

# EXTENDING ANTI-DISCRIMINATION ON THE GROUNDS OF DISABILITY: WHAT SCOPE EXISTS FOR NEW FORMS OF DISCRIMINATION?

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## Abstract

This study-case focuses on the extension of anti-discrimination rules on the grounds of disability, taking into account the recent development with regards to obesity, from a legal point of view. The questions to be raised are whether obesity itself can be considered a protected ground of discrimination in its own right in accordance with the general principle of the EU law prohibiting discrimination in the labour market (Directive 2000/78/EC) and whether obesity, in some circumstances, can be considered as a disability and thus be protected through the disability provisions of the EU legislation. The landmark decision taken the European Court of Justice (December 2014) aims to protect obese employees from discrimination at work because of their weight and has established a precedent that could affect employment rights across the EU.

## Keywords

*obesity; disability; right to work; human rights at the workplace; discrimination; freedom of choice*

## 1. Introduction

According to the World Health Organization's data, obesity represents one of the greatest challenges of the 21st century. Overweight and obesity are the fifth leading risk for global deaths. At least 2.8 million adults die each year as a result of being overweight or obese. In addition, 44% of the diabetes burden, 23% of the ischemic heart disease burden and between 7% and 41% of certain cancer burdens are attributable to being overweight and obese.<sup>2</sup>

Being obesity responsible for 2-8% of health costs, national policies should encourage the involvement of different "actors" (public, private, civil society, etc.) in curbing its incidence.<sup>3</sup> Although, its prevalence in many EU countries has tripled since 1980, there are major differences among countries and socioeconomic groups. Among the 19 EU Member States for which data are available, the proportion of adults (aged 18 years and over) who were considered to be overweight or obese varied in 2008 between 37.0 % and 56.7 % in the case of women and between 51.0 % and 69.3 % for men. Moreover, for both women and men aged 18 years and over, the lowest proportions of the population considered to be obese in 2008 were observed in Romania (8.0 % for women and 7.6 % for men) while the highest proportions was registered in the United Kingdom (for instance, in the case of women : 23.9 %).<sup>4</sup>

Beyond health risks and economic costs, obesity has recently become a well-debated legal subject in the EU in connection with both principles of respect for human rights and fundamental freedoms and rule of law (particularly, concerning the discriminations on grounds of weight - overweight). In Denmark, a former childminder from the Municipality of Billund (between 1996 and 2010), who was dismissed on November 2010, brought an action founded on the grounds of his perceived weight, upon unlawful disability discrimination, contending that his obesity was a disability. The Danish court opted to make a preliminary reference to the European Court of Justice, seeking guidance on whether obesity itself can be considered a protected ground of discrimination in its own right in accordance with the general principle of the EU law

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<sup>2</sup> European Association for the Study of Obesity (EASO), 2015

<sup>3</sup> World Health Organization, Obesity, 2015

<sup>4</sup> Eurostat, European health interview survey, 2015



prohibiting discrimination on the labour market (Directive 2000/78/EC) and whether obesity, in some circumstances, can be considered as a disability and thus be protected through the disability provisions of the EU legislation. Finally, the landmark decision taken by the European Court of Justice in December 2014 aims to protect overweight employees from discrimination at work and has established a precedent that could affect anti-discrimination and employment rights across the whole European continent.

## 2. EU legislation on discrimination

The EU's Charter of Fundamental Rights includes the right to non-discrimination in the Article 21, which states that:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”<sup>5</sup>

The Council Directive 2000/78/EC of 27 November 2000 ('the Employment Equality Directive'), adds new provisions to the previous requirements and establishes a general framework for equal treatment in employment and occupation.<sup>6</sup>

- Article 1: the purpose of the Directive:
  - '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.'
- Article 2(1) and (2): (1) 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.
- Article 3: the area of application:
  - Article 3(1)(c) provides that within the limits of the areas of competence conferred on the Community, Directive 2000/78 shall apply 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;
  - 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:
    - 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;
    - access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
    - employment and working conditions, including dismissals and pay;
    - membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- Article 8(1):

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<sup>5</sup> Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000, available on [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>6</sup> Directive 2000/78/EC, OJ 2000 L 303, p. 16  
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- 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.'

The Directive 2000/78 was transposed into Danish law by Law No 1417 of 22 December 2004, amending the Law on the principle of non-discrimination in the labor market; According to the version published by Consolidated Law No 1349 of 16 December 2008 ('the Law on anti-discrimination'):

- Paragraph 1(1): 'Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the basis of race, skin color, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.'
- Paragraph 2(1): 'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, and promotions or with respect to remuneration and working conditions.'
- Paragraph 2a : '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. This burden shall not be regarded as disproportionate when it is sufficiently remedied by public measures.'
- Paragraph 7(1): 'Persons whose rights have been infringed by breaches of Paragraphs 2 to 4 may be awarded compensation.'
- Paragraph 7a: 'When persons who consider themselves wronged by a failure to comply with Paragraphs 2 to 4 establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

### 3. Case description and ruling

Mr. Karsten Kaltoft was employed as a child-minder in the Municipality of Billund, Denmark from 1996 up until he was dismissed on 22 November 2010. During his employment as a consequence of his recognised obesity, Kaltoft was provided financial assistance between January 2008 and January 2009 to fund fitness and physical training sessions as part of the local authority's health policy. Although it was disputed by the local authority that his obesity formed part of the reasons behind his dismissal, Kaltoft brought an action founded upon unlawful disability discrimination, contending that obesity was a disability and that he was dismissed by reason of being too overweight to carry out his employment obligations<sup>7</sup>

Mr. Kaltoft's lawyers in the case argued that his weight was one of the reasons he lost his job and that it amounted to unfair discrimination, while the employer, Billund city council, denied that obesity was among the reasons for Kaltoft's dismissal. When faced with this matter the Danish court opted to make a preliminary reference to the European Court of Justice (ECJ), seeking guidance on the following questions:<sup>8</sup>

1. Is it contrary to EU law 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 between a Danish citizen and his employer?
3. Is the assessment 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?

<sup>7</sup> Mark Butler, Obesity as A Disability ..., 2014 (See bibliography)

<sup>8</sup> CJUE, Judgement of the Court, 2014a



4. Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC? 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?

In essence, while the first three questions are touching upon a similar point, seeking guidance on whether obesity itself can be considered a protected ground of discrimination in its own right in accordance with the general principle of EU law prohibiting discrimination in the labour market, the fourth question is raising the question as to whether obesity, in some circumstances, can be considered as a disability and thus be protected through the disability provisions of the Framework Directive.<sup>9</sup>

In its request addressed to the European Court of Justice (ECJ), the District Court of Kolding, Denmark, asked the Court to specify whether EU law itself prohibits discrimination on grounds of obesity and whether obesity can constitute a disability and therefore falls within the scope of the above directive.

In its judgment the Court states, first of all, that the general principle of non-discrimination is a fundamental right which forms an integral part of the general principles of EU law. This principle is therefore binding on Member States where a national situation falls within the scope of EU law. In that regard, the Court recalls that no provision of the Treaties or of secondary EU legislation prohibits discrimination on grounds of obesity as such. In particular, the Employment Equality Directive does not cite obesity as a ground for discrimination and the scope of that directive should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively. Moreover, the Charter of Fundamental Rights of the European Union is likewise inapplicable in such a situation. Consequently, the Court held that, in the area of employment and occupation, EU law does not lay down a general principle of non-discrimination on grounds of obesity as such.<sup>10</sup>

The concept of 'disability' within the meaning of the directive must be understood as referring to 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.

The Court emphasised that this concept must be understood as referring not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity. The directive has the object of implementing equal treatment and aims in particular to enable a person with a disability to have access to or participate in employment. In addition, it would run counter to the aim of the directive if its application was dependent on the origin of the disability.<sup>11</sup>

Furthermore, the Court observes that the definition of the concept of 'disability' comes before the determination and assessment of the appropriate accommodation measures that, pursuant to the directive, employers must take in each particular case so as to enable a person with a disability to have access to, participate in, or advance in employment (unless such measures result in a disproportionate burden being imposed on the employer). Therefore, the mere fact that such accommodation measures may not have been taken in respect of Mr Kaltoft does not mean that he could not be considered a disabled person within the meaning of the directive.<sup>12</sup>

On those grounds, the Court finds that if, under given circumstances, the obesity of the worker entails 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 that person in professional life on an equal basis with other workers, and the

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<sup>9</sup> Mark Butler, Obesity as A Disability ..., 2014

<sup>10</sup> CJUE, Press Release, 2014b

<sup>11</sup> CJUE, Judgement of the Court, 2014a

<sup>12</sup> Ibidem



limitation is a long-term one, such obesity can fall within the concept of 'disability' within the meaning of the directive. Such would be the case, in particular, if the obesity of the worker hindered that participation on account of reduced mobility or the onset of medical conditions preventing that person from carrying out work or causing discomfort when exercising professional activity.<sup>13</sup>

To sum up, according to the CJEU's judgement, if "under given circumstances, the obesity of the worker entails 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 that person in professional life on an equal basis with other workers, and the limitation is a long-term one, such obesity can fall within the concept of 'disability' within the meaning of the directive" and it would be for the national court to determine whether Mr Kaltoft's obesity falls within the definition of 'disability'.<sup>14</sup>

#### **4. Implication of the judgement (generalisations of the impact in the whole Europe)**

Mr. Kaltoft's lawyer, Jacob Sand, has publicly acknowledged that the ruling is a landmark case and may consequently have a significant impact :<sup>15</sup>

- "This ruling clearly establishes that the notion of disability is to be construed to the effect that clinical obesity also may qualify as an impairment enjoying protection under the relevant rule"
- "It is the first time ever that a case has been brought at EU level regarding protection as a result of clinical obesity.
- "The ruling implies that there will be a shared burden of proof in relation to the discrimination of employees suffering from clinical obesity and that employers in relation to this group of employees will be obliged to initiate appropriate measures in order to remedy any functional defects."

The judgment has to be carefully examined by employment lawyers since decisions by the ECJ are binding across the European Union.

#### **5. Concluding remarks**

The Kaltoft case was the CJEU's first opportunity to determine which provisions of EU law would offer protection to discrimination on the grounds of obesity. As the obesity is a rising problem (obesity levels increasing both in the EU and globally, with great cost either for society or the economy) there is potential for this endemic problem to have further implications on employment law.

At the first sight, among others, the potential implications imply reasonable adjustments within the workforce. For example, "if determined a disability this may require practical changes to the working arrangements such as reconsideration of the types of machinery that an individual could operate, the size of workstations or more appropriate seating, or even priority parking to ensure shorter walking distances to the office" and "alongside this structural change may have been needed including reassessment of work stations and environments, reworking of work policies, including harassment policies and training. All of which would be at the expense of the employer".<sup>16</sup>

What the Kaltoft case does show is that the ECJ is willing to and can extend the concept of discrimination with time and open the door for new areas where discrimination is prohibited, in line with changes in society.

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<sup>13</sup> Ibidem

<sup>14</sup> CJUE, Press Release, 2014b

<sup>15</sup> Owen Bawcott, Obesity can be a disability, EU court rules, the Guardian, 2014; I Drury, Obesity IS a disability, Daily Mail, 2014; J. Woods, Calling obesity a 'disability' is simply fatuous, The Telegraph, 2014.

<sup>16</sup> Mark Butler, Obesity as A Disability, 2014



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## Portals

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