Key Issues: **Social Policy – Equal Treatment – Disability Discrimination - Preliminary Ruling**

Case: **HR Rail SA**

Reference: **Case C-485/20, CJEU (Third Chamber), 10 February 2022**

Legislation: **Directive 2000/78/EC**

Background

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.

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). 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'.

The applicant in the main proceedings was then assigned to a warehouseman's position within the same undertaking. 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). 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.

On 3 September 2018, the company's Medical Appeals Board confirmed the decision at issue. 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. 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.

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. The Conseil d'État decided to stay the proceedings and to refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling on the interpretation of Council Directive 2000/78/EC.

Consideration by CJEU

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.

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.

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.

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.

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.

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, 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. 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.

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.

The CJEU held that:

Article 5 of Council Directive 2000/78/EC 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.

Why is this decision important?

The requirement of "*reasonable accommodation*" means an employer must review carefully the nature of the employee's disability, the functions the employee can (and cannot) undertake and the alternative positions within the business. Such a review needs to carried out diligently and, if the employer concludes that no other position can reasonably be offered to the employee, legal advice may be necessary before termination of the employee's contract.

NOTE: The Disability Discrimination Act 1995 (to the extent that it still applies in Northern Ireland) forms part of "Retained Law" for the purposes of the European Union (Withdrawal) Act 2018 ("the Act"). By section 6 of the Act, UK courts and tribunals are not bound by decisions of the CJEU made after "exit day". However, a UK court or tribunal may have regard to any such decision of the CJEU so far as it is relevant to any matter before the court or tribunal.

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