EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2021/6 Conclusion of the ECJ case on whether obesity may constitute a disability (DK)

In 2014, the ECJ was presented with a preliminary reference from the District Court in Kolding on the matter of whether EU law provides protection against discrimination on grounds of obesity with regard to employment and occupation. Following the ECJ's ruling, first the District Court and later the High Court found that an employee's obesity as such did not constitute a disability within the meaning of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation since his obesity had not constituted a limitation or inconvenience in the performance of his job.

Summary

p style="margin-right:-33px">In 2014, the ECJ was presented with a preliminary reference from the District Court in Kolding on the matter of whether EU law provides protection against discrimination on grounds of obesity with regard to employment and occupation. Following the ECJ's ruling, first the District Court and later the High Court found that an employee's obesity as such did not constitute a disability within the meaning of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation since his obesity had not constituted a limitation or inconvenience in the performance of his job.

Legal background

p style="margin-right:-33px">The Danish Anti-Discrimination Act contains provisions implementing Directive 2000/78. Although neither the Act nor the Directive lay down a

definition of when a person has a disability, the term has developed through case law, especially in *Ring* and *Werge* (C-335/11 and C-337/11).

p style="margin-right:-33px">In case C-354/13 (*FOA*), the ECJ was presented with a reference for a preliminary ruling on whether it is contrary to EU law for an employer to discriminate on grounds of obesity in the labour market and on whether obesity could be defined as a disability within the meaning of Directive 2000/78.

p style="margin-right:-33px">The ECJ ruled that there is no general principle in EU law to prohibit discrimination on grounds of obesity regarding employment and occupation. The ECJ also held that obesity as such does not constitute a disability within the meaning of the Anti-Discrimination Act implementing Directive 2000/78.

p style="margin-right:-33px">However, the ECJ noted (in paragraph 59 of the judgment) that obesity may qualify as a disability if it entails a limitation that hinders the full and effective participation of the worker in professional life on an equal basis with other workers, and if that limitation is a long-term one, thus quoting the definition of disability first presented in the *Ring* and *Werge* cases.

p style="margin-right:-33px">Following the ECJ ruling in 2014, it was for the Danish courts to ascertain whether the employee met these criteria and had been discriminated against because of their obesity.

Facts

p style="margin-right:-33px">The case at hand concerned an employee who, after 15 years of employment with a municipality as a childminder, was dismissed due to declining birth rates. At no point during his employment had the employee weighed less than 160 kg. Therefore, he had been obese throughout the employment, as defined by the WHO.

p style="margin-right:-33px">The employee's trade union issued proceedings against the municipality, arguing that the employee had been dismissed because of his obesity and that the dismissal was, for this reason, in conflict with the general principle of non-discrimination and the right to equal treatment in EU law and Denmark's other international obligations. The trade union also argued that the employee's obesity was a disability protected under the Anti-Discrimination Act.

p style="margin-right:-33px">With reference to the ECJ ruling, the employer argued that there was no prohibition of discrimination based on obesity according to Denmark's obligations under international conventions enforceable by the Danish courts. Furthermore, the employer

argued that the employee had not proven that his obesity had hindered the full and effective participation in professional life *on an equal basis* with other workers. In fact, at no point during his employment had the employee expressed that he was limited in the performance of his tasks or that he experienced any particular inconvenience in performing his job. Consequently, the employee's obesity could not be considered a disability.

p style="margin-right:-33px">Finally, the employer argued that the employee's obesity had not been a factor in the decision to dismiss.

Judgment

p style="margin-right:-33px">Referring to the ECJ ruling, the District Court held that obesity as such does not constitute a disability. In the assessment of whether the employee had been hindered in performing his job due to obesity, the Court attached importance to the fact that the employee had performed his job as a childminder for more than a decade without any special accommodation being made or discussed. Furthermore, there was no medical information suggesting that the employee had physical or mental injuries stopping him from performing his job as a childminder on an equal basis with other workers. Therefore, the Court concluded that the employee did not have a disability within the meaning of the Anti-Discrimination Act.

p style="margin-right:-33px">The employee had also claimed compensation under the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR) as well as other international conventions. The District Court held that the Directive provided protection for employees with a disability with regard to employment and occupation and that, for this reason, the Charter could not be relied upon. In addition, the Court held that it was not for the national courts to decide on the issue of compensation under Article 41 of the ECHR. Accordingly, the District Court ruled in favour of the employer.

p style="margin-right:-33px">The employee appealed the case to the Western High Court, which delivered the final judgment in the case. In the High Court proceedings, the employee's trade union claimed, alternatively, that the dismissal was gender discrimination since the employee had been selected for dismissal among his co-workers as some parents had chosen not to have their children minded by him due to him being a man. Before the High Court, the employee also presented medical information describing that he had suffered from reduced lung function due to his obesity.

p style="margin-right:-33px">The High Court upheld the decision from the District Court, concluding that the employee had not proven that he had a disability within the meaning of the Anti-Discrimination Act.

p style="margin-right:-33px">The employee had been dismissed due to a decline in birth rates in the area and had been selected for dismissal among his co-workers because it was more difficult to refer children to him than the municipality's other childminders. The High Court concluded that the possibility of referring children was a gender-neutral criterion, and that there was no evidence presented supporting that such a criterion treated men less favourably than women. In conclusion, there was no evidence that the employee had been discriminated against due to his obesity or gender.

p style="margin-right:-33px">Further, the High Court did not find any basis in the evidence that the employer had taken the employee's obesity into consideration when dismissing him. The Court found that the employee had not been discriminated against on grounds of his obesity and, for that reason, concluded that the employee could not claim compensation based on a – potential – general prohibition of discrimination following from Denmark's international obligations or otherwise.

p style="margin-right:-33px">Accordingly, the High Court upheld the ruling from the District Court in favour of the employer.

Commentary

p style="margin-right:-33px">The decision from the High Court puts an end to the lengthy journey of this case. Based on the ruling, it could be concluded that EU law does not lay down a general principle of non-discrimination on grounds of obesity as such with regard to employment and occupation.

p style="margin-right:-33px">The preliminary ruling and the subsequent national rulings illustrate some of the guidelines laid down in *Ring* and *Werge* as to when a condition may be defined as a disability. One of the key points of the case is that the concept of disability does not depend on the extent to which the person may or may not have contributed to the onset of their disability, meaning that the concept of disability is not limited to conditions that are congenital or that result from accidents, but may include illnesses even if they are – to a certain extent – self-inflicted.

p style="margin-right:-33px">In addition, the ECJ noted that even if accommodating measures have not been taken, this does not mean that the employee could not be a disabled person within the meaning of the Directive.

p style="margin-right:-33px">In the case at hand, the employee suffered from some complications due to his obesity and was to a certain extent limited in the performance of his job according to his own statement – but he had performed his job without complaints or

extraordinary sickness absence all along. Nor had any accommodating measures been requested or made.

p style="margin-right:-33px">The District Court found, and the High Court agreed, that the inconvenience experienced by the employee was not of a nature that prevented him from performing his job as a childminder. Thus, the case illustrates that not any inconvenience caused by obesity constitutes a disability and that it is for the employee to prove that they are, to a not insignificant extent, limited in performing their job in order to be covered by the Anti-Discrimination Act.

Comments from other jurisdictions

p style="margin-right:-33px">*Austria (Hans Georg Laimer and Melina Peer, Zeiler Floyd Zadkovich)*: According to Section 3 of the Austrian Act on Employment of People with Disabilities (*Behinderteneinstellungsgeset*, 'BeinstG'), disability is defined as the effect of a non-temporary physical, mental or psychological impairment or an impairment of the senses which is suitable to complicate or prevent participation in working life. Non-temporary means a period which is (or expected to be) more than six months.

p style="margin-right:-33px">As far as can be seen no Austrian Supreme Court case law dealing with disability discrimination based on obesity exists. Nevertheless, if a person is significantly overweight and this leads to a physical or mental impairment, which may complicate or prevent participation in working life, such obesity may be qualified as a disability under Austrian law. For such serious impacts, the employee has to be permanently obese in a morbid manner. Whether or not such a permanent morbid obesity exists has to be assessed in every individual case. However, in line with the ECJ's case law, being significantly overweight in a morbid manner may be qualified as a disability.

p style="margin-right:-33px">

p style="margin-right:-33px">*Belgium (Gautier Busschaert, Van Olmen & Wynant)*: I understand from the case commentary that the Court considered that the obesity of the employee in the case at hand did not impede his participation in working life so that there is no disability as such seen the need of an interaction between a person's physical or psychological long-term impairment and the social activity (here work) in which he wishes to take part.

p style="margin-right:-33px">This is a valid point but the Court does not seem to have gone very deep into the reasons *why* less children were referred to the employee compared to the other childminders. From a Belgian perspective, this would be important since the Labour

Tribunal of Liège, in a judgment of 20 June 2016 commented in this review, ruled that discrimination based on obesity seen as a disability may occur even when the worker does not suffer from a handicap as such. In that regard, it is sufficient that their employer presumes (even falsely) that they suffer from an obesity which impairs their participation in working life. This ruling was influenced by the case law of the ECJ and more particularly the *Coleman* (C-303/06) and *Chez* (C-83/14) cases.

p style="margin-right:-33px">Both cases rely on the concept of 'discrimination by association'. The Labour Tribunal goes one step further and admits that one may be discriminated against by (false) perception. Was there a false perception behind the lack of referrals, that the employee due to his obesity would perform not so well compared to the other childminders? This question would have been important before Belgian courts.

p style="margin-right:-33px">

p style="margin-right:-33px">*Germany (Nina Stephan and Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH)*: In Germany, Directive 2000/78/EC has been implemented by the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). In accordance with Section 1 AGG, the objective of this Act is "[...] to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation."

p style="margin-right:-33px">This means that in Germany, too, discrimination on the grounds of disability is generally prohibited. However, as in Denmark, the AGG does not define or specify what constitutes a disability in accordance with the AGG. However, there are explanations and indications in other legislation and sections of the law stating the circumstances in which a disability can be assumed in the opinion of the legislator. For example, a definition can be found in Section 2 para. 1 of the 9th Social Code – Rehabilitation and participation of people with disabilities (9. *Sozialgesetzbuch*, 'SGB IX'). It states:

p style="margin-left:47px; margin-right:-33px">People with disabilities are people who have physical, mental, intellectual or sensory impairments which, in interaction with attitudinal and environmental barriers, are likely to hinder them from an equal participation in social life for longer than six months. An impairment according to sentence 1 exists if the physical and health condition deviates from the condition typical for a person's age. [...]

p style="margin-right:-33px">A very similar definition can also be found in Section 3 of the Disability Equality Act (*Behindertengleichstellungsgesetz*, 'BBG'). It states:

p style="margin-left:47px; margin-right:-33px">Persons with disabilities according to this Act are persons who have long-term physical, mental, intellectual or sensory impairments which,

in interaction with attitudinal and environmental barriers, may hinder them from an equal participation in social life. Long-term means a period of time that will most likely last longer than six months.

p style="margin-right:-33px">According to the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') (see judgment of 19 December 2013 – 6 AZR 190/12), these two definitions should also apply to the AGG, although the ECJ's case law has to be taken into account when interpreting these definitions. Thus, the German courts have to consider the same requirements as the Danish courts.

p style="margin-right:-33px">Since the ECJ's decision in 2014, the BAG has so far not had to deal (again) with the issue of whether and under what conditions adipositas (obesity) might constitute a (severe) disability. However, in 2016, the Regional Labour Court of Niedersachsen (*Landesarbeitsgericht Niedersachsen*) denied a disability based on adipositas because the employee was not prevented from participating fully and effectively like other employees in work life (decision of 29 November 2016 – 10 Sa 216/16). It referred in this respect to the decision of the ECJ and stated that there has to be a limitation in the concrete situation. Not every limitation due to being overweight is sufficient. Similarly, the Federal Social Court (*Bundessozialgericht*, 'BSG') decided in 2019 (decision of 30 April 2019 – B 9 SB 76/18 B) that being overweight alone is not sufficient for official recognition of a severe disability (in Germany, authorities have the power to grant a disabled person a disability status on application which leads to, among other things, special protection against dismissal and an increased vacation entitlement for persons with a disability of 50% or more). Only consequential and concomitant damages (in particular to the cardiopulmonary system or the musculoskeletal system) could justify the recognition of a severe disability.

p style="margin-right:-33px">Against this background, it seems very likely that a German court would have come to the same decision as the Danish court.

p style="margin-right:-33px">

p style="margin-right:-33px">*The Netherlands (Peter Vas Nunes)*: This case and the case report focus on the disability aspect. There is, however, another aspect, on which the report unfortunately does not provide much detail and on which the author does not comment. The employee in this case had been selected for dismissal among his co-workers as some parents had chosen not to have their children minded by him due to him being a man. Was this sex discrimination? The High Court concluded that 'the possibility of referring children' was a gender-neutral criterion, and that there was no evidence presented supporting that such a criterion treated men less favourably than women. This sounds as if the Court limited its

examination to the question of indirect sex discrimination. If I had been the employee's lawyer, I might have raised a direct sex discrimination argument. Imagine if the facts of the matter had been slightly different: there is a lack of work (reduction in the number of children), so one of the employees has to go. Some parents have indicated that they do not want their children to be minded by a muslim. The employee is a muslim, the only one on the staff, so the employer selects him for dismissal. Legally, the facts are identical to the Danish case, except that the strand of discrimination is different, religion rather than disability. Yet I suspect few lawyers will accept the defence that the criterion for dismissal is religiously neutral. The employee has been dismissed because of his religion. In the Danish case: because of his gender.

p style="margin-right:-33px">

p style="margin-right:-33px">*United Kingdom (Richard Lister, Lewis Silkin LLP)*: It is always interesting to learn about the final outcome of significant cases that are referred to the ECJ for a preliminary ruling, once they have returned to the relevant national court. The position under EU law and Danish law, as now confirmed by the High Court, is consistent with the approach that has applied in relation to obesity under UK equality law for many years.

p style="margin-right:-33px">Back in 2013, before this case went to the ECJ, the UK's Employment Appeal Tribunal (EAT) considered whether obese workers were protected from disability discrimination under the Equality Act 2010. The EAT concluded that, while obesity does not of itself render an employee disabled, its effects might make it more likely that they have impairments that have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, within the meaning of the legislation – for example, diabetes or mobility problems (*Walker – v – Sita Information Networking Computing Limited* UKEAT/009/12). That analysis remains consistent with the EU law position as clarified by the *Billund* ruling: obesity potentially amounts to a disability but this will depend upon the individual circumstances.

p style="margin-right:-33px">**Subject**: Disability Discrimination

p style="margin-right:-33px">**Parties**: FOA acting for A – v – the Local Authority of Billund (*Billund Kommune*)

p style="margin-right:-33px">**Court**: *Vestre Landsret* (Danish Western High Court)

p style="margin-right:-33px">**Date**: 6 November 2020

p style="margin-right:-33px">**Case number**: BS-1716/2016-VLR

p style="margin-right:-33px">**Hard copy publication**: Not yet available

p style="margin-right:-33px">**Internet publication**: Available from info@norrbomvinding.com

p style="margin-right:-33px">

p style="margin-right:-33px">

p style="margin-right:-33px">

Creator: The Danish Western High Court
Verdict at: 2020-11-06
Case number: BS-1716/2016-VLR