

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

10 February 2022 (\*)

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Prohibition of discrimination on the ground of disability – Dismissal of a worker who had become permanently incapable of performing the essential functions of the post – Staff member completing training as part of recruitment – Article 5 – Reasonable accommodation for people with disabilities – Requirement to reassign to another post – Obligation subject to it not being a disproportionate burden for the employer)

In Case C-485/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 30 June 2020, received at the Court on 29 September 2020, in the proceedings

**XXXX**

v

**HR Rail SA,**

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, N. Jääskinen, M. Safjan (Rapporteur), N. Piçarra and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- XXXX, by M. Wilmet, avocate,
- HR Rail SA, by C. Van Olmen, V. Vuylsteke and G. Busschaert, avocats,
- the Belgian Government, by M. Van Regemorter, L. Van den Broeck and C. Pochet, acting as Agents,
- the Greek Government, by M. Tassopoulou, acting as Agent,
- the Portuguese Government, by M. Pimenta, A. Barros da Costa and M. João Marques, acting as Agents,
- the European Commission, by D. Martin and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2021,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The reference has been made in proceedings between XXXX and HR Rail SA concerning the lawfulness of the former's dismissal owing to his disability.

### Legal context

#### *International law*

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

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

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

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

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

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

'For the purposes of the present Convention:

...

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

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

...'

6 Article 27 of the UN Convention, headed 'Work and employment', provides in paragraph 1 thereof:

'States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

...

(h) promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

...

(k) promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.’

### ***European Union law***

7 Recitals 16, 17, 20 and 21 of Directive 2000/78 state as follows:

‘(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

...

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

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

8 Article 3 of the same directive, headed ‘Scope’, states in paragraph 1 thereof:

‘Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

...’

9 Article 5 of that directive, headed ‘Reasonable accommodation for disabled persons’, provides:

‘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.’

### ***Belgian law***

- 10 The loi tendant à lutter contre certaines formes de discriminations (Law to combat certain forms of discrimination), of 10 May 2007, which transposes Directive 2000/78 into Belgian law, prohibits direct and indirect discrimination based on one of the protected criteria, set out in Article 4, 4°, of that law, which include the current or future state of health, and disability.
- 11 Under Article 9 of that law, an indirect distinction on the basis of disability constitutes indirect discrimination unless it is demonstrated that no reasonable accommodation can be made. Under Article 14 of that law, all forms of discrimination are prohibited, with discrimination including, inter alia, direct discrimination, indirect discrimination and the refusal to make reasonable accommodation for a person with a disability.
- 12 In that regard, Article 4, 12°, of that same law defines the concept of ‘reasonable accommodation’ as all ‘appropriate measures, based on the needs of a given situation, in order to enable a person with a disability to have access to, participate in and advance in the areas to which that law applies, unless those measures create a disproportionate burden on the person who has to adopt them. This burden shall not be disproportionate when it is sufficiently remedied by existing measures within the framework of the public policy with regard to disabled persons’.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 13 The applicant in the main proceedings was recruited as a specialist maintenance technician for railway tracks by HR Rail, the sole employer of railway staff in Belgium. On 21 November 2016, he started a traineeship at Infrabel, the legal entity acting as the ‘management infrastructure’ for the Belgian railways. In December 2017, the applicant in the main proceedings was diagnosed with a heart condition that required the fitting of a pacemaker, a device which is sensitive to the electromagnetic fields present, inter alia, on railway tracks. Since that medical device was incompatible with the repeated exposure to electromagnetic fields to which a maintenance technician on railway tracks is subject, the applicant in the main proceedings was no longer capable of performing the duties for which he had originally been recruited.
- 14 On 12 June 2018, he was recognised as having a disability by the Service public fédéral ‘Sécurité sociale’ (Federal Public Service for Social Security, Belgium).
- 15 By a decision of 28 June 2018, the centre régional de la médecine de l’administration (the company’s regional medical centre, Belgium), responsible for assessing the medical capacity of Belgian Railway staff members, declared the applicant in the main proceedings to be permanently unfit to perform the duties for which he was recruited (‘the decision at issue’). The company’s regional medical centre stated, however, that he could be employed in a post which met the following requirements: ‘moderate activity, no exposure to magnetic fields, not at altitude or exposed to vibrations’.
- 16 The applicant in the main proceedings was then assigned to a warehouseman’s position within the same undertaking.
- 17 On 1 July 2018, he brought an action against the decision at issue before the commission d’appel de la médecine de l’administration (the company’s Medical Appeals Board, Belgium).
- 18 On 19 July 2018, HR Rail informed the applicant in the main proceedings that he would receive ‘personalised support in order to find a new job with [the company]’ and that he would shortly be called for an interview for that purpose.
- 19 On 3 September 2018, the company’s Medical Appeals Board confirmed the decision at issue.

- 20 On 26 September 2018, the Senior Adviser – Head of department, informed the applicant in the main proceedings of his dismissal on 30 September 2018 with a ban on his recruitment for a period of five years to the grade at which he had been recruited.
- 21 On 26 October 2018, the Managing Director of HR Rail informed the applicant in the main proceedings that, pursuant to the articles of association and general rules applicable to staff of the Belgian railway, his traineeship was terminated owing to his total and permanent incapacity to perform the duties for which he had been recruited. By contrast with staff members on confirmed permanent contracts, trainees who were recognised as having a disability and therefore no longer capable of performing their duties do not benefit from a reassignment within the company. The Managing Director also informed him that the letter offering him ‘personalised support’ was no longer valid.
- 22 The applicant in the main proceedings brought before the Conseil d’État (Council of State, Belgium) an action to annul the decision of 26 September 2018 informing him of his dismissal on 30 September 2018.
- 23 The referring court observes that health condition of the applicant in the main proceedings means that he may be classified as having a ‘disability’ within the meaning of the legislation transposing Directive 2000/78 into Belgian law. However, it observes that the national case-law has not consistently analysed the question of whether, in respect of ‘reasonable accommodation’ within the meaning of Article 5 of that directive, it is necessary also to consider the possibility of redeploying to another job a person who, due to his or her disability, is no longer in a position to perform the job which he or she held before that disability arose.
- 24 In those circumstances, the Conseil d’État (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 5 of [Directive 2000/78] be interpreted as meaning that an employer has an obligation, in relation to a person who, due to his or her disability, is no longer capable of performing the essential functions of the post to which he or she was assigned, to assign him or her to another post, for which he or she has the requisite skills, capabilities and availability, where such a measure would not impose a disproportionate burden on the employer?’

### **Consideration of the question referred**

- 25 By its question, the referring court asks, in essence, whether Article 5 of Directive 2000/78 must be interpreted as meaning that the concept of ‘reasonable accommodation’ for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability.
- 26 As a preliminary point, it should be recalled that it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that that directive is intended to establish a general framework for ensuring that everyone benefits from equal treatment ‘in matters of employment and occupation’ by providing effective protection against discrimination based on any of the grounds listed in Article 1 thereof, which include disability (judgment of 15 July 2021, *Tartu Vangla*, C-795/19, EU:C:2021:606, paragraph 26 and the case-law cited).
- 27 That directive is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter of Fundamental Rights of the European Union (‘the Charter’). Moreover, Article 26 of the Charter provides that the European Union is to recognise and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (judgment of 21 October 2021, *Komisia za zashtita ot diskriminatsia*, C-824/19, EU:C:2021:862, paragraphs 32 and 33 and the case-law cited).

- 28 At the outset, it is necessary to determine whether that directive may be relied on by a person who, like the applicant in the main proceedings, while undertaking a traineeship with his or her employer following recruitment, has had to be fitted with a pacemaker, which made it impossible for him or her to continue to perform the duties for which he or she was originally hired, taking into account the sensitivity of that device to the electromagnetic fields emitted by railway tracks, and consequently led to his or her dismissal.
- 29 In that regard, first, as follows from Article 3(1) thereof, Directive 2000/78 applies to both the public and private sectors, including public bodies. Hence, the fact that HR Rail is a public limited liability company governed by public law does not prevent the applicant in the main proceedings from relying on that directive against it.
- 30 Second, according to Article 3(1)(a) and (b), that directive applies to conditions for access to employment, to self-employment or to occupation, and also to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining. It is clear from the wording of that provision that it is sufficiently wide to cover the situation of a worker undertaking a traineeship following recruitment by his or her employer.
- 31 Moreover, the Court has already held that the concept of ‘worker’, within the meaning of Article 45 TFEU, which is the same as that referred to in Directive 2000/78 (see, to that effect, judgment of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 19), extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer (judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 50 and the case-law cited).
- 32 It follows that the fact that the applicant in the main proceedings was not, at the time of his recruitment, a member of staff recruited on a permanent basis, does not preclude his professional situation from falling within the scope of Directive 2000/78.
- 33 Third, it is not disputed that the applicant in the main proceedings has a ‘disability’ within the meaning of the national legislation which gives effect to Directive 2000/78.
- 34 According to the case-law, the concept of ‘disability’ within the meaning of that directive has to be understood as referring to a limitation that results in particular from long-term physical, mental or psychological impairments, which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers (see, to that effect, judgments of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 38, and of 11 September 2019, *Nobel Plastiques Ibérica*, C-397/18, EU:C:2019:703, paragraph 41).
- 35 In the present case, the applicant in the main proceedings suffers from a health condition that requires him to be fitted with a pacemaker, a device that is sensitive to electromagnetic fields emitted, inter alia, by railway tracks, which prevents him from being able to carry out the essential functions of the post for which he was recruited.
- 36 Therefore, a situation such as that at issue in the main proceedings falls within the scope of Directive 2000/78.
- 37 In order to provide an answer to the referring court’s question, it should be observed that it is clear from the wording of Article 5 of Directive 2000/78, read in the light of recitals 20 and 21 thereof, that the employer is required to take appropriate measures, that is to say effective and practical measures, taking each individual situation into account, 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.
- 38 In that regard, it should be recalled that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention (judgment of 21 October 2021, *Komisija za zaščita*

*ot diskriminatsia*, C-824/19, EU:C:2021:862, paragraph 59 and the case-law cited). Article 2, third indent, of the UN Convention provides that discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation.

- 39 According to Article 5 of Directive 2000/78, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation must be provided. Therefore, the employer must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.
- 40 As regards recital 20 of that directive specifically, which includes amongst the appropriate measures, ‘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’, the Court has already held that that recital provides a non-exhaustive list of appropriate measures, and that they may be physical, organisational and/or educational, since Article 5 of that directive, read in the light of Article 2, fourth indent, of the UN Convention prescribes a broad definition of the concept of ‘reasonable accommodation’ (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 49 and 53).
- 41 As the Advocate General stated in point 59 of his Opinion, the reference made in recital 20 of Directive 2000/78 to the adaptation of ‘the workplace’ should be understood as meaning that that adaptation should be made as a matter of priority having regard to other measures which make it possible to adapt the working environment for the disabled person in order to enable him or her to participate fully and effectively in professional life on an equal basis with other workers. Those measures may include the implementation by the employer of measures which make it possible for that person to remain in employment, such as a reassignment to another position.
- 42 Furthermore, as the Court has already held, Directive 2000/78 is a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter. In addition, Article 26 of the Charter provides that the European Union is to recognise and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (see, to that effect, judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47, and of 21 October 2021, *Komisija za zashtita ot diskriminatsia*, C-824/19, EU:C:2021:862, paragraphs 32 and 33).
- 43 It must therefore be held, as the Advocate General suggested in point 69 of his Opinion, that, where a worker becomes permanently incapable of remaining in his or her job because of the onset of a disability, reassignment to another job may constitute an appropriate measure in the context of reasonable accommodation within the meaning of Article 5 of Directive 2000/78.
- 44 That interpretation is consistent with that concept which must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers (see, to that effect, judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 54).
- 45 However, it should be observed that Article 5 of Directive 2000/78 does not oblige an employer to take measures which would impose a ‘disproportionate burden’ on it. In that regard, it follows from recital 21 of that directive that, in order to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.
- 46 It should be recalled that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 61 and the case-law cited).

- 47 One factor which may be relevant for the purposes of that assessment, is that, as the referring court observed, after being declared incapable of performing the duties for which he had been recruited, the applicant in the main proceedings was reassigned to a warehouseman's position within the same company.
- 48 In addition, it should be stated that, in any event, the possibility of assigning a disabled person to another job is only available where there is at least one vacancy that the worker in question is capable of holding, as the Advocate General observed in point 77 of his Opinion.
- 49 Having regard to all the foregoing considerations, the answer to the question referred is that Article 5 of Directive 2000/78 must be interpreted as meaning that the concept of 'reasonable accommodation' for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.

### Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the concept of 'reasonable accommodation' for disabled persons, within the meaning of that article requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.**

[Signatures]

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\* Language of the case: French.