21] Interesting examples are offered by BOB HEPPLE, *Equality – the Legal Framework*, Hart Publishing, Oxford, 2014, 2nd edition, p. 94-95.

[22] *Igualdad y no discrimination*…, *cit*., p. 150-151.

[23] July, 11th, 2006, process C-13/05.

> "It follows from the above considerations that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on the grounds of disability by Directive 2000/78". (§47)

This ruling was widely criticized for establishing a very inaccurate contradistinction between disability and sickness and also for assuming disability as a medical concept (*medical model*), as if it always stemmed from an individual physical or mental limitation[24].

An impressive evolution took place from then on. A very different ruling was laid down on the *Jette Ring* case[25]. This time, the EUCJ adopted a broader concept of disability, inspired by the so-called *social model*, which means the recognition of the role of society in creating disabling barriers – attitudinal, physical, political – according to the Convention on the Rights of Persons with Disabilities, meanwhile ratified.

> "The UN Convention, which was ratified by the European Union by decision of 26 November 2009, in other words after the judgment in *Chacón Navas* had been delivered, acknowledges in recital (e) 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'. Thus the second paragraph of Article 1 of the convention states that 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'" (§37)
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> "(…) The concept of 'disability' must be understood as referring to 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". (§38)

[24] See, among others, TERESA COELHO MOREIRA, "A jurisprudência do TJUE sobre a discriminação dos trabalhadores em razão da deficiência: breve análise dos casos *Chacón Navas, Jette Ring e Coleman*", *Questões Laborais*, special number (no. 42), 2013, p. 659..., and MARIANGELA VIZIOLI, "Malattia e handicap di fronte alla corte di giustizia", *Argomenti di Diritto del Lavoro*, 1/2007, p. 221-227.

[25] April 11th 2013, processes C-335/11 and C-337/11.

> "In addition, it follows from the second paragraph of Article 1 of the UN Convention that the physical, mental or psychological impairments must be 'long-term'". (§39)
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> "It may be added that, as the Advocate General observes in point 32 of her Opinion, 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". (§40)
>
> "It must therefore be concluded that if a curable or incurable illness entails 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, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78". (§41)

We will not end this approach to the conceptualization of disability without briefly referring to other three rulings which seem to us very important too. Firstly, *Coleman's*[26]: in this case, the EUCJ stated that the prohibition of discrimination is not limited only to people who are disabled themselves, it also extends to the case where an employee's relative (child, in this particular case), whose care is provided primarily by that employee, suffers from disability. Secondly, we will stress the *Kaltof* case[27]. With this ruling, the EUCJ recognized that a condition such as obesity may constitute a disability if, interplaying with various barriers, hinders the full and effective participation of the person concerned in professional life on an equal basis with other workers. This ruling is very important – on the one hand because it makes clear that the concept of disability shall not be rejected even if the condition was somehow caused by the person who suffers from it; and, on the other hand, because it points out that the limitations considered to be relevant as results of disability within the meaning of the Directive are only those affecting professional life. This point of view was also adopted

[26] June 17th 2008, process C-303/06.

[27] December 18th 2014, process C-354/13.

in the process C-363/12[28], a case in which the EUCJ stated that the inability to have a child by conventional means does not in itself, in principle, prevent the mother from having access to, participating in or advancing in employment – that's the reason why that condition does not constitute a disability within the meaning of the Directive. This is a very important aspect, because, on this subject, there is a patent difference between European and American courts' positions. In fact, according to the American *Bragdon v. Abbott* ruling[29], an HIV-infected individual, even if asymptomatic, may be considered a disabled person because of the substantial limitations on *major life* activities, mainly reproduction – an activity that is obviously beyond professional life[30].

3. Revisiting the *Jette Ring* case

We have already mentioned the *Jette Ring* ruling with regard to the conceptualization of disability as grounds for discrimination within the sense of the Employment Directive. However, we must pay attention to this case at the light of a different question, that is, the occurrence of indirect discrimination on the grounds of disability. As we have already pointed out, the new kind of dismissal set forth in the Portuguese Labour Code risks to entail the *effect* of discriminatory treatment against disabled employees. In fact, the *Jette Ring* case shows that the distinction between a dismissal on the grounds of disability and a dismissal justified "by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post", as presupposed in the *Chacón Navas* ruling, is indeed very elusive.

The *Jette Ring* case refers to the Danish Law, which prescribes that if an employer terminates the employment contract, a period of notice shall be given; this period varies according to the contract duration: one month's notice during the first six months of employement; three months' notice after six months of employment; however, it may be stipulated by written agreement that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has received

[28] March 18th 2014.

[29] 524 U.S. 624, 1998. See, on this ruling, MICHAEL ZIMMER/CHARLES SULLIVAN/REBECCA HANNER WHITE, *Cases and materials...*, *cit.* p. 491.

[30] From this point of view, it would be dubious to argue that the cook referred to on footnote 7 would be covered by the prohibition of discrimination on the grounds of disability…

his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months – that is, overall the period of notice ends up being shorter in this case. Ms Ring was dismissed under an agreement like this.

In the context of a preliminary ruling, the EUCJ stated that:

> "Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in article 5 of that directive.
>
> Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, *where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess*"[31].

Despite the distance between the Danish and the Portuguese legislation, we think it is possible to accentuate two features in common: *(i)* both the possibility of a reduced period of notice and the dismissal on the grounds of evidence of inability typify unfavourable treatment for the employees concerned; *(ii)* in the former case as in the latter, that unfavourable treatment may fall mainly upon disabled employees, since these are the ones who are more likely to be absent for the period mentioned and also to show less satisfactory results as far as productivity, safety and health and working tools keeping are concerned.

IV. Comparative data and return to the Portuguese case

[31] Italics are our responsibility.

Coming back to the Portuguese legislation, we think we are now in better conditions for analyzing the terms in which the dismissal on the grounds of inability may be applied and, mainly, the content of article 374, section 3, stating that inability and its evidence shall not be evaluated disregarding legal prescriptions on disabled, sick or less capable employees' special protection.

One point seems very clear, in our view: the dismissal is not lawful – on contrast, it will be discriminatory – unless the employer proves having adopted the required accommodation measures, that is, those than can be considered reasonable in the concrete situation.

The question is – again! – the point to which this duty of adopting reasonable accommodation measures extends to. It is not our purpose to work on that. However, we would like to look at a specific action, which might be seen as an example of such accommodation duty. We refer to the obligation of assigning the (disabled) employee to a different job, that is, a job which is available and more adequate for his/her condition, mainly when dismissing him/her is the other option to be considered…

If we look at other European legislations – namely French or Italian– we will conclude that the dismissal on the grounds of employees' inability, which was admitted long before it was in Portugal, is always preceded by an attempt to offer the employee another job, obviously requiring different skills and expected to be more suitable for his/her condition. It's easy to understand that this duty gets reinforced if the targeted worker is a disabled. But the most important aspect to stress is that, in such case, that duty is seen as a consequence of the accommodation obligation arising from article 5 of the Employment Directive, which means it has to be accomplished unless it shall be figured as unreasonable. According to MICHEL MINÉ[32]:

> "Quand le salarié est reconnu travailleur handicapé, la proposition de reclassement doit tenir compte de l'exigence d'un 'aménagement raisonnable' d'un poste de travail pour permettre le maintien dans l'emploi".

We have to clarify the meaning of this sentence. In our opinion, the point is not that the employer shall look for an alternative job to be offered to the disabled worker, which would be obvious. Differently, what MINÉ is trying to say is that, when the employee to dismiss is disabled, the duty of looking for an alternative job is more

[32] *Le Droit du travail en pratique*, Eyrolles, Paris, 2014, 26th edition, p. 238.

rigorous: in that case, the employer would have to perform the adjustments which appeared to be necessary pursuant to the aim of making the job appropriate for the employee risking to be dismissed. The same opinion is shared, in Italy, by STEFANO GIUBBONI[33], for whom, being it unquestionable that disabled employees' '*repêchage'* is to be understood under the European prescription of reasonable accommodation, that duty shall be seen as demanding not only an attempt to offer disabled employees a different job, if available, but also an obligation to adjust possible available jobs to those employees' condition.

As for the Portuguese Labour Code, there is, in fact, an article prescribing the duty of employees' replacement as a condition for the legitimacy of the dismissal. We are referring to article 375, section 1, subsection *d)*. Nevertheless, two questions have to be considered in this context: first, it is not evident if such obligation regards only the dismissal on the grounds of lack of adjustment to new working requirements (*despedimento por inadaptação*, *proprio sensu*) or the new dismissal on the grounds of inability regardless of any change as well; on the other hand, the meaning and extent of that duty of moving the employee into another alternative job are truly vague, especially from the point of view of its coherence with the obligation of accommodation towards disabled workers.

As for the former question, the fact is that the legal wording suggests that such obligation does not cover dismissal on the grounds of inability (in the latter sense mentioned): strictly speaking, article 375, section 1, subsection *d)*, only includes the old and traditional *despedimento por inadaptação*. Referring to legal conditions for dismissal on the grounds of inability itself, article 375, section 2, subsection *d)*, makes reference to article 375, section 1, subsections *b)* and *c)*, *but not subsection* d). Despite that, we believe there are compelling reasons to hold the opposite answer. Firstly, having the Portuguese Parliament removed that obligation from the Labour Code (also with the Statute 23/2012), the Constitutional Court evaluated that choice and concluded

[33] "Sopravenuta inidoneità alla mansione e licenziamento. Note per una Interpretazione 'adeguatrice'", *Rivista Italiana di Diritto del Lavoro*, year XXXI, 2012, p. 289 to 309 [303 to 306]. See also DAVIDE CASALE ("Malattia…", *cit.*, p. 410), stating that the omission of accommodation measures being itself a discriminatory behavior, denying disabled employees the possibility of '*ripescaggio*' leads not only to the conclusion that the alleged inability is not the *real* cause for dismissal but also to a judgement of discrimination.

it would infringe the Portuguese Constitution, mainly article 53, which demands the dismissal to be seen and regulated as a *ultima ratio* solution. If we analyse the arguments laid down on the Constitutional Court ruling no. 602/2013, we will surely realize that they are also relevant as far as dismissal on the grounds of inability is concerned; otherwise, the latter would violate article 53 of the Portuguese Constitution. Besides that, if we hold the opinion, like French and Italian authors, that the attempt to offer the disabled employee a new available job, before considering dismissal, is a consequence of the duty of the adoption of reasonable accommodation measures, that duty turns out to bind employers who intend to dismiss disabled employees on the grounds of their inability to perform job functions by means of that general accommodation obligation, which, in the Portuguese Code, stems from articles 85 to 88 and, in the context of inability dismissing processes, article 374, section 3.

Regarding the latter aspect, regardless of the substantive content, in general, of the duty to offer the employee to be dismissed an alternative job, we think, according to the authors mentioned above, that if the targeted employee suffers from an impairment caused by disability, he/she has the right of getting the job previously arranged in accordance with that condition. This is, in fact, what the Portuguese legislation clearly establishes for employees injured as a result of a working accident or victim of a professional disease (Statute 98/2009, September 4th, articles 155 to 164). As for disabled employees, we believe that obligation stems, after all, from the superlative principle of equality and non-discrimination and, in summary, because of the realization that:

> "The differences between men and women (…), Black and White people, persons with different sexual orientations, or of different faiths or age groups are generally treated as irrelevant. But the law does not expect disabled people to be treated in exactly the same way as those who are not disabled. The reason for this is that formal equality, comparing a disabled person with others, would not result in genuinely equal treatment (…)".[34]

[34] BOB HEPPLE, *Equality…*, *cit.*, p. 91.