



Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 11 November 2021¹

Case C-485/20

XXXX

v

HR Rail SA

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Prohibition of any discrimination based on disability – Person completing a training period in the context of his recruitment – Worker permanently unfit to carry out the post to which he was assigned – Article 5 – Reasonable accommodation – Obligation to reassign that worker to another post for which he is competent, capable and available – Disproportionate burden)

I. Introduction

1. A worker, XXXX ('the applicant'), recruited by the company HR Rail SA, became permanently unfit, during his traineeship, to hold the post to which he had been assigned, due to the onset of a disability. He was then dismissed due to incapacity. The applicant contested that decision, arguing that he was discriminated against on the grounds of disability.
2. In such a situation, was his employer obliged, pursuant to Directive 2000/78/EC² and in order to avoid any discrimination on grounds of disability, to assign the applicant to another post for which he was competent, capable and available? That, in essence, is the question asked by the Conseil d'État (Council of State, Belgium).
3. This question will lead the Court to consider, in particular, the application of that directive to persons undergoing a traineeship as part of their recruitment and the scope of the concept of 'reasonable accommodation', within the meaning of Article 5 of that directive, read in the light of the United Nations Convention on the Rights of Persons with Disabilities, which was concluded in New York on 13 December 2006³ and entered into force on 3 May 2008 ('the UN Convention'), and of the Charter of Fundamental Rights of the European Union ('the Charter').

¹ Original language: French.

² Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

³ *United Nations Treaty Series*, vol. 2515, p. 3.

II. Legal context

A. *International law*

4. Article 1 of the UN Convention, entitled ‘Purpose’, states:

‘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, entitled ‘Definitions’, states in its third and fourth paragraphs:

‘For the purpose of this 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 5 of that convention, entitled ‘Equality and non-discrimination’, provides, in paragraph 3 thereof:

‘In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.’

7. Article 27 of that convention, entitled ‘Work and employment’, provides in paragraph 1:

‘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:

- (a) prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

...

- (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;

...'

8. The UN Convention was approved on behalf of the European Community by Decision 2010/48/EC.⁴

B. European Union law

9. Recitals 16, 17, 20 and 21 of Directive 2000/78 state:

- '(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.'

10. Article 1 of that directive, entitled 'Purpose', states:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

⁴ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 L 23, p. 35).

11. Article 2 of that directive, entitled ‘Concept of discrimination’, provides, in paragraph 1 thereof:

‘For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.’

12. Article 3 of that directive, entitled ‘Scope’, provides, in paragraph 1:

‘Within the limits of the areas of competence conferred on the Community, 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;

...’

13. Article 5 of Directive 2000/78, entitled ‘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.’

14. Article 7 of the directive, entitled ‘Positive action’, provides:

‘1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.’

C. Belgian law

15. Article 3 of the loi tendant à lutter contre certaines formes de discrimination (Law to combat certain forms of discrimination), of 10 May 2007,⁵ in the version applicable to the dispute in the main proceedings ('the Law of 10 May 2007'), states:

'The purpose of this Law is to create, as regards the matters referred to in Article 5, a general framework for combating discrimination on the grounds of age, sexual orientation, marital status, birth, property, religious or philosophical belief, political belief, trade union conviction, language, current or future state of health, disability, physical or genetic characteristic or social origin.'

16. Article 4 of that law provides:

'For the purposes of this Act, the following definitions shall apply:

...

4° protected criteria: age, sexual orientation, marital status, birth, property, religious or philosophical conviction, political belief, trade union conviction, language, current or future state of health, disability, physical or genetic characteristic, social origin;

...

12° reasonable adjustments: 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;

...'

17. Article 14 of that law provides as follows:

'In matters falling within the scope of this Act, any form of discrimination is prohibited. For the purposes of this title, discrimination means:

...

– refusal to make reasonable accommodation for a disabled person.'

⁵ *Moniteur Belge* of 30 May 2007, p. 29016.

III. The dispute in the main proceedings, the question referred and the proceedings before the Court of Justice

18. The applicant was recruited by HR Rail⁶ as a specialist maintenance technician for the maintenance of railway tracks. On 21 November 2016, he began his traineeship with Infrabel.

19. In December 2017, he was diagnosed with a heart condition requiring the fitting of a pacemaker, a device which is sensitive to the electromagnetic fields emitted, inter alia, by railway tracks. On 12 June 2018, the applicant was recognised as disabled by the service public fédéral Sécurité sociale (Federal Public Service for Social Security, Belgium).

20. On 28 June 2018, he was examined at the Centre régional de la médecine de l'administration (the company's Regional Medical Centre, Belgium), an examination which led HR Rail to declare him permanently unfit to perform the duties for which he had been recruited. The applicant was told that, pending the decision to dismiss him, he could occupy a post suited to his state of health, which met the following requirements: 'moderate activity, no exposure to magnetic fields, not at altitude or exposed to vibrations'. Following that decision, the applicant was assigned to the post of warehouseman within Infrabel. On 1 July 2018, he lodged an appeal against that decision with the commission d'appel de la médecine de l'administration (the company's Medical Appeals Board, Belgium).

21. By letter of 19 July 2018, HR Rail informed the applicant that he would receive 'personalised support in order to find a new job with [it]' and that he would shortly be called for an interview for that purpose. By letter of 29 August 2018, the applicant was informed that the date of that interview was set for 18 September 2018.

22. On 3 September 2018, the company's Medical Appeals Board confirmed the decision of medical unfitness taken in respect of the applicant.

23. By letter of 26 September 2018, the senior adviser – head of the relevant department of HR Rail – informed the applicant that he would be dismissed with effect from 30 September 2018, with a ban on his recruitment for a period of five years to the grade at which he had been recruited.

24. On 26 October 2018, the Managing Director of HR Rail informed the applicant that the company's articles of association and the general rules for the allocation of jobs in the company provided that 'the traineeship of a member of staff who is declared totally and permanently unfit shall be terminated where he or she is no longer able to carry out the duties attaching to his or her grade' and that, consequently, 'the letter which [he] [was] sent relating to personalised support for staff who are unfit on medical grounds [was] not applicable'.

25. On 26 November 2018, the applicant brought an action before the Conseil d'État (Council of State), the referring court, seeking the annulment of the decision of the senior adviser – head of department concerned – to dismiss him with effect from 30 September 2018.

26. The referring court noted that the Law of 10 May 2007, which transposes Directive 2000/78 into Belgian law, prohibits direct and indirect discrimination on the grounds of, inter alia, current and future state of health and of disability.

⁶ As stated in the referral decision, HR Rail's purpose is the recruitment and selection of statutory and non-statutory staff required to work for Infrabel SA and the Société nationale des chemins de fer belges (SNCB) (Belgian railway company).

27. In this case, according to the referring court, 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 applicant, by reason of his condition which necessitated the fitting of a pacemaker, no longer fulfilled an essential and fundamental occupational requirement of his role as a specialised maintenance worker, which involves being subjected to the electromagnetic fields emitted by the railway tracks. The referring court deduced therefrom that the decision to dismiss him could only constitute unlawful discrimination if it was shown that HR Rail failed to provide the required reasonable accommodation.

28. In this respect, the applicant argues that he could have been reassigned to another post, in particular that of a warehouseman to which he had been temporarily assigned pending his dismissal, and that such reassignment constituted a reasonable accommodation which his employer was required to provide under the Law of 10 May 2007. For its part, HR Rail submits that it was not possible to provide reasonable accommodation for the applicant to continue to perform his function as a specialist maintenance officer.

29. The national court states that the question as to whether ‘reasonable accommodation’ within the meaning of the Law of 10 May 2007 means the possibility of assigning another post to a person who, owing to the onset of a disability, is no longer able to occupy the post to which he or she was assigned, is not assessed in a consistent manner in the national case-law.

30. Furthermore, recitals 17, 20 and 21 of Directive 2000/78 do not make it possible to determine with certainty whether the obligation to provide reasonable accommodation for disabled persons entails the obligation to assign the person concerned to another job within the undertaking.

31. It was in those circumstances that 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:

‘Is Article 5 of [Directive 2000/78] to 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?’

32. Written observations were lodged by the applicant, HR Rail, the Belgian, Greek and Portuguese Governments and by the European Commission.

IV. Analysis

33. By its question, the national court asks, in essence, whether Article 5 of Directive 2000/78 is to be interpreted as meaning that, where a worker, including one completing a traineeship in the context of his or her recruitment, becomes permanently unfit, due to the onset of a disability, to occupy the post to which he or she has been assigned, his or her employer is required, as a matter of ‘reasonable accommodation’ under that article, to reassign him or her to another post for which he or she has the necessary skill, capability and availability and where such a measure does not impose a disproportionate burden on the employer.

34. As a preliminary point, it should be noted that it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that it 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.⁷ Thus, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability.⁸

35. It is important, in the first place, to ascertain whether a person such as the applicant falls within the scope of Directive 2000/78 (A) and, in the second place, to determine the scope of the concept of ‘reasonable accommodation’, within the meaning of Article 5 of that directive, with regard to the reassignment of a disabled person to another post within the undertaking (B).

A. *The scope of Directive 2000/78*

36. I note, first of all, that it is clear from the referring decision that the applicant was recruited by HR Rail, a public limited company, which means that he is a public sector worker. He was dismissed because he became permanently unfit for the post for which he had been recruited.

37. It must therefore be concluded that the applicant falls within the scope of Directive 2000/78. It follows from Article 3(1)(c) of that directive that it applies, within the limits of the areas of competence conferred on the EU, ‘to all persons, as regards both the public and private sectors, including public bodies’, in relation to ‘employment and working conditions, including dismissals and pay’.⁹

38. Next, the referring court states that the applicant has a ‘disability’ within the meaning of the Law of 10 May 2007. In this respect, the fact that the applicant is recognised as a disabled person, within the meaning of national law, does not mean that he has a ‘disability’ within the meaning of Directive 2000/78,¹⁰ which is an autonomous concept of EU law that must be interpreted in a uniform manner throughout the European Union.

39. As regards that directive, it must be recalled that the European Union approved the UN Convention on Disabilities by Decision 2010/48. The provisions of the convention are therefore, from the time of that decision’s entry into force, an integral part of the European Union legal order. Moreover, according to the appendix to Annex II to that decision, which concerns independent living and social inclusion, work and employment, Directive 2000/78 is one of the EU acts relating to matters governed by that convention. It follows that the UN Convention may be relied on for the purposes of interpreting that directive, which must, as far as possible, be interpreted in a manner consistent with that convention.¹¹

40. It is for that reason that, following the European Union’s approval of the UN Convention, the Court has taken the view that the concept of ‘disability’ within the meaning of Directive 2000/78 must be understood as referring to a limitation of capacity which results in particular from

⁷ Judgment of 15 July 2021, *Tartu Vangla* (C-795/19, EU:C:2021:606, paragraph 26 and the case-law cited).

⁸ Judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C-16/19, EU:C:2021:64, paragraph 34).

⁹ See, in this regard, judgment of 2 April 2020, *Comune di Gesturi* (C-670/18, EU:C:2020:272, paragraph 21 and the case-law cited).

¹⁰ See, to that effect, judgment of 18 January 2018, *Ruiz Conejero* (C-270/16, EU:C:2018:17, paragraph 32).

¹¹ Judgment of 11 September 2019, *Nobel Plastiques Ibérica* (C-397/18, EU:C:2019:703, paragraphs 39 and 40 and the case-law cited).

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.¹²

41. In interpreting Directive 2000/78, the Court has thus adopted, like the UN Convention, the social concept of disability, which is based on a context-sensitive approach, according to the interaction between the person's impairment and the reaction of society or the organisation of society to accommodate a person with an impairment, rather than the medical notion of disability, which attaches particular importance to the person himself or herself and to his or her impairment which makes it difficult for him or her to adapt to or integrate into his or her surrounding societal environment.¹³

42. In the present case, it follows from the order for reference that the applicant was recruited as a maintenance worker specialising in the maintenance of railway tracks. Following his recruitment, he suffered from a health problem requiring the fitting of a pacemaker, a device which is sensitive to the electromagnetic fields emitted, in particular, by railway tracks. He has therefore become permanently unfit to perform the essential functions of the post concerned.

43. Subject to verification by the referring court, I am of the view that, in the light of these factors, the applicant has suffered a lasting limitation of his capacity, resulting from physical impairments, which, in interaction with various barriers may hinder his full and effective participation in professional life on an equal basis with other workers, and that he must be classified as a 'disabled person' within the meaning of Directive 2000/78.

44. Finally, it is clear from the order for reference that, at the time of his dismissal, the applicant was completing a traineeship as part of his recruitment. It must be ascertained whether, as a trainee, he falls within the scope of Directive 2000/78.

45. In this respect, I note that, in view of its wording, this directive does not concern only those who are permanently recruited. Pursuant to Article 3(1)(a) and (b) of the directive, it applies to the conditions for access to employment, to self-employment or to occupation and to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining. In the present case, the applicant's situation as a trainee concerns his access to employment and work.

46. I would add that, from a purposive point of view, a person completing a traineeship as part of his or her recruitment is, by definition, in a more vulnerable position than a person who has a stable job. For such a trainee, it is more difficult to find another job in the event of a disability rendering him or her unfit for the job for which he or she was recruited, especially if he or she is at the beginning of his or her professional career. In these circumstances, it seems to me justified to ensure the protection of such a trainee against discrimination.

47. I am therefore of the opinion that a person completing a traineeship as part of his or her recruitment falls within the scope of Directive 2000/78, in this case, as regards the provisions on disability.

¹² Judgment of 11 September 2019, *Nobel Plásticos Ibérica* (C-397/18, EU:C:2019:703, paragraph 41 and the case-law cited).

¹³ See, to that effect, Opinion of Advocate General Wahl in *Z.* (C-363/12, EU:C:2013:604, points 83 to 85).

48. That interpretation finds support in the Court’s case-law. As already noted by that case-law, the concept of ‘worker’, within the meaning of Directive 2007/78, is the same as in Article 45 TFEU.¹⁴ As regards the classification of ‘worker’, within the meaning of that article, the Court has consistently held that that concept has an autonomous meaning and must not be interpreted narrowly.¹⁵ The concept of ‘worker’ in EU law thus 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.¹⁶

49. In the present case, it is not disputed that the applicant, in the context of his traineeship, was carrying out a real and effective activity as an employed person for and under the direction of an employer, and that he should therefore be classified as a ‘worker’ within the meaning of Directive 2000/78.

50. Furthermore, it should be noted that the scope of application of the UN Convention is broadly understood. Article 27(1)(a) of that convention provides that States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability in the course of employment, by taking appropriate measures, including through legislation, to prohibit discrimination on the basis of disability *with regard to all matters concerning all forms of employment*, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. As stated in point 39 of this Opinion, Directive 2000/78 must be interpreted, as far as possible, in conformity with the UN Convention.

51. Therefore, in addition to the fact that the applicant was dismissed within the meaning of Article 3(1)(c) of that directive, in my view, in his capacity as a person undergoing a traineeship in connection with his recruitment, he also falls within the meaning of Article 3(1)(a) of that directive.

52. Therefore, I am of the opinion that a person such as the applicant falls within the scope of Directive 2000/78.

B. Scope of the concept of ‘reasonable accommodation’, within the meaning of Article 5 of Directive 2000/78

53. The national court wonders whether the concept of ‘reasonable accommodation’, within the meaning of Article 5 of Directive 2000/78, includes the obligation, in respect of a person who has become permanently unfit to occupy his or her post because of the onset of a disability, to reassign him or her to another post within the undertaking.

54. According to Article 5 of that directive, ‘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

¹⁴ See judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 18 and 19).

¹⁵ See judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 19 and the case-law cited).

¹⁶ Judgment of 9 July 2015, *Balkaya* (C-229/14, EU:C:2015:455, paragraph 50 and the case-law cited).

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’.

55. As a preliminary point, I note that, pursuant to the third paragraph of Article 2 of the UN Convention, discrimination on the grounds of disability includes all forms of discrimination, including denial of reasonable accommodation. Therefore, assuming that HR Rail was obliged to reassign the applicant to another job, he was discriminated against on the grounds of disability within the meaning of that convention and Directive 2000/78 when he was dismissed for being unfit to perform the duties for which he had been recruited.¹⁷

56. As noted by Advocate General Kokott¹⁸ and Advocate General Wahl,¹⁹ the rationale behind the requirement of reasonable accommodation is to strike a fair balance between the needs of persons with disabilities and those of the employer.

57. It is clear from recital 20 of Directive 2000/78, on reasonable accommodation, that ‘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’.

58. Of course, as HR Rail points out in its written observations, this recital refers to ‘the workplace’. It deduces from this that the reasonable accommodation is limited to the job assigned and cannot be used to give the disabled worker another job.

59. However, in my view, Article 5 of Directive 2000/78, read in the light of recitals 17 and 20 thereof, must be understood as meaning that, *as a matter of priority and as far as possible*, the employer must accommodate the job which the worker had prior to the onset of the disability. The objective is, using an approach based on the social concept of disability, to adapt the working environment of 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. This accommodation requires that, where possible, practical measures be implemented by the employer in order for the disabled person to *remain in employment*.

60. In the judgment of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222; ‘the judgment in *HK Danmark*’), the Court held that recital 20 of Directive 2000/78 provides a non-exhaustive list of appropriate measures, which may be physical, organisational and/or educational.²⁰

61. In the main proceedings, as the national court states, given the nature of the applicant’s disability, no physical, organisational and/or educational measures can be adopted to enable him to retain his post as a maintenance worker specialising in the maintenance of railway tracks.

¹⁷ Some authors point out that, unlike the UN Convention, Directive 2000/78 does not provide for the refusal of reasonable accommodation as a form of discrimination. See, in particular, Waddington, L., ‘Equal to the Task? Re-Examining EU Equality Law in the Light of the United Nations Convention on the Rights of Persons with Disabilities’, *European Yearbook of Disability Law*, vol. 4, edited by Quinn, G., Waddington, L. and Flynn, E., Intersentia, Cambridge, 2013, pp. 169-200, in particular p. 190. However, since the directive must be interpreted as far as possible in accordance with the UN Convention, I am of the opinion that the directive must be understood as prohibiting discrimination in the form of a refusal of reasonable accommodation. Thus, in the judgment of 11 September 2019, *Nobel Plastiques Ibérica* (C-397/18, EU:C:2019:703, paragraph 72), the Court explicitly referred to the UN Convention’s provision on the denial of reasonable accommodation.

¹⁸ Opinion of Advocate General Kokott in Joined Cases *HK Danmark* (C-335/11 and C-337/11, EU:C:2012:775, point 59).

¹⁹ Opinion of Advocate General Wahl in *Z.* (C-363/12, EU:C:2013:604, point 105).

²⁰ The judgment in *HK Danmark*, paragraph 49.

Indeed, the fitting of a pacemaker, a device sensitive to the electromagnetic fields emitted by the railways, makes it impossible for the applicant to remain in his job. The adaptation of the premises or an adjustment of the equipment, of the patterns of working time, of the distribution of tasks or the provision of training or integration resources cannot therefore constitute appropriate measures within the meaning of Article 5 of Directive 2000/78 in the specific situation of the applicant.

62. However, his disability is not such as to exclude him from all working life. The question is then whether, in such a situation, the employer is obliged, in so far as possible, to reassign such a disabled worker to another post within the undertaking. To the best of my knowledge, the Court has not yet ruled on this issue, which is of considerable practical importance.²¹

63. I am of the view that this question should be answered in the affirmative. Article 5 of Directive 2000/78 merely states that reasonable accommodation shall be provided to enable a disabled person to have access to, participate in, or advance in employment, or to receive training. Consequently, that article does not limit the measures adopted to the position occupied by the disabled worker. On the contrary, access to *a job* and the provision of *training* leaves open the possibility of an assignment to another job. Furthermore, as stated in recital 16 of that directive, 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.

64. In this regard, in the judgment in *HK Danmark*, the Court noted that, in accordance with the fourth paragraph of Article 2 of the UN Convention, ‘reasonable accommodation’ is ‘necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, as 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’. The Court deduced therefrom that that provision *prescribes a broad definition* of the concept of ‘reasonable accommodation’.²² Thus, with respect to Directive 2000/78, that concept 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.²³

65. Therefore, in that judgment, the Court held that the reduction of working time, even if it were not covered by the concept of ‘pattern of working time’, could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours make it possible for the worker to continue employment, in accordance with the objective of that article.²⁴ The Court has therefore recognised as reasonable accommodation a measure which is not explicitly referred to in recital 20 of the directive.²⁵

²¹ HR Rail refers to the judgment of 11 September 2019, *Nobel Plásticos Ibérica* (C-397/18, EU:C:2019:703), which, in its view, would confirm the interpretation that reasonable accommodation must be confined to the workplace occupied. However, in that judgment, the Court merely noted that it was for the national court to verify whether the adaptations made was sufficient to be regarded as reasonable accommodation. The Court did not therefore rule on the scope of the concept of ‘reasonable accommodation’ within the meaning of Article 5 of Directive 2000/78 (see paragraphs 68 and 69 of that judgment). Furthermore, paragraph 65 of that judgment reproduces the wording of recitals 20 and 21 of that directive.

²² The judgment in *HK Danmark*, paragraph 53.

²³ The judgment in *HK Danmark*, paragraph 54.

²⁴ The judgment in *HK Danmark*, paragraph 56.

²⁵ See, also, Opinion of Advocate General Kokott in Joined Cases *HK Danmark* (C-335/11 and C-337/11, EU:C:2012:775, points 54 to 58).

66. Furthermore, Article 27(1)(a) of the UN Convention, already cited, states that States Parties shall safeguard and promote the exercise of the right to work, by taking appropriate measures, including through legislation, to prohibit discrimination on the grounds of disability with regard to all matters concerning all forms of employment, including *continuance of employment*.

67. Moreover, in addition to Article 21 of the Charter, which provides for the prohibition of any discrimination on grounds of disability,²⁶ Article 26 thereof states that the European Union recognises and respects 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.²⁷

68. It follows from the above that, as far as possible, people with disabilities should be kept in employment rather than being dismissed for unfitness, which should only be a last resort.²⁸ More generally, I think it is important to stress that society cannot progress if it excludes people with disabilities, especially with regard to employment and work. In this regard, reasonable accommodation is a preventive measure to maintain the employment of disabled persons.²⁹

69. In those circumstances, I am of the view that it follows from the wording of Directive 2000/78, read in the light of the UN Convention and the Charter, and from the case-law of the Court, that, where a worker becomes permanently unfit to hold his or her post because of the onset of a disability, his or her reassignment to another post is likely to constitute an appropriate measure in the context of reasonable accommodation within the meaning of Article 5 of that directive.³⁰

70. For its part, the Committee on the Rights of Persons with Disabilities, established under the UN Convention,³¹ also adopts a broad interpretation of the concept of ‘reasonable accommodation’ within the meaning of Article 5 of that convention, which includes the reassignment of the disabled person to another post.

71. In the Views adopted under Article 5 of the Optional Protocol, concerning Communication No 34/2015, of 29 April 2019,³² that committee considered that the rules which prevented the disabled person concerned from being assigned to modified duty did not guarantee the rights

²⁶ Directive 2000/78 is a specific expression, in the areas that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter. See judgment of 15 July 2021, *WABE* (C-804/18 and C-341/19, EU:C:2021:594, paragraph 62 and the case-law cited).

²⁷ See judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 78), according to which Article 26 of the Charter requires the EU to respect and recognise the right of persons with disabilities to benefit from integration measures.

²⁸ See, in this regard, judgment of 11 September 2019, *Nobel Plásticos Ibérica* (C-397/18, EU:C:2019:703, paragraph 73). This interpretation is also apparent from recital 17 of Directive 2000/78.

²⁹ See Gutiérrez Colomidas, D., ‘Can Reasonable Accommodation Safeguard the Employment of People with Disabilities?’, *European Yearbook on Human Rights*, Intersentia, Cambridge, 2019, pp. 63-89, in particular p. 83.

³⁰ In its written observations, the Commission points out that, in certain situations, reassigning the disabled worker to another job could involve a lesser financial burden for the employer or be less difficult to implement from an organisational point of view than another reasonable accommodation, such as a reduction in the pattern of working time or the adaptation of the equipment necessary to perform the tasks required for the job concerned. In the present case, it does not appear to me to be necessary to consider this question since, in the present case, there was no reasonable accommodation that would have enabled the applicant to retain the post to which he had been assigned.

³¹ Under Article 1(1) of the Optional Protocol to the UN Convention, each State Party to that protocol recognises the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the UN Convention.

³² See CRDP/C/21/D/34/2015, which can be consulted through the following Internet link: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2F21%2FD%2F34%2F2015&Lang=en.

that that person derived from the UN Convention, in particular the possibility of having his or her particular disability assessed with a view to enhancing his or her ability to perform alternative or other supplementary functions.³³

72. It is true that the EU has not approved the Optional Protocol to the UN Convention and the Committee on the Rights of Persons with Disabilities is not a judicial body. Nevertheless, it is of interest that that committee adopts the same interpretation as the one I advocate, with a view to protecting disabled people at work.³⁴

73. In the event that no reasonable accommodation measures allow the disabled person to retain the post to which he or she has been assigned, it follows from the wording of Directive 2000/78 that the reassignment of that worker to another post presupposes that two cumulative conditions are met.

74. In this regard, first, the directive, according to recital 17 thereof, 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. I infer from that recital, read broadly, that the obligation to reassign a disabled worker to another post within the undertaking presupposes that he or she is competent, capable and available to perform the essential functions of that new post. Beyond that recital, it is a rule dictated by common sense.

75. In the present case, it is apparent from the order for reference that the applicant had been reassigned to a position as a warehouseman before his dismissal on 30 September 2018. Furthermore, as the national court stated, the applicant argued before it that he had extensive professional experience as a warehouseman. Therefore, it is for that court to verify that the applicant was competent, capable and available to occupy the post to which he was reassigned. Having regard to the wording of the question referred for a preliminary ruling, that court appears to consider that to be the case in the main proceedings.

76. Second, as stated in Article 5 of Directive 2000/78, reasonable accommodation measures must not impose a disproportionate burden on the employer. Recital 21 of the directive specifies that 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’.

77. The obligation imposed by Article 5 of Directive 2000/78 to take appropriate measures, where needed, is aimed at all employers.³⁵ Nevertheless, the possibility of assigning a disabled person to another job is, in my view, aimed at the situation where there is *at least one vacancy* which the worker concerned is able to occupy, so as not to impose a disproportionate burden on the

³³ That case concerned a Spanish national who had a road accident causing him to suffer a permanent motor disability. As he was permanently unable to work as a police officer, he was forced to retire and was dismissed from the local police force. He applied to the Barcelona City Council (Spain) for an assignment to a job suited to his disability, which was rejected. Following the legal proceedings in Spain and before the European Court of Human Rights, he submitted a communication to the Committee on the Rights of Persons with Disabilities.

³⁴ See, also, the Views of the Committee on the Rights of Persons with Disabilities concerning Communication No 37/2016, of 29 September 2020. CRPD/C/23/D/37/2016, available through the following Internet link: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f37%2f2016&Lang=en.

³⁵ Judgment of 4 July 2013, *Commission v Italy* (C-312/11, not published, EU:C:2013:446, paragraph 61).

employer.³⁶ As the Commission stressed in its written observations, the reassignment of a disabled worker should not result in depriving another worker of his or her job or forcing the latter to swap jobs. Such a reassignment would therefore appear to be easier in a large company, for which the number of available posts is, in principle, greater. Similarly, the reassignment of a worker to another position will be easier to implement depending on the extent of his or her adaptability to the undertaking's positions.

78. Here again, it is for the referring court to determine whether the reassignment of the applicant to another post constitutes a disproportionate burden, within the meaning of Article 5 of Directive 2000/78, read in the light of recital 21 thereof, for his employer. Having regard to the wording of its question for a preliminary ruling, that court appears to accept that there is no such disproportionate burden in the main proceedings. In this respect, I note that HR Rail initially reassigned the applicant to the post of warehouseman within the undertaking, without claiming that that new assignment represented a disproportionate burden for it.

79. In its written observations, HR Rail argues that a dismissal based on the finding that a worker no longer fulfils a genuine and determining occupational requirement, within the meaning of Article 4(1) of Directive 2000/78,³⁷ is not discriminatory provided that the employer has first considered the adoption of reasonable accommodation in respect of the post occupied. Such accommodation could not be made for the position concerned.

80. However, as I have indicated, Article 5 of the directive implies that reasonable accommodation may include reassignment of the disabled person to another job within the undertaking. Therefore, the mere fact that the applicant is permanently unfit to occupy the post to which he has been assigned does not mean that his employer has the right to dismiss him because he no longer fulfils an essential and determining occupational requirement relating to that post.³⁸

81. HR Rail also argues that a distinction should be made between 'reasonable accommodation' within the meaning of Article 5 of Directive 2000/78 and 'positive action' within the meaning of Article 7 of that directive. Interpreting the concept of 'reasonable accommodation' as including an obligation for the employer to seek another job within the undertaking would undermine this distinction in so far as that employer would have to provide alternative employment to a worker who does not fulfil the essential functions of the job concerned, outside the specific framework of 'positive action'. First, the disabled worker who does not fulfil the essential functions of the post to which he or she has been assigned would be given another post, while other workers who could no longer perform those functions would be dismissed. Second, the disabled worker would be given priority for a vacant post for which he or she would not have competed with other potentially interested candidates, even though he or she is not necessarily the most competent to carry it out, especially if he or she is still in training.

³⁶ Recital 21 of Directive 2000/78 uses the term 'in particular', which implies that elements, other than those mentioned, could constitute a disproportionate burden for the employer.

³⁷ Pursuant to that provision, 'notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

³⁸ See, in this regard, Hendrickx, F., 'Disability and Reintegration in Work: Interplay between EU Non-discrimination Law and Labour Law', *Reasonable Accommodation in the Modern Workplace, Potential and Limits of the Integrative Logics of Labour Law*, Bulletin of comparative labour relations No 93, 2016, pp. 61-72, in particular, p. 62.

82. I do not share that interpretation. In that regard, I note that the Court has clarified the concept of ‘positive action’ by finding that Article 7(2) of Directive 2000/78 allows a distinction to be established, based on disability, provided that it forms part of provisions on the protection of health and safety at work or measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of persons with disabilities into the working environment.³⁹ The purpose of that provision is to authorise specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social lives and, in particular, their professional lives, and to achieve substantive, rather than formal, equality by reducing those inequalities.⁴⁰

83. Therefore, Article 7(2) of Directive 2000/78 relates to measures concerning disabled persons as a group,⁴¹ and not to the actual situation of a worker with a specific disability, which is covered by Article 5 of that directive.⁴² In the present case, it is the latter situation which is the subject matter of the main proceedings.

84. Furthermore, the EU legislature has chosen to grant specific protection to disabled persons under Directive 2000/78,⁴³ in particular, in the form of reasonable accommodation, which by definition is not available to non-disabled persons. These accommodations, which are the legal translation of the social concept of disability, are the means to achieve substantive equality in a concrete and individualised situation of discrimination.⁴⁴ They are therefore not a derogation from the principle of equality but a guarantee of its effectiveness.⁴⁵

85. Having regard to all of the foregoing, I am of the opinion that ‘reasonable accommodation’ within the meaning of Article 5 of Directive 2000/78, read in the light of the UN Convention and the Charter, includes the obligation to reassign the worker concerned to another post within the undertaking where the conditions laid down in that directive are met.

V. Conclusion

86. In light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Conseil d’État (Council of State, Belgium) as follows:

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, where a worker, including one completing a traineeship as part of his or her recruitment, becomes permanently unfit, owing to the onset of a disability, to occupy the post to which he or she has been assigned within the undertaking, the employer is obliged, as part of the ‘reasonable

³⁹ Judgment of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 46).

⁴⁰ Judgment of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 47).

⁴¹ In the same way, Article 27(1)(h) of the UN Convention states that States Parties are to safeguard and promote the realisation of the right to work by taking appropriate steps, in particular, to 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.

⁴² See, in this regard, Dubout, E., ‘Article 7. Action positive et mesures spécifiques’, *Directive 2000/78 portant création d’un cadre général en faveur de l’égalité de traitement en matière d’emploi et de travail, Commentaire article par article*, Larcier, Brussels, 1st ed., 2020, in particular, No 48, p. 207, according to which ‘reasonable accommodation measures should be considered as individualised, whereas positive actions, such as preferential access, are articulated within a more collective logic’.

⁴³ See, in this respect, judgment of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 36 and the case-law cited), according to which the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof.

⁴⁴ See Joly, L., *L’emploi des personnes handicapées entre discrimination et égalité*, Dalloz, Paris, 2015, in particular, No 327, p. 239.

⁴⁵ Joly, L., *op. cit.*, No 316, p. 232.

accommodation' provided for in that article, to reassign that worker to another post where he or she has the required competence, capability and availability and where that measure does not impose a disproportionate burden on the employer.