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Disability Discrimination: Obesity and the Court of Justice of the European Union's decision in *Karsten Kaltoft v Billund Kommune* Case C-354/13 ECJ

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Abstract: *Walker* and *Karsten* are two important decisions in disability discrimination law – not solely on the basis of their legal and practical repercussions for the United Kingdom (UK) and European Union (EU), respectively, but because they capture the very ideological spirit of domestic and European anti-discrimination legislation. The former directly relates to disability discrimination in the UK and the entire EU is feeling the brunt of the Court of Justice of the European Union's decision in the latter. This article explores the impact of both these decisions and to what extent the obese or those suffering from a functional overlay are now protected from being discriminated against by the Framework Directive 2000/78 and the United Kingdom's Equality Act 2010.

Keywords: obesity; functional overlay; disability discrimination; equal treatment.

Introduction

Discrimination law in the United Kingdom (UK) has been through some radical changes for instance the Equality Act 2010¹ rationalised the law and introduced

¹ The Disability Discrimination Act 1995 was amended to accord with the Framework Directive (2000/78/EC of 27th November 2000) that established a general framework for equal treatment in employment and occupation. Therefore, fewer changes were made in the Equality Act 2010. The Directive continuously applies on UK law and practice that remain inconsistent with it or perhaps are unclear – the latter would require interpretation in accordance with it. See: *Paterson v Commissioner of Police of the Metropolis* UKEAT/0635/06/LA and The Convention on the Rights of Persons with Disabilities A/RES/61/106. Note the Convention has an Optional Protocol.

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the notion of protected characteristics.² Obesity is a growing crisis across the world; in 20 years the number of “obese” people in England doubled from 13.2% to 24.4%. More recent conservative estimates suggest that this figure could rise to one third of the population by 2020.³ Therefore, any decision that results in obesity and/or its effects being protected under the current legislative regime against disability discrimination could potentially create a raft of new and potentially very interesting litigation. It also creates an additional cause for employers to be concerned with. Two notable cases have brought the issue of whether obesity, or at the very least the functional overlay caused by it, amounts to a protected characteristic (disability) to the limelight. This article compares the two decisions and their impact on equality law in the UK.

European Union Law – The Framework Directive 2000/78/EC

The European Union’s Framework Directive 2000/78/EC established the general structure under which member states can promote equal treatment in employment and occupation so as to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation with the view to putting into effect the principle of equal treatment in all European Union member states.⁴ Discrimination also presents an impediment to the right of member state citizens to move freely throughout the union.⁵

2 The Equality Act 2010 defines protected characteristics as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation. Note in relation to same sex marriage the Marriage (Same Sex Couples) Act 2013.

3 Health and Social Care Information Centre. *Statistics on Obesity, Physical Activity and Diet – England, 2014*. Published online 26th of February 2014. (Date accessed: July 2014). The University of Birmingham’s Centre for Obesity Research also reports on the rates of obesity in the UK, see: <http://www.birmingham.ac.uk/research/activity/mds/centres/obesity/obesity-uk/index.aspx>.

4 See Chapter 1 Article 1.

5 On free movement see: Directive 2014/54/EU of the European Parliament and the Council of Europe of the 16th April 2014 on *Measures that facilitate the exercise of the rights that are conferred upon workers in the context of their freedom of movement*. (ONLINE) Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0054>. (Accessed 14th January 2016).

United Kingdom Law – Disability under the Equality Act 2010

Equality in the UK seeks to promote the right of people to be treated fairly, or at least that is the basis of its legal premise. To this endeavor a number of characteristics are protected (as stated earlier). In terms of disability discrimination, the statutory regime covers indirect discrimination and discrimination that arises from disability.⁶ The latter was a change that was introduced as part of the Equality Act 2010 after the House of Lords decision in *Lewisham London Borough Council vs. Malcolm* (2008) UKHL 43. The effect of the Malcolm judgment was to limit the meaning of disability related discrimination thereby severely restricting the scope of disabled people to claim that they had been treated less favourably. This position was clearly contrary to policy intention of the government that was to protect the disabled from less favourable treatment. Up and until 2010 UK law had developed somewhat on a rather piecemeal basis, it was fragmented by the fact that it was contained in a variety of Acts and Regulations and therefore it was in urgent need to be brought together in a coherent and clear piece of legislation. The EA 2010 did achieve this, and that I do not think many would contest.

The 2010 Act applies what is called a detriment model to protection from victimisation and therefore aligns the approach across anti-discrimination focused employment law in the UK. It also harmonised the thresholds set for the duty to make reasonable adjustments and extended the protection against harassment of employees to include harassment by third parties in relation to all protected characteristics. The statute makes it difficult for an employer to unfairly screen out disabled people in the recruitment process by restricting the circumstances in which questions relating to disability or health can be posed. There is a major discrimination issue in terms of screening out candidates on the basis of race and other protected characteristics, which is one of the reasons behind the proposal to anonymise the identity of an applicant on their application forms.⁷

⁶ Note: the EA 2010 also includes protection from “associated discrimination” and there was discussion to include a duty on an employer to provide protection from discrimination by “third parties,” however this was highly contentious and never brought into force. Employers felt that these two categories of protection from discrimination were too wide.

⁷ Note: whilst there are obvious benefits to this the neutralising of application forms may only delay discrimination to later on in the recruitment process and this requires that candidates emanate from structurally similar groups applicant groups. See also: PM: Time to end discrimination and finish the fight for real equality – Press releases – GOV.UK. 2016. *PM: Time to end discrimination and finish the fight for real equality*. Press releases, GOV.UK. (ONLINE) Available at: <https://www.gov.uk/government/news/pm-time-to-end-discrimination-and-finish-the-fight-for-real-equality>. (Accessed 14 January 2016).

The Framework Directive, Disability Discrimination Act 1995 (DDA) and the Equality Act 2010 (EA) did not expressly prohibit discrimination on the grounds of obesity and as a result some interesting case law has brought change to this area of the law.

Obesity and Functional Overlay

Obesity is defined as simply having too much fat on the body. The measure used to ascertain this is known as the body mass index (BMI), this uses a simple calculation; the ratio of a person's height and weight ($BMI = \text{kg}/\text{m}^2$). A healthy BMI for a male or female lies between 18.5 and 24.9, persons considered overweight have a BMI that lies between 25 and 29.9, those classed as obese have a BMI of over 30 and persons considered to be morbidly obese have a BMI of over 40. Often having a BMI far in excess of this (obesity or morbid obesity). Functional overlay is defined as the response or excessive reaction to, or emotional aspect of an organic physical disease. This may be caused by an overreaction to an illness and it usually characterised by symptoms that have a continual effect long after the disease that caused them has ended.⁸ The diagnosis of functional overlay⁹ is difficult and often as a result of the physician not being able to find any other cause for the symptoms complained of – note: this does not mean that they do not exist. However, if to be used as evidence then it must be implied that the physician must be sure that the symptoms are not malingering – a feigned symptom. Although, it is a point to be noted that the genuineness of neither the symptoms nor their cause was ever challenged in *Walker*.

***Walker v Sita Information Networking Computing Ltd* UKEAT 0097/12**

The case fell under the DDA 1995, which has now been replaced by the EA 2010. Walker worked for Sita Information Networking Computing Limited. He claimed that he was disabled which his employer challenged. Walker contended that he genuinely suffered from, amongst other things, asthma, diabetes, high blood pressure, chronic fatigue syndrome, bowel and stomach problems, knee prob-

⁸ Mosby's Medical Dictionary. 8th Edition, 2009. Elsevier.

⁹ See: Romberg, W. *Functional overlay: An illegitimate diagnosis?* Forensic Medicine. West J Med 130:561–565, June 1979.

lems and sacro-iliac joint pains, chemical sensitivity, anxiety and depression, persistent cough, hearing loss, fungal infections, carpal tunnel syndrome and eye problems. An magnetic resonance imaging (MRI) scan had revealed a bulging disc in his spine between C6 and C7 level. As a result these conditions gave rise to a number of symptoms which included pain in the abdomen, head, knees, left leg and knee, lower back, left arm and shoulder, both his feet and diarrhoea, difficulty swallowing, shortness of breath, constant fatigue and poor concentration/memory. The existence of these symptoms was not a matter in issue.

He contended that he was suffering from a number of symptoms that caused him significant difficulty in his ability to conduct his day-to-day life. It was clear from the medical evidence of Doctor Davies (an occupational health specialist) that Walker suffered from a permanent condition that affected his daily life and that his obesity, at the time he weighed 21.5 stones,¹⁰ had significantly contributed towards them. Furthermore, anyone carrying that much weight would experience some of the symptoms he was complaining of. The doctor also concluded that a functional or behavioral part played a significant part in the existence of a wide range of the symptoms outlined. The mental or pathological cause of the symptoms could not be attributed nor was there any significant structural changes (physical) that would have led to a significant impairment or disability. These were therefore to be regarded as being a functional overlay. The question for the tribunals was whether the definition of disability (and statutory protection) included someone who suffered from a functional overlay that was accentuated by obesity and was obesity an impairment as required by the statute.

At first instance the employment tribunal (ET) judge held that because no cause for the mental or physical symptoms could be identified the claimant did not fall within the definition of a disabled person under the DDA scheme. The judge also stated that the cause of the claimant's impairment was not a disability but his obesity and therefore concluded that Walker had no claim in disability discrimination law. In his judgment the judge concluded:

“11. The respondent resists the claim of disability on a narrow basis. Mrs. Winstone, counsel for the respondent, does not challenge Mr. Walker's account of his symptoms. She says that the wording of the Act is such that the claimant must establish a physical or mental impairment. There is no suggestion of any mental illness causing the functional overlay, though in the absence of objective evidence of a physical impairment she invites me to say that if the functional overlay is disregarded the symptoms do not amount to a disability. Not so, says Mr. Walker, who invites me to take him as I find him and have overall regard to his condition as a whole.

¹⁰ The additional weight that he was carrying was stated as being equivalent to a 90lb bag of sand.

12. I have given this matter careful consideration. Mr. Walker presents as a man who has difficulties in his life but I have to determine this issue having regard to the framework of the act. The position is that, put shortly, in the absence of any mental condition Doctor Davies has been unable to identify any physical or organic cause for Mr. Walker's conditions apart, to a degree, from his obesity. I have been referred to a number of authorities including *McNicol v Balfour Beatty Rail Maintenance Ltd* (2002) EWCA Civ. 1074 and the cases of *Rugamer v Sony Music Entertainment (UK)*, *McNicol v Balfour Beatty Rail Maintenance Ltd*, reported at 2002 ICR 381. These cases are authority for the proposition that, depending on the facts of the instant case, it is open to a tribunal to conclude that an individual is not disabled where there is no physical or organic cause for his symptoms. So it is here, I find that there is no such cause for the claimant's symptoms and that they are exacerbated by a functional overlay."

Walker appealed, the employment appeal tribunal (EAT) held in his favour stating that the ET judge had erred in law because the legislation did not require the court to determine the cause of the mental impairment but to have regard to its effect. The basic issue started with the fact that section 1 (1) of the DDA 1995 stated that disability was "a physical or mental impairment, which has a substantial and long-term adverse effect upon (someone) to carry out normal day to day activities". The term "impairment" was not defined and therefore in accordance with general principles of English law was to be given its "natural" meaning.¹¹ In addition reference also had to be made to the Guidance¹² provided with the Act on what should be taken into consideration when determining questions relating to the definition of disability. Paragraph A8 of Part 2 of the Guidance to the Act clearly stated that "It not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded... what it is important to consider the effect of an impairment, not its cause."¹³ It is clear that, as a matter of law, the cause of the impairment is not relevant. Paragraph 19 of *McNicol v Balfour Beatty Rail Maintenance Ltd* (2002) EWCA Civ 1074 and

11 In English law there are a number of rules of statutory construction, the literal rule when applied gives the terms in a statute an ordinary or natural meaning. The purpose of interpretation here is clearly to respect the intention of Parliament and avoid usurping the function of the legislature. See: Lord Simonds in *Magor and St Mellons Rural District Council v Newport Corporation* (1952) AC 189 at page 191. For a classic example for the application of the rule see: *Fisher v Bell* (1961) 1 QB 394.

12 Disability Discrimination Act – Guidance on matters to be taken into account in determining questions relating to the definition of disability.

13 Page 5 of the original Guidance. Note: the same is provided by the Guidance that accompanies the Equality Act 2010 at paragraph A3 on page 8. See: Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability. 2015. (ONLINE) Available at: http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/odi_equality_act_guidance_may.pdf. (Date accessed: 13th March 2015).

the judgment in *The College of Ripon & York St John v Hobbs* (2002) IRLR 185 also supported this contention.

It has been argued that had the existence of the symptoms been challenged then the ET would have been well within its rights to question the absence of a cause to which to attribute them – this was not the case here. Evidentially this would have been a significant fact that may well have helped determine whether the symptoms were malingering. The employment judge at first instance did not refer to the Guidance that accompanied the DDA and had relied on authorities that were no longer relevant under the current legislative regime. The EAT held that Walker was both mentally and physically impaired and had been in such state for a long time. Whilst the EAT did not directly accept that obesity is a disability under the DDA scheme it did recognise that an obese person is more likely to be disabled. Therefore, an obese claimant was more likely to persuade an ET that he or she suffered from impairment for the purposes of the law so as to be afforded protection. The result rendered Walker disabled for the purposes of the DDA at the time.

Advocate General’s Opinion in FOA, acting on behalf of *Karsten Kaltoft v Billund Kommune* Case C-354/13 ECJ

In 2010 the Billund City Council (a Danish local authority) dismissed a child-minder after he had been too obese to bend over and tie-up shoelaces. Karsten weighed well over 25 stone (160 kg). The World Health Organisation classifies this as severe, extreme or morbid obesity (class III). He contended that his weight was one of the reasons for his dismissal and that this amounted to unfair disability discrimination,¹⁴ the council denied this. The following questions were referred by the Danish Courts for a preliminary ruling to the Advocate General (AG) of the European Union:

- Is it contrary to European Union law (EU law) as expressed, for example, in Article 6 Treaty of the European Union (TEU) concerning fundamental rights,

¹⁴ The Lov om forbud mod forskelsbehandling på arbejdsmarkedet mv. (Forskelsbehandlingsloven) lovbekendtgørelse nr. 1349 af 16. December 2008. This is the law on the prohibition of discrimination in the labour market (etc.). Consolidated Law No. 1349 of 16 December 2008, see paras.1, 2(1), 2a and 7a. Directive 2000/78 was implemented in Danish law via an amendment to the *Forskelsbehandlingsloven*.

- generally or particularly for a public-sector employer to discriminate on grounds of obesity in the labour market?
- If there is a prohibition of discrimination on grounds of obesity, is it directly applicable as between a Danish citizen and his employer, a public authority?
 - 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 (see recital 18 in the preamble to Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex 1)?
 - Can obesity be deemed to be a handicap covered by the protection provided for in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 2 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 handicap as laid down in that directive?

The first three questions related to whether obesity could be considered as a ground of discrimination in its own right. If the answer were yes then the act complained of would be unlawful by reason of the prohibition of discrimination in EU law. In absence of an express provision providing protection the question whether it could be afforded by implication under any of the existing provisions in European Union fundamental rights law that dealt with disability also required consideration. Question number four asked whether obesity could be included within the notion of disability as set out in Directive 2000/78. The answer for the first, and therefore subsequent two questions, were in the negative. In the AG's opinion was there is no general principle in EU law that prohibits discrimination on the grounds of obesity in its own right nor could it be implied by reason of any other provision (discussed later). However, in relation to question four he went on to state that morbid obesity may fall within the definition of "disability" for the purposes of the Equal Treatment Directive (2000/78/EC) if the degree of obesity is such that it hinders an individual from fully participating in their professional life on an equal footing with other employees.

What follows is a brief summary of the AG's response to the first three questions. In terms of Article 6 (1) of the TEU and the first three questions; the four

European Treaty provisions that address disability are Articles 10 and 19 of the Treaty for the Functioning of the European Union (TFEU)¹⁵ – the former sets out the aim to combat discrimination and the latter the legal basis for doing so. Articles 21 and 26 of the Charter of Fundamental Rights of the European Union (EU Charter 2000/C 364/01), respectively, prohibit discrimination on particular grounds including disability and for those with disability to be able to benefit from the protections provided in the form of independence, occupational and social integration, and to be able to live and participate in community life. Although the drafting of Article 21 allowed some argument for inclusion of grounds not expressly stated it was quite clear that this would be futile.¹⁶ Clearly obesity was not expressly protected in any of these provisions or in any other principle of EU law. It is clear from the AG's opinion that in the absence of express prohibition European Union fundamental rights law requires a specific degree of connection that is beyond close relation or oblique impact between the legal issue and EU law.¹⁷ Therefore, a generalised connection is not enough to engage the protection of European Union fundamental rights at a national level because this would breach the boundaries that have already been set.¹⁸

In terms of question four “can obesity be classed as a disability so as to afford someone protection under the Framework Directive”. The Directive did not define disability¹⁹ and therefore the CJEU had been quite active on this issue in terms of its jurisprudence. The interpretation of disability as in accordance with the United Nations Convention on Rights of Persons with Disabilities²⁰ which itself accepts disability as being a concept that is continually evolving. The AG stated

15 The TFEU (named by Lisbon Treaty as such) was formerly known as the EC Treaty and the Treaty of Rome. It sets out the functional and organisational details of the European Union.

16 The AG acknowledged that Article 6(1) of the TEU precluded recourse to the Charter for the purposes of extending the competencies of the European Union as defined in its Treaties. The following cases set out the extent of fundamental rights law in the European Union: *Åklagaren v Hans Åkerberg Fransson*. Case C-617/10 REC and *Thomas Pringle v Government of Ireland*. (2013) 2 CMLR 46. Case C-370/12.

17 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*. (2014) CJEU Case C-206/13. The point of the AG here was that there must be a specific member state provision that falls within a specific provision of European Union law, see: *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP*. (2013) EUECJ C-258/13. Clearly this was not the case here.

18 See *ibid.* note 13.

19 See: *Sonia Chacón Navas v Euresit Colectividades SA*. (2006) EUECJ Case C-13/05.

20 For details of the approval see: Council Decision 2010/48/EC of the 26th of November 2009 (OJ 2010 L 23). See also: Convention on the Rights of Persons with Disabilities. 2015. (ONLINE) Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>. (Date accessed: 13th March 2015).

that the CJEU had emphasised that the purpose of the Directive was to combat disability discrimination in all its forms.²¹ The AG concluded, in line with the CJEU, that the notion of disability for the purposes of the Directive must include all persons that have a disability that corresponds to the CJEU's jurisprudential definition.²² Therefore, an illness, whether curable or not, that accords with this definition would be covered by Directive 2000/78.²³ The CJEU clearly held that it would be in contradiction of the Directive to define the scope of disability by reference to its origin.

The CJEU's Decision in *Karsten*

In December 2014 the CJEU made its decision,²⁴ this accorded with the AG's opinion and thus impacts the entire European Union. The reasoning was as follows: "while no general principle of EU law prohibits, in itself, discrimination on grounds of obesity, that condition falls within the concept of "disability" where, under particular conditions, it hinders the full and effective participation of the person concerned in professional life on an equal basis with other workers".

Significance for UK Business/Employers

The definition of disability from the DDA 1995 to the EA 2010 remains unchanged and therefore *Karsten* is relevant to all claims relating to disability discrimination. Employers are required to be aware that whilst obesity in itself may not be expressly classed as a disability or labelled as a protected characteristic it may mean that an employee who is obese is disabled for the purposes of the law and entitled to reasonable adjustments. Few would argue that the extension of protection often bears no cost – this decision will see employers having to make adjust-

²¹ *Coleman v Attridge Law and Steve Law*. (2008) EUECJ Case C-303/06.

²² The CJEU has stated the disability must be limitations that occur from a long-term, physical, mental or psychological impairment which when in interaction with various barriers can hinder a person's full and effective participation in professional life when compared to other workers on an equal basis. See also: *Commission v Italy*. (2013) CJEU C-312/11.

²³ See *ibid.* note 16 (*Chacón*).

²⁴ See: *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*. Case C-354/13. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140183en.pdf>.

ments in the workplace to accommodate the individual needs of an employee who is severely obese with a BMI of over 40.²⁵ For instance, the employer may need to limit the duties of such an employee to those that do not require a certain level of physical fitness, provide special or modified equipment (chair/desk) and ensure fairness in the recruitment process because of this. For example, if an applicant is refused employment by reason of their obesity then they may have a potential claim under disability discrimination law. Even instances of banter that relate to an obese person's appearance in the office may result in a harassment claim. The limitation to those severely obese seems sensible but it is postulated that employers will have to take care in relation to any obese employees otherwise they leave themselves open for criticism and potential claims.

Conclusion

Both these decisions show that legislative framework prohibiting disability discrimination includes impairment caused by a particular level of obesity or morbid obesity – what is important is the effect that it has on a person's ability to conduct their professional life. *Walker* explored the functional overlay (emotional response/mental impairment) and *Karsten* firmly deals with obesity itself. These decisions may open the floodgates for other conditions to be given the same status. The CJEU confirmed that a tribunal is open to investigate the disability and its effects. However, the ET is not necessarily the best place to explore whether a disability is feigned. Although the UK courts did not recognise obesity as a disability in its own right – the decision in *Walker* made some inroads into this. The decision in *Karsten* means that the results of extreme, severe or morbid obesity can be classed as a disability under the Framework Directive. The decision of the CJEU is significant for the UK because the current regime of protection is predominantly based on the latter and therefore employers and service providers must take steps to ensure they do not fall foul of the law.

Bionotes

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²⁵ Note, the usual caveats in relation to making reasonable adjustments apply.