

Case C-485/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 September 2020

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

30 June 2020

Applicant:

XXXX

Opposing party:

HR Rail, SA de droit public

1. Facts and subject matter of the dispute:

- 1 HR Rail is the employer of the railway staff in Belgium.
- 2 XXXX was recruited as a specialist maintenance technician (tracks) and began his traineeship on 21 November 2016.
- 3 In order to treat a heart problem, XXXX was fitted with a pacemaker, a device which is sensitive to the electromagnetic fields present, inter alia, on railway tracks.
- 4 On 12 June 2018, the applicant was recognised as disabled by the SPF Sécurité sociale (FPS Social Security).
- 5 On 28 June 2018, he was examined at the company's Regional Medical Centre and declared permanently unfit to perform the duties for which he was recruited, with the specification that, pending the decision to dismiss him, he could occupy an appropriate post meeting the following requirements: 'moderate activity, no exposure to magnetic fields, not at altitude or exposed to vibrations'.

- 6 Following that decision, the applicant was assigned to a warehouseman’s position.
- 7 On 3 September 2018, the decision that he was medically unfit to perform his duties was confirmed by the company’s Medical Appeal Board, before which XXXX had brought an appeal.
- 8 By letter of 26 September 2018, the opposing party informed the applicant that he would be dismissed with effect from 30 September 2018.
- 9 On 26 October 2018, the opposing party confirmed to the applicant that the statutory regime provided ‘that the traineeship of a member of staff who is declared totally and permanently unfit where he is no longer in a condition to perform the duties associated with his grade shall be terminated’.
- 10 By an application lodged on 26 November 2018, XXXX sought the annulment of the decision to dismiss him with effect from 30 September 2018.

2. Provisions at issue:

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- 11 Article 5 provides:

‘Reasonable accommodation for disabled persons

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.’

3. Positions of the parties:

XXXX

- 12 XXXX criticises HR Rail for having dismissed him without offering to redeploy him to a position appropriate to his state of health.
- 13 He complains, in particular, about the fact that the redeployment of members of staff who are unfit to perform their normal duties is reserved for members of staff who have been appointed on a permanent basis. That difference of treatment with regard to members of staff who are in training infringes, inter alia, Article 5 of

Directive 2000/78/EC inasmuch as it establishes a general refusal to provide reasonable accommodation for trainees with disabilities, without its having been shown that such accommodation would impose a disproportionate burden on the employer.

- 14 XXXX asserts that, according to the legal literature, if a worker is unfit to do his job for health reasons, the employer is obliged to check whether another job is available in another department, and that obligation may extend to forcing a worker who is in better health to give up his post. He argues that he was temporarily reassigned to a warehouseman's job, for which he has considerable professional experience, so that there was indeed a possibility of reasonable accommodation. He rejects the argument that, unlike a member of staff who has been appointed on a permanent basis, a member of staff who is in training has yet to prove himself, arguing that neither has a permanent member of staff proved his suitability to hold the post to which he will be reassigned or redeployed. He maintains that members of staff who are in training and members of staff who have been appointed on a permanent basis are in a comparable situation since they are in the same situation from the point of view of their medical and professional fitness to perform the job: they work in the same environment and are assigned to the same tasks.
- 15 XXXX maintains that he is entitled to rely upon Directive 2000/78/EC, which has direct effect and infringement of which may, therefore, be invoked directly. He continues to maintain that the redeployment of a worker with a disability, who has become permanently incapable of performing the job for which he was recruited, to a post for which he is professionally and physically fit, constitutes reasonable accommodation within the meaning of the directive, and that the majority of the legal literature and case-law fully support that. He asserts that he amply demonstrated that he was fit for the warehouseman's position to which he was assigned pending the final decision of the company's Medical Appeal Board and that reasonable accommodation would have consisted of assigning him to that position. According to him, trainees and members of staff who have been appointed permanently are in a comparable situation from the point of view of their being unfit for their position and of their state of health, because a member of staff who has been appointed permanently has been no more able to prove his suitability for a position to which he will potentially be redeployed than a trainee in the same situation. He claims that the opposing party has not demonstrated that it was impossible for it, or even that it tried, to redeploy him to a position allowing for the supervision given to trainees, and that neither has it demonstrated that there was a concrete reason why it was unable to apply the rules of the traineeship to the job to which he was temporarily assigned pending the decision of the company's Medical Appeal Board.

HR Rail

- 16 HR Rail takes the view that the mere fact that the applicant was dismissed on the grounds of his state of health or disability does not imply that discrimination has

taken place. After explaining what, very specifically, the job of specialist maintenance technician (tracks) entails, it states that the essential requirements of that post involve daily contact with the tracks, the catenary or generators and that XXXX, who wears a pacemaker, can no longer be exposed to the electromagnetic fields present in railway tracks, as they may cause his pacemaker to malfunction.

- 17 HR Rail observes that, in the present case, no reasonable accommodation could be made. According to HR Rail, it is in view of the essential requirements of the post concerned that the possibility of reasonable accommodation must be examined, and not in view of any other job which the worker might be fit to perform. In support of its argument, it cites a judgment of the tribunal du travail du Hainaut, division Charleroi (Labour Court, Charleroi, Hainaut) of 10 December 2018.
- 18 HR Rail indicates that the system of redeployment goes well beyond reasonable accommodation, which does not extend to requiring the allocation of a job other than the one agreed upon. HR Rail insists on the fact that its regulations do not establish a general refusal of reasonable accommodation for trainees with disabilities and adds that such accommodation, where it can be envisaged, may be proposed by the competent medical authorities, which was not the case in the present case.
- 19 HR Rail states that the system of redeployment laid down in the statutory provisions goes beyond reasonable accommodation since it provides that certain members of staff are to be given particular priority. It maintains that it is justifiable to reserve that system for permanent members of staff and to exclude trainees from it, as the traineeship is a period of training and a probationary period during which the trainee must prove his ability to hold the job concerned. It claims that, as a result, a member of staff who is in training does not enjoy the job security associated with a permanent appointment and that the career-mobility system is not the same either. It emphasises that the jobs reserved for members of staff who are to be redeployed are not necessarily jobs intended for a trainee, who has still to be familiarised with the particular environment of railways, and that it would be anomalous to consider that members of staff who are in training, who have, therefore, not yet demonstrated that they fulfil the conditions for permanent appointment, are competing with a member of staff who has been appointed on a permanent basis within the framework for members of staff who are to be redeployed. It thus concludes that it is legitimate to consider that a member of staff who is in training is not in a situation comparable to that of a member of staff who has been appointed on a permanent basis and that the regulations may exclude him from benefiting from the specific redeployment measures laid down by the statutory provisions.

4. Assessment of the Conseil d'État (Council of State):

- 20 The loi du 10 mai 2007 « tendant à lutter contre certaines formes de discriminations » (Law of 10 May 2007 'combating certain forms of

discrimination'; 'the Law of 10 May 2007'), which transposes Directive 2000/78/EC into national law, prohibits direct and indirect discrimination on the grounds, inter alia, of current and future state of health or disability.

- 21 According to the Court of Justice of the European Union, the concept of disability within the meaning of Directive 2000/78/EC 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 (judgments of 11 April 2013, *HK Danmark v Dansk almenyttigt Boligselskab* and *v Dansk Arbejdsgiverforening*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 38, and of 11 September 2019, *DW v Nobel Plastiques Ibérica SA*, C-397/18, EU:C:2019:703, paragraph 41).
- 22 The principle of non-discrimination applies, inter alia, to the termination of employment relationships.
- 23 Under Article 8 of the Law of 10 May 2007, direct discrimination based on disability may be justified only by a genuine and determining occupational requirement. Under Article 9, an indirect distinction on the basis of disability constitutes indirect discrimination unless it is demonstrated that no reasonable accommodation can be made. Finally, under Article 14, 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.
- 24 It is neither open to dispute nor disputed that the cause of the decision that the applicant was unfit must be classified as a disability within the meaning of the Law of 10 May 2007. The question of whether the statutory provision which provides for the dismissal of a trainee for permanent physical unfitness constitutes a direct or indirect distinction on the basis of disability involves an examination of whether or not the concept of disability covers that of permanent physical unfitness. In the present case, there is, however, no need to answer that question, because it is not disputed that the applicant, due to his heart complaint which made it necessary to fit a pacemaker, no longer meets a determining occupational requirement of his position as a specialist maintenance technician (tracks), which involves being subject to the electromagnetic fields present on railway tracks. Consequently, the contested act may constitute prohibited discrimination within the meaning of the Law of 10 May 2007 only if it is demonstrated that there was a refusal by the opposing party of reasonable accommodation which it was possible to make.
- 25 According to Article 4(12) of the Law of 10 May 2007, 'reasonable accommodation' is to mean all the 'appropriate measures, taken where needed in a particular case, to enable a person with a disability to have access to, participate and advance in the areas in which this law applies, unless such measures would impose a disproportionate burden on the person obliged to adopt them. This

burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the state’s disability policy’.

- 26 In this case, the applicant does not maintain that reasonable accommodation would have allowed him to perform his job as a specialist maintenance technician (tracks), but he maintains that the opposing party was able to employ him in another job, in particular that of warehouseman to which he had been temporarily assigned pending his dismissal, and that such assignment would have constituted reasonable accommodation which the opposing party was obliged to provide under the provisions set forth in the plea in law. On the other hand, the opposing party has demonstrated that it was not possible to provide reasonable accommodation in order that the applicant could perform the job of specialist maintenance technician (tracks), but has not demonstrated that, on the basis of the particular conditions of access to the job of ‘specialist maintenance technician (tracks)’, it would not have been possible to entrust him, within the railway companies, with other tasks which were compatible with his disability and corresponded to the same particular conditions of access to employment as those for which he was recruited.
- 27 The question of whether ‘reasonable accommodation’ is also to involve consideration of the possibility of assigning to another job a person who, due to his disability, is no longer in a position to perform the job which he held before that disability arose, is not assessed in a consistent manner in the case-law.
- 28 The opposing party mentions a judgment of the Labour Court, Hainaut, of 10 December 2018, which, with regard to a train conductor found to be unfit to perform that job, held that ‘It is [...] in view of the post concerned that reasonable accommodation must be examined and not in view of any other job [...] which the person might be fit to perform. In addition, it does not imply that the employer is obliged to examine whether a worker with a disability could be redeployed to another post’. XXXX cites other case-law finding, inter alia, that reasonable accommodation could consist of the allocation of another post or of the modification of the worker’s job. The cour du travail de Bruxelles (Higher Labour Court, Brussels) thus held that ‘undertaking training, intended to allow the worker to be reassigned to a job which is compatible with his disability, may, depending on the circumstances of the case, constitute reasonable accommodation within the meaning of the Law of 10 May 2007’ (Higher Labour Court, Brussels, 23 October 2017).
- 29 In several judgments, and in particular in its judgment of 11 September 2019, *DW v Nobel Plastiques Ibérica SA* (C-397/18, EU:C:2019:703, paragraphs 65 and 74), the Court of Justice refers, in that regard, on the one hand, to recitals 20 and 21 of Directive 2000/78 and, on the other, to recital 17 of that directive in the following terms:

‘65. As set out in recitals 20 and 21 of Directive 2000/78, the employer must take appropriate measures, i.e. effective and practical measures to adapt the workplace

to the disability, for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources, without imposing a disproportionate burden on the employer, taking account, in particular, of the financial and other costs entailed, the scale and financial resources of the undertaking and the possibility of obtaining public funding or any other assistance’;

‘74. In that regard, recital 17 makes clear that that directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities’.

- 30 It follows from those recitals that reasonable accommodation relates to ‘the workplace’ and may consist of tangible or intangible adaptations, such as adapting the ‘distribution of tasks’, but that the obligation not to discriminate does not oblige an employer to retain a worker who is no longer capable of performing the ‘essential functions of the post concerned’ and that is ‘without prejudice to the obligation to provide reasonable accommodation for people with disabilities’.
- 31 Those recitals do not, however, make it possible to determine with certainty whether the obligation to provide reasonable accommodation for persons with disabilities carries with it an obligation to assign a person who, due to his disability, is no longer capable of performing the essential functions of the post concerned, to another post in the business, for which he has the requisite skills, capabilities and availability, where such an obligation would not constitute a disproportionate burden for the employer.
- 32 It is therefore necessary to refer a question on that point for a preliminary ruling.

5. Question referred for a preliminary ruling:

- 33 The following question has been referred to the Court of Justice of the European Union for a preliminary ruling:

‘Is Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as meaning that an employer has an obligation, in relation to a person who, due to his disability, is no longer capable of performing the essential functions of the post to which he was assigned, to assign him to another post, for which he has the requisite skills, capabilities and availability, where such a measure would not impose a disproportionate burden on the employer?’