

Case Notes

On Obesity as a Disability

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Case C-354/13, Fag og Arbejde (FOA) v Kommunernes Landsforening (KL) [2014] (not yet reported)

There is no general principle under European Union law prohibiting discrimination on the basis of obesity in regard to employment and occupation. Obesity alone is not a disability but can constitute a disability where it is accompanied by a limitation resulting from long term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the individual in professional life on an equal basis with other workers (official headnote).

In December 2014, the Court of Justice of the European Union (CJEU) issued a preliminary ruling addressing, firstly, whether obesity is a protected ground of non-discrimination, and, secondly, whether obesity can amount to a disability. This piece begins with an introduction to the topic of obesity, followed by the facts of the case, the CJEU's judgment and a comment on the decision.

I. Introduction

Obesity is a major health concern worldwide.¹ It is a contributor to non-communicable diseases such as diabetes, musculoskeletal disorders, cardiovascular diseases and some cancers (endometrial, breast, and colon).² Over the last 20 years, adult and childhood obesity rates have doubled to the extent that an estimated 53% - or 200 million - individuals in the European Union are overweight or obese.³ Obesity not only impacts individual health; it is thought to absorb 2-8% of the healthcare budgets of EU states.⁴ Furthermore, obesity may contribute to indirect

health costs, such as absence from work and loss of productivity.⁵

The most widely used measurement of unhealthy weight is body mass index (BMI) which is mass (kg) divided by height squared (m²). A person with a BMI of over 25 is classified as overweight; whereas a BMI of over 30 qualifies as obesity. From BMI 30, obesity is divided into different strains of severity (class I, II and III). However, BMI is a relatively crude measurement which does not take body fat composition into account.⁶

Besides its physical impact, obesity is linked to psychosocial disorders.⁷ Stigmatisation of persons

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1 Carmen Perez Rodrigo, "Current mapping of obesity", 28 *Suppl 5 Nutr Hosp* (2013).

2 World Health Organisation, "Obesity and overweight Fact Sheet No 311", August 2014, available on the Internet at <<http://www.who.int/mediacentre/factsheets/fs311/en/>> (last accessed on 20 December 2014).

3 OECD/European Union, *Health at a Glance: Europe 2014*, (OECD Publishing, 2014).

4 European Commission, *Public Health*, (Luxembourg: Publications Office of the European Union, 2013), at p. 13.

5 Falk Müller-Riemenschneider, Thomas Reinhold, Anne Berghöfer, et al., "Health-economic burden of obesity in Europe", 23 *European Journal of Epidemiology* (2008).

6 WHO, "Global Database on Body Mass Index", available on the Internet at <www.apps.who.int/bmi/index.jsp?introPage=intro_3.html> (last accessed on 21 January 2015).

7 Vishal Vaidya, "Psychosocial aspects of obesity", 27 *Adv Psychosom Med* (2006).

with obesity is well documented in educational settings, health care facilities and the work place, as are hostile attitudes in the media and social settings.⁸ Stigma appears to relate to the perception that persons with obesity are responsible for their condition.⁹ Studies from the United States show that stigma can lead to discrimination in the hiring process, with negative characteristics such as laziness or poor hygiene baselessly attributed to persons with obesity.¹⁰ Although U.S. federal law does not protect persons with obesity from discrimination, in Michigan, weight is a protected ground.¹¹ Furthermore, six U.S. cities, including San Francisco¹² and the District of Columbia,¹³ have outlawed weight based discrimination. France is the only EU Member State that specifically protects individuals from discrimination based on physical appearance.¹⁴ As a result of this lack of protection, courts on both sides of the Atlantic are increasingly asked to consider obesity as a disability in workplace discrimination claims.

1. The Employment Equality Directive

European Union discrimination law began with the rationale of pursuing equality between men and women in employment.¹⁵ The Employment Equality Directive (2000/78/EC) expanded the grounds of protection from discrimination to also include religion or belief, disability, age or sexual orientation.¹⁶ The objective of the Directive is to create a level playing field in employment and occupation at EU level.¹⁷ It applies to conditions for access to employment, access to training, employment and working conditions, and membership to employers' and workers' organisations.

The Directive prohibits direct and indirect discrimination unless justified by a legitimate aim, through appropriate and necessary means.¹⁸ A difference in treatment may be justified where, due to the nature of the particular occupational activities concerned, or the context in which they are carried out, the characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.¹⁹

Under Article 5 of the Directive, employers have an obligation to provide reasonable accommodation to workers with a disability. This requires that "appropriate measures" be taken (specific to the individual case) to enable the person to access employment.

This is not an absolute duty; it is subject to the requirement that such measures should not impose a "disproportionate burden" on the employer.

II. Facts

Karsten Kaltoft worked as a child minder for the Municipality of Billund, Denmark. For the entirety of his employment, Kaltoft had obesity (i.e. a BMI of over 30). He received financial support from the Municipality to lose weight but was unsuccessful in doing so. After approximately 15 years of service, Kaltoft was dismissed in November 2010. According to the Municipality, the reason was a fall in the number of children using the service. On the other hand, Kaltoft petitioned the District Court of Kolding for compensation, arguing that he had been dismissed, and as such discriminated against, due to his obesity. The Municipality denies that Kaltoft's weight was a factor in his dismissal.

The Danish Court stayed the proceedings and referred the following questions to the CJEU for a preliminary ruling under Article 267 TFEU:

1. Is it contrary to EU law, as expressed, for example, in Article 6 TEU concerning fundamental rights, generally or particularly for a public-sector employer to discriminate on grounds of obesity in the labour market?
2. If there is an EU prohibition of discrimination on grounds of obesity, is it directly applicable as be-

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- 8 Rebecca M. Puhl and Chelsea A. Heuer, "The Stigma of Obesity: A Review and Update", 17 *Obesity* (2009).
 - 9 Thomas Bøker Lund, Peter Sandoe and Jesper Lassen, "Attitudes to publicly funded obesity treatment and prevention", 19 *Obesity (Silver Spring)* (2011), Thomas Bøker Lund, Morten Juul Nielsen and Peter Sandoe, "In a class of their own: the Danish public considers obesity less deserving of treatment compared with smoking-related diseases", *Eur J Clin Nutr* (2014).
 - 10 Puhl and Heuer, "The Stigma of Obesity: A Review and Update", *supra* note 8.
 - 11 Elliot Larsen Civil Rights Act, Act 453 of 1976, Sec. 209.
 - 12 San Francisco Administrative Code, Chapters 12A, 12B, & 12C, San Fran. Municipal/Police Code, Art. 33.
 - 13 Human Rights Law, Subchapter II, Sec. 1-2512.
 - 14 Law no 2001-1066 of 16 November 2001.
 - 15 Article 119, Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.
 - 16 Article 1.
 - 17 Preamble, at para. 37.
 - 18 Article 2(b)(i).
 - 19 Article 4.

- tween a Danish citizen and his employer, a public authority?
3. Should the Court find that there is a prohibition under EU law of discrimination on grounds of obesity in the labour market generally or in particular for public-sector employers, is the assessment as to whether action has been taken contrary to a potential prohibition of discrimination on grounds of obesity in that case to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer ...?
 4. Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC ... and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that directive?

III. Judgment

1. First question: Does EU law, generally, lay down a principle of non-discrimination on grounds of obesity in employment and occupation?

The CJEU reiterated that the general principle of non-discrimination is part of the general principles of Union law. This principle is binding on Member States where the national situation in the main proceedings falls within the scope of EU law.²⁰ The Court noted that no provisions of the TEU or TFEU specifically prohibit discrimination on grounds of obesity, including neither Article 10 TFEU nor Article 19 TFEU. Following its case law, Article 19 TFEU cannot be a basis for measures of the Council of the European Union to combat discrimination on the ground of obesity as it does not refer thereto and only contains rules on the competencies of the EU. Obesity is

also not mentioned in secondary legislation of the EU, nor the Directive. The scope of the Directive should not be extended by analogy and thus, obesity cannot be regarded as falling thereunder. Thus, as dismissal due to obesity does not fall within the competence of the EU, the Charter of Fundamental Rights of the EU is inapplicable.

For these reasons, the CJEU concluded that Union law does not lay down a general principle of non-discrimination on grounds of obesity in relation to employment and occupation. As this first question was answered in the negative, the Court did not address the second and third questions.

2. Fourth question: Can obesity constitute a disability under the Directive and, if so, what are the criteria which decide whether a worker with obesity may avail of the protection of the Directive against disability based discrimination?

a. Admissibility

The Danish Government disputed the admissibility of the claim as *Kaltoft* was able to carry out his functions while working, and had not been considered to be suffering from a disability. Furthermore, it argued that, in light of *HK Danmark*,²¹ the Danish court could already give a ruling on the definition of disability under the Directive.

The CJEU stated that it is for the referring court to determine the need to refer. It is in principle bound to give a ruling and this may be rebutted only in exceptional cases, such as that it is obvious that the interpretation of Union law sought bears no relation to the actual facts of the case or its purpose, or where the CJEU does not have the factual or legal material needed to give a useful answer. The referral was admissible as it was not obvious that the interpretation sought was unnecessary in order to resolve the case. Furthermore, the national court is not prohibited from referring a question, the answer to which leaves no scope for reasonable doubt.

b. Decision

The Court defined disability in the context of the United Nations Convention on the Rights of Persons

²⁰ See Case C-13/05, *Sonia Chacón Navas v Eures Colectividades SA* [2006] ECR I-06467, at para 56.

²¹ Joined cases C-335/11 and C-337/11, *HK Danmark* [2013] OJ C 269, 10.9.2011.

with Disabilities²² as “a limitation which 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”.²³ It emphasised that disability does not only mean the impossibility of exercising a professional activity, but also a “hindrance” in doing so. Any other interpretation would be incompatible with the objective of the Directive. Furthermore, the origin of the disability should not be used to define its scope. Thus, the extent to which a person may or may not have contributed to his disability is irrelevant.

The determination and assessment of appropriate accommodation comes after the definition of disability. Thus, the fact that such accommodation measures did not take place, did not mean that Kaltoft could not be considered to have a disability under the Directive.

Obesity in itself is not a disability under the Directive as, by its nature, it does not necessarily cause a limitation. However, obesity can be a disability if it entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one. Obesity that hinders full and effective participation in professional life on an equal basis with other workers due to, for example, reduced mobility or the onset of medical conditions preventing the individual from working, or causing discomfort while working, could amount to a disability.

It is for the Danish Court to determine whether Kaltoft’s obesity entailed a limitation that hindered his full and effective participation in professional life on an equal basis to others. Should Kaltoft establish that this is the case; the burden of proof is on the Municipality to prove that there was no breach of the principle of equal treatment. The Danish court is expected to reach a decision toward the end of 2015.

IV. Comment

The judgment is a common sense interpretation of the Directive in light of the Union’s obligations following ratification of the UN Disability Convention.

It should not come as a surprise to those familiar with *HK Danmark*. While the case does not appear to fundamentally alter the state of the art, it may lead to an increased awareness on the part of employees and employers of their respective rights and duties. On the other hand, the judgment has been accused of creating uncertainty and excessive burdens for employers.²⁴

In his Opinion of 17 July 2014, Advocate General (AG) Jääskinen came to the same conclusion as the Court, that obesity, is not in itself, a disability. However, the AG suggested that only obesity of a certain severity, i.e. class III obesity, will result in limitations, such as mobility, endurance and mood, amounting to a disability.²⁵ The CJEU declined to adopt a test which could assume persons of a certain BMI and over have a disability. Instead, the Court focused on the effect of the individual’s obesity. While the BMI approach offers more clarity, it obscures the key determinant of functionality. Classifying everyone with obesity as having a disability implies a lack of functionality that many may not experience.²⁶ Furthermore, employers could consider themselves required to monitor employee BMI in order to fulfil their duties and avoid liability.

The judgment has sparked debate between those who view obesity as a result of individual behaviour that employers should be permitted to penalise, and those who believe persons with obesity should be aided by their employer in participating in work life to the fullest extent possible.²⁷ While some may feel that the ruling encourages unhealthy habits, studies

22 *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

23 Paragraph 53, quoting *HK Danmark*, paragraphs 37 to 39, C-363/12, *Z v A Government Department, The Board of Management of a Community School*, [2014] OJ C 311, 13.10.2012, paragraph 76, and C-356/12, *Wolfgang Glatzel v Freistaat Bayern* [2014] (not yet reported), paragraph 45.

24 Owen Bowcott, “Obesity can be a disability, EU court rules”, *The Guardian*, 18 December 2014, available on the Internet at: <www.theguardian.com/society/2014/dec/18/obesity-can-be-disability-eu-court-rules> (last accessed on 21 January 2014).

25 Advocate General’s Opinion in Case C-354/13 FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund, see paras. 55-6.

26 Anna Kirkland, “Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement”, Vol. 42, No. 2 (June 2008): 397-431., 42 *Law & Society Review* (2008).

27 Clive Coleman, “Obesity ‘could be a disability’ - EU courts rule”, *BBC News*, 18 December 2014, available on the Internet at: <www.bbc.com/news/health-30529791> (last accessed on 21 January 2014).

suggest that stigmatising behaviour does not help individuals to lose weight.²⁸ The cause of obesity is widely regarded as an energy imbalance resulting from too little physical activity and the consumption of an excess of calories. However, there are those that dispute this model and call for a wider consideration of the factors that contribute to obesity, such as stress, sleep and the built environment.²⁹

The CJEU, like the AG, stated that the cause of the disability is not relevant. Therefore, protection is not limited to those who can establish an underlying condition has contributed to their obesity. This seems appropriate given that the origin of a disability is not taken into account in other circumstances, such as where a person develops a disability as a result of a car crash in which he was negligent. Employers should avoid value judgments based on the perceived origin of a disability. Likewise, the immutability of the condition was not a factor in the Court's decision. Although clinically meaningful weight loss is possible, research shows that it is not maintained long-term in the majority of instances.³⁰

As obesity in itself is not a protected ground from discrimination, the employer's duty only arises where the employee's obesity is coupled with a limitation that may hinder his full and effective participation in the workplace on an equal basis to others. The Court gave some indication of the potential barriers that could accompany obesity. Research suggests an increased prevalence of functional difficulties³¹, musculoskeletal problems, back pain, diabetes and mental health disorders in persons with obesity.³²

The Court has been accused of a lack of clarity, which creates confusion for employers as to how to comply with the law.³³ Yet, disabilities are individual, and require functionality based responses. Reasonable accommodation is assessed on a case by case basis and seeks to accommodate individual needs. Examples could include providing more suitable chairs, larger uniforms, convenient parking spaces or reassigning physically demanding tasks. Although costs of reasonable accommodation vary based on the individual situation, they are reported as generally low.³⁴ Furthermore, the employer's duty is not absolute, where the accommodation would place an unreasonable burden.

V. Conclusion

The judgment suggests that it could be in employers' interests to review their role in employee health, given that persons with obesity, that impairs functionality, will, in some cases, lead to costs for employers. This may cause employers to consider the benefits of bolstering a healthful workplace through, for example, access to physical activity and nutritious food. There is some evidence that work-based interventions can have an impact on weight loss.³⁵ On the other hand, employers must respect employee privacy and health decisions. Moralising or incentivising weight loss could lead to increased stigmatisation and discrimination.³⁶

As the majority of EU Member States do not protect individuals from employment discrimination on

28 Carissa B. Wott and Robert A. Carels, "Overt Weight Stigma, Psychological Distress and Weight Loss Treatment Outcomes", 15 *Journal of Health Psychology* (2010), Lenny R. Vartanian and Jacqueline G. Shaprow, "Effects of Weight Stigma on Exercise Motivation and Behavior: A Preliminary Investigation among College-aged Females", 13 *Journal of Health Psychology* (2008).

29 Jean-Philippe Chaput, Zachary M. Ferraro, Denis Prud'homme, et al., "Widespread misconceptions about obesity", 60 *Canadian Family Physician* (2014); Thorkild I. A. Sørensen, "Challenges in Understanding Development of Obesity", in Clévio Nóbrega, Raquel Rodriguez-López (eds.), *Molecular Mechanisms Underpinning the Development of Obesity* (Switzerland: Springer International Publishing, 2014).

30 Stephan U. Dombrowski, Keegan Knittle, Alison Avenell, et al., "Long term maintenance of weight loss with non-surgical interventions in obese adults: systematic review and meta-analyses of randomised controlled trials", 348 *BMJ* (2014).

31 Functional difficulties meaning 'walking one-fourth mile, walking up 10 steps without resting, stooping / crouching / kneeling, lifting or carrying 10 lb, walking between rooms on the same floor, and standing from an armless chair', Dawn E. Alley and

Virginia W. Chang, "The changing relationship of obesity and disability, 1988-2004", 298 *Jama* (2007).

32 Louisa J. Ells, Rebecca Lang, Julian P. H. Shield, et al., "Obesity and disability - a short review", 7 *Obes Rev* (2006), Katherine Froehlich-Grobe and Donald Lollar, "Obesity and disability: Time to act", 41 *American Journal of Preventive Medicine* (2011).

33 Owen Bowcott, "Obesity can be a disability, EU court rules", supra note 24.

34 Sandra K. Collins and Eric P. Matthews, "Americans with Disability Act: financial aspects of reasonable accommodations and undue hardship", 39 *J Health Care Finance* (2012).

35 Laurie M. Anderson, Toby A. Quinn, Karen Glanz, et al., "The Effectiveness of Worksite Nutrition and Physical Activity Interventions for Controlling Employee Overweight and Obesity: A Systematic Review", 37 *American Journal of Preventive Medicine* (2009).

36 See further, Anna Kirkland and Jonathan Metzl (eds), *Against Health: How Health Became the New Morality*, (New York and London: New York University Press, 2010).

the basis of appearance or weight, obesity discrimination actions rely on disability claims for now. An under-explored avenue is discrimination on the basis of a perceived disability. This is a well-established cause of action in the U.S. and Australia. It arises when an individual is treated less favourably due to his employer's incorrect assumption that he has a disability. The CJEU has recognised "associated disability", stating that "EU protection is not limited only to people who are disabled".³⁷ Therefore, although the question has not been directly addressed by the CJEU,

it has been suggested that perceived disability is covered by Union law.³⁸ This could be an avenue for an individual with obesity who does not have a disability, but suffers discrimination from his employer due to a falsely held view that his weight prevents him from carrying out his employment.

37 Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

38 See for instance, Equal Treatment Commission Opinion (The Netherlands) 2011-78 of 13 May 2011.