SUMMARY

2014/55 Being overweight does not constitute a disability (GE)

<p>Being overweight without suffering from severe or morbid obesity (<i>adipositas</i>) does not constitute a disability as defined in the German Equal Treatment Act. Therefore, the rejection of an overweight applicant cannot lead to a successful claim for damages based on disability discrimination.</p>

Summary

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Facts

The plaintiff in this case was a 42 year old woman. On 24 July 2012 she applied for the vacant position of managing director of a charitable organisation (the 'charity') that aims to promote health, in particular on behalf of patients with Lyme disease (*boreliosis*). Some of the members of the charity's Board of Governors are such patients.

The plaintiff was invited to an initial job interview at the home of the charity's public relations officer (the 'PR Officer'). The interview lasted several hours. The plaintiff later described it as a pleasant, intensive and personal meeting. It was agreed that there would be a second interview, this time with the entire Board of Governors, on Tuesday 28 August.

On Sunday 26 August in the evening, the PR Officer sent the plaintiff an email. The email confirmed the interview that was to be held two days later. The PR Officer added that she would like to have a telephone conversation with the plaintiff the next day (the day before the second interview) to discuss something she had observed during the first interview. She had

noticed that the plaintiff was overweight. (The judgment does not specify the plaintiff's weight, but it is known from an article in the press that she weighed 83 kilos which, given her 1.70metre height, yielded a body mass index (BMI) of 29). The email asked the plaintiff to explain the reason why she was overweight. This was because, as Managing Director, the plaintiff would need to chair meetings of the charity's members, at which the need for a healthy lifestyle was a recurring theme and health issues were often discussed openly. Having an overweight Managing Director would not be setting a good example. The email concluded, *"I do not want to hurt your feelings. I know from experience how it is to be overweight, having suffered from that condition myself between the ages of 12 and 22. Perhaps there is a good reason for the fact you are overweight".*

Fifteen minutes after the PR Officer had sent off her email, the plaintiff's husband called her. Exactly what was said during this telephone conversation is not clear, as the versions presented by the PR Officer and the plaintiff's husband differed. According to the latter, the PR Officer said: if your wife fails to provide a good reason why she is overweight, there will be no point in her coming to the interview on Tuesday. The PR Officer denied having said this. The plaintiff's husband said he replied: *"my wife's weight is a personal matter, for which she will not provide an explanation."*

The plaintiff failed to appear at the second interview. The Board members came for nothing, at least one from far away. On 29 August the plaintiff was informed that her application had been rejected.

On 26 October, a lawyer acting on behalf of the plaintiff sent the charity a 15-page letter. It alleged that the charity had discriminated against the plaintiff and had injured her constitutional right to human dignity (*Persönlichkeitsrecht*). The plaintiff claimed € 33,500 in damages along with unspecified compensation for loss of income and legal expenses. The PR Officer replied with a letter dated 6 November. The letter included the following:

"We did not reject the application. In fact, she was our favourite. We invited her to meet with the Board. There was only one point on which we felt misled. On the photograph she included in her application there was no indication of her enormous overweight. However, because she managed to convince us of her capabilities, we invited her for a second interview, for which our treasurer was to come over from Bremen. Internally, we discussed what the reason could be for a good looking woman with great abilities and ideas to derail physically at such an age.

[…]

At no point in time did we decide not to employ her.

It is clear that, by not appearing for the interview, she herself withdrew her application."

The plaintiff brought legal proceedings against both the charity and the PR Officer personally, claiming € 30,000 in damages on account of disability discrimination (and violation of human dignity1).

Judgment

The *Arbeitsgericht* (first instance court) held that the plaintiff was not disabled, and therefore not eligible for damages. The plaintiff did not qualify as a disabled person.

Section 15 of the German Equal Treatment Act2 (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'), which is the German transposition of Directive 2000/78/EC, provides for damages for those who have been discriminated against and applies, not only to employees but also to job applicants.

The *Arbeitsgericht* relied on the definition of a disability as a condition caused by an illness (diagnosed as curable or incurable) that entails a limitation resulting in particular from physical, mental or psychological impairments that, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional and personal life on an equal basis with other workers.

The *Arbeitsgericht* reasoned that the plaintiff, who did not describe herself as overweight, was clearly not obese to the point where it constituted an illness. Therefore, she was not disabled within the meaning of the AGG. The plaintiff was – also in the eyes of the defendant – professionally successful and socially integrated. Therefore, the defendants had not rejected the plaintiff's job application on grounds of disability.

The plaintiff further argued that the defendants had acted under the mistaken assumption that she was obese, which under German law is also a sufficient basis for a claim3. The court stated that in such a situation the plaintiff bears the onus of providing evidence of the alleged assumption. This, however, was not possible in the case at hand. The defendants had sent a letter explaining the situation when they were first addressed by the plaintiff regarding her claim for damages. The letter contained no indication regarding the possible assumption of a disability and merely reflected the mind-set of the defendants regarding overweight persons. Since this letter had obviously been written by the defendants themselves without any form of legal counsel, the Court followed the defendants' argument that the plaintiffs' application had been rejected not because of her weight but because she did not attend the follow-up interview.

The plaintiff has filed an appeal to attempt to overturn this decision.

Commentary

Being overweight without suffering from morbid obesity - which does constitute an illness - is not a disability. While the *Arbeitsgericht* has based its ruling on the German AGG, it seems the ECJ is likely to come to the same conclusion in its pending4 case of *Kaltoft* - v - *Kommunernes Landsforening*, which is a request for a preliminary ruling in a Danish case. In that case (C-354/13), the employee had been working for the municipality when his employment was terminated. A decline in the number of children was stated as the grounds for dismissal. Throughout his employment the employee never weighed less than 160kg and therefore, with a BMI of 54, he was classified as obese. The obesity was discussed at the dismissal hearing, but the employer denied that it formed part of the basis of its dismissal decision. The employee claimed that his dismissal was rooted in unlawful discrimination against him owing to his weight. The questions for the preliminary ruling are "*Is there a general prohibition in EU law on all forms of discrimination that includes obesity?*" and "*Can obesity be considered as a 'disability'?*" In his opinion (summarised in EELC 2014-2, page 58), the Advocate General argued that if the obesity has reached such a degree that it plainly hinders participation in professional life, it can be a disability. Only extreme, severe or morbid obesity (BMI of over 40), could suffice to create limitations, such as problems of mobility, endurance and mood, which amount to a disability for the purposes of the Directive in question. The German decision is in line with this opinion and it is likely that the ECJ will follow the Advocate Generals' opinion, although the opinion is not binding. While the plaintiff in the Danish case might succeed in his claim (BMI 54), the plaintiff in the German case (BMI 29) is less likely to be successful in her appeal against the decision of the *Arbeitsgericht*.

Moreover, in the hearing, the question of whether the incorrect assumption of the employer regarding disability could lead to discrimination was apparently discussed. The Advocate General gave his opinion regarding this question: from a German point of view the answer is yes.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Martina Hunger): The Austrian Equal Treatment Act prohibits direct or indirect discrimination on account of gender, ethnicity, religion or ideology, age and sexual orientation. This list is exhaustive. Therefore, discrimination on account of a person being overweight or obese is not covered by the Act.

However, disability is covered by the Austrian Disabled Persons Employment Act. A person is disabled within the meaning of the Act if he or she has a physical, mental or psychological

impairment for more than a temporary time period (i.e. for more than six months), which is liable to complicate or prevent participation in working life. Disabled persons under this Act may not be discriminated against directly or indirectly in relation, for example, to hiring, remuneration and other benefits, working conditions and termination of employment.

In the case at hand, the plaintiff claimed that she had been discriminated by the defendant on account of a supposed disability. If obesity leads to a physical or mental impairment that may complicate or prevent participation in working life, this may be treated as a disability under the Act. For this to happen, the employee must be permanently and morbidly obese. Whether this is the case should be assessed on a case by case basis. However, in line with the ECJ's most recent decision (C- 354/13), it seems that obesity could be regarded in this way.

Greece (Harry Karampelis):

1. Directive 2000/78 provides for the prohibition throughout the EU of any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation with a view to the attainment of a high level of employment and social protection (recital clause 11). Said Directive lays down minimum requirements, leaving to the Member States the option of introducing or maintaining more favourable provisions.

2. The European Court of Justice by its landmark Decision in the *Kaltoft* Case (C-354/13) establishes a precedent that could affect employment rights across Europe, ruling that obesity can, in severe cases, constitute a disability, stopping short, however, of declaring obesity to be a protected characteristic against which all discrimination is prohibited. The ECJ ruled that: (1) EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity regarding employment and occupation and (2) Directive 2000/78 must be interpreted in the sense that the obesity of a worker constitutes a 'disability' within the meaning of that directive if it entails a limitation resulting 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. It is for the national court to determine whether, in the main proceedings, those conditions are met.

3. This ECJ ruling is of great interest to employers across Europe. The judgment makes no direct link between Body Mass Index and obesity, but is a statement that an obese worker whose weight hinders his performance at work is entitled to disability protection. This means that employers must, on a case by case basis, make "reasonable" adjustments, for example, provide particular equipment to work, for example, a special desk or chair for office workers; consider whether there are duties that the employee may find particularly challenging because

he requires a long period of time standing or walking; consider requests for reduced hours or alternative working times where the employee suffers from particular fatigue or other physical symptoms which make it difficult to work core hours etc.; and protect such employees from verbal harassment, as well as initiate appropriate measures in order to remedy any functional defects. As one may well understand, the key concept of 'reasonable' adjustments is and will be under great discussion in the future. Further, obesity, particularly what is sometimes known as morbid or severe and complex obesity, can be a particularly sensitive subject. Employers thus should continue to promote healthy lifestyles and extend support to workers who are actively trying to reduce their weight.

4. Many grey areas however remain, including how employers will determine whether an employee is obese, whether such obesity is sufficiently severe to trigger protection, how to handle an employee who is 'in denial' and to what extent the individual can be expected to take self-help measures in the first place.

5. Employers and service providers will also have to take care not to make assumptions about the needs of an obese worker or customer. The issue of (mistakenly) perceived protected characteristic occurs quite frequently. Indicatively, in the case of *Estlin* -v- *Central Manchester University Hospitals NHS Foundation Trust*, the tribunal addressed the question of what the employer must perceive in order for an employee to gain the relevant protection in the context of a perceived disability discrimination claim. The tribunal found that the question for employers is simply what did they know about the condition, its duration or likely duration, and its effects upon the claimant? If there are elements that they did not know or had not addressed, it will not be possible to show that they perceived any such disability. If, however, the evidence shows that they did have such information and, when analysed, that information would satisfy all the necessary components of disability, then that will amount to a perception of disability. The tribunal went on to find that the perception must be that the claimant *actually* possesses that characteristic, and not merely that he *might* possess it. It is insufficient for an employer to suspect that the claimant possesses that characteristic: he must perceive that he actually does have it. The tribunal acknowledged that there may be a 'thin line between the two', as there was a sliding scale of perception of the characteristic by the employer - the highest on this scale being knowledge, then perception, followed lastly by suspicion. This scale would need to be considered in a case of perception discrimination.

6. Under Greek Law, employment rights and non-discrimination requirements in the employment sector would certainly fall under the protective scope of the constitutionally provided principle of proportionality and the rights to life, human dignity and the free development of the personality (Articles 2, 5 and 25 of the Greek Constitution). This has been recently ruled on by the *Conseil d' Etat* (State Council). According to Judgment no 3671/2014,

issued in October 2014, the *Conseil d' Etat* (Supreme Administrative Court of Greece) ruled on a case where a candidate to be hired as a secretary of the Judicial Body of the Greek Army was disqualified owing to "soft obesity", followingtherelevantlegalprovisionsthatsuchcandidates"should not weigh 2/10 or 3/10 above the normal weight" and thus should be excluded from such positions.The Counsellors interpreted the principles of meritocracy and proportionality, which provide that every Greek citizen should have the right to access public positions under objective criteria according to their personal capabilities and credentials. They further ruled that exclusion could only be justified by serious reasons in the public interest, which, in their opinion, were not present in the case at issue. Since the issue was considered to be of "high importance", it has been referred to a wider composition of the *Conseil d' Etat* (seven members) for it to produce a final judgment on the matter. It should be noted that the case deals with a job in the public sector. Things might be different in the private sector, as the employer has the right to impose stricter and/or specific standards when interviewing candidates in private sector employment and an application's rejection based on (mistakenly) perceived protected characteristics could not easily constitute sufficient grounds for a claim to be brought before the courts. However, if there is obvious discriminatory behaviour on the employer's part, this could possibly give rise to (i) claims against it for moral harm to the employee or potential employee flowing from that behaviour; (ii) claims regarding rehiring or compensation for invalid dismissal; and/or (iii) criminal complaints for verbal abuse.

The Netherlands (Peter Vas Nunes): This judgment raises a number of interesting issues.

1.Directive 2000/78 defines direct discrimination. This occurs where a person is treated less favourably than another grounds of, *inter alia*, disability. What does "on grounds of" mean? The recitals to the directive use the expression "based on", but that is equally vague as "on grounds of". If I treat a person unfavourably because I believe he or she is disabled (or (fe)male, foreign, Muslim, communist, aged, etc.), am I discriminating against that person on grounds of, or based on, disability? In his opinion in the *Kaltoft* case (C-354/13), Advocate-General Jaässkinen (at § 48-49)described this as a "difficult legal question". In a footnote, he refers to a report issued by the European Commission on 17 January 2014 (COM (2014)2 final) on the application of Directives 2000/43 and 2000/78. In this report "the Commission considers that the Directive also prohibits a situation where a person is directly discriminated against on the basisof a wrong perception or assumption of protected characteristics, for example, if a candidate for a job is not selected because the employer wrongly believes he or she is of a specific ethnic origin or homosexual." A footnote in the report references an Annex (which is not published on www.eurlex.eu). That annex mentions the UK case English - v - Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421, which it summarises as follows: "An

employee alleged that he had been subjected by colleagues at work to sexual innuendo suggesting that he was homosexual, in consequence of which he left his job. He was in fact a heterosexual married man and it was accepted that the perpetrators of this conduct had known that he was not gay. The UK Court of Appeal held that it did not matter whether the employee in these circumstances was gay or not. What was required was that an employee's sexual orientation - whether real or supposed - was the basis of the harassment. This was held to be the case, not only in the event of harassment of a person who was thought to be gay but was not, but also where a person harassed who was being treated as though he were gay although it was known that he was not. It followed that there had been harassment on grounds of sexual orientation." This UK judgment goes even further than outlawing discrimination on the basis of a supposed protected characteristic.

2. The issue of (mistakenly) perceived protected characteristics is by no means an academic or theoretical one, as this case illustrates. It is said to occur quire frequently in, for example, the situation where a job application is rejected on account of the applicant's name. If a native-born job applicant carries her husband's name El-Amari, for instance, and is not considered for a job interview, that could be a case of racial discrimination, even though Mrs El-Amari is not an immigrant herself. Another example, which the Dutch Equal Treatment Commission ruled on in 2004, was where an employee was dismissed during his probationary period following a minor stroke from which he recovered quickly. The employer mistakenly assumed that the stroke would cause the employer to lose his driving licence "for a lengthy period of time". The employer was considered to have dismissed the employee for a discriminatory reason, that is to say on the ground of (mistakenly supposed) disability.

3. Strangely, Dutch law, as is the case in Germany, used to outlaw supposed disability discrimination explicitly until the definition of unequal treatment was amended in 2011. The omission in the new definition seems to be an oversight of the legislator. The concept of supposed discrimination is now no longer based on the wording of statute but on its interpretation.

4. The doctrine that the concept of discrimination includes discrimination on the basis of a *perceived* protected characteristic is attractive but dangerous. Once we go down this path, where will we end up? Take the case of a job applicant who is not hired because she is ugly. Clearly, ugliness is not a disability. But what if the prospective employer believes that the applicant, because of her ugliness, has a "*long-term physical, mental or psychological impairment which in interaction with various barriers may hinder her full and effective participation in professional life on an equal basis with other workers*" (ECJ's definition)?

5. The case reported here concerns (supposed) obesity. The plaintiff seems to have based her

claim on direct (supposed) disability discrimination. Direct disability discrimination cannot, in principle, be justified. The plaintiff could perhaps, alternatively, have alleged indirect discrimination: overweight people are more often obese than others. The distinction between direct supposed disability and indirect actual disability seems to be a thin line.

Subject: Disability discrimination

Parties: unknown

Court: Arbeitsgericht Darmstadt (Labour Court)

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