Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 17 July 2014[1]

Case C-354/13

FOA, acting on behalf of Karsten Kaltoft
v
Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund

(Request for a preliminary ruling from the Retten i Kolding (Denmark))

(Equal treatment in employment and occupation — Discrimination on grounds of disability — Whether EU fundamental rights law includes a general prohibition of discrimination in the labour market covering discrimination on grounds of obesity — Scope of application of the EU Charter of Fundamental Rights — Whether obesity can amount to a 'disability' under Article 1 of Directive 2000/78)

I – **Introduction**

1. Obesity is a growing problem in modern society.[2] In this order for reference the Court is asked to determine, and for the first time, which provisions of EU law, if any, apply to discrimination based on obesity.

2. Mr Kaltoft, the plaintiff in the main proceedings, claims that his employment with the Municipality of Billund as a childminder was terminated due to his obesity, and that this amounted to discrimination on grounds of disability. Mr Kaltoft further states that at no time during his period of employment with the Municipality of Billund has he weighed under 160 kg. He is 1.72 metres tall. The parties agree that throughout his 15 years of employment as a childminder with the Municipality of Billund, Mr Kaltoft has been obese as defined by the WHO.[3]

3. Mr Kaltoft's case is framed on two principal arguments. First, it is contended that obesity falls within a general prohibition in EU law covering all forms of discrimination in the labour market, and that this rule has been breached by the Municipality of Billund through Mr Kaltoft's dismissal. Secondly, it is proposed that obesity is a form of 'disability', so that discrimination on the basis of obesity is precluded by Articles 1 and 2 of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[4]

1 — Original language: English.

2 — For an overview of the problems in Europe see e.g. the Commission's White Paper entitled *A Strategy for Europe on Nutrition, Overweight and Obesity related health issues*, COM(2007) 279 final.

3 — Obesity is not a clear-cut phenomenon but ranges from the simple condition of being gravely overweight to morbid obesity. For a discussion, including an assessment of obesity by the WHO, see Part III C. 3. below.

4 — OJ 2000 L 303, p. 16. See notably *Chacón Navas*, C-13/05, EU:C:2006:456; *Coleman*, C-303/06, EU:C:2008:415; *Odar*, C-152/11, EU:C:2012:772; *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222; *Commission* v *Italy*, C-312/11, EU:C:2013:446; *Z*, C-363/12, EU:C:2014:159; *Glatzel*, C-356/12, EU:C:2014:350.

II – **Legal framework, facts, the questions referred and the procedure before the Court**

A – *Applicable provisions*

1. EU law

4. Pursuant to Article 1 of Directive 2000/78, the purpose of the 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', while Article 2 confirms that both direct and indirect discrimination are encapsulated in Directive 2000/78, with only the latter being subject to the proviso of objective justification.

5. The scope of Directive 2000/78 is set out in Article 3. 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.

2. Danish law

6. The Lov om forbud mod forskelsbehandling på arbejdsmarkedet mv. (Forskelsbehandlingsloven) lovbekendtgørelse nr. 1349 af 16. december 2008 (Law on the prohibition of discrimination in the labour market, etc, Consolidated Law No 1349 of 16 December 2008), Paragraphs 1, 2(1), 2a and 7a, are mentioned in the order for reference as the pertinent provisions of Danish law. Directive 2000/78 has been implemented through an amendment to the Forskelsbehandlingsloven.

7. Pursuant to the Forskelsbehandlingsloven, discrimination is understood to mean any direct or indirect discrimination on the grounds of, inter alia, disability. Such discrimination by employers is precluded in, inter alia, dismissal.

B – *Facts and the questions referred*

8. The plaintiff, Mr Karsten Kaltoft, who is represented by his union the FOA Fag og Arbejde ('FOA') has been employed since 1996 as a childminder in the Municipality of Billund, which is part of the public administration of Denmark. Childminders are hired to take care of other peoples' children in their own homes. Due to Mr Kaltoft's obesity, as part of its health policy the Municipality of Billund provided financial assistance for the period from January 2008 to January 2009 in order for him to attend fitness and physical training sessions.

9. Mr Kaltoft was dismissed by letter of 22 November 2010. The dismissal took place following an official hearing process applicable to dismissal of public-sector employees. At a meeting held during that process Mr Kaltoft's obesity was discussed. The parties disagree, however, as to how Mr Kaltoft's obesity came to be discussed at that meeting, just as they disagree as to whether it was stated that his obesity formed part of the basis for the dismissal decision. The reason given in the written notice of dismissal was that the dismissal had been decided on 'following a specific assessment on the basis of a decline in the number of children'. Obesity was not mentioned in the notice of dismissal, and nor were any reasons given as to why precisely Mr Kaltoft, of the several childminders employed by the Municipality of Billund, was selected for dismissal.

10. Mr Kaltoft submits that he was unlawfully discriminated against because of his obesity, and that the Municipality of Billund must pay him damages by way of compensation for the discrimination in which it engaged. He instituted proceedings before the Retten i Kolding, in pursuit of this claim.

11. On 25 June 2013 the Retten i Kolding decided to refer the following questions for a preliminary ruling.

'(1) Is it contrary to EU law, as expressed, for example, in Article 6 TEU concerning fundamental rights, generally or particularly for a public-sector employer to discriminate on grounds of obesity in the labour market?

(2) If there is an EU prohibition of discrimination on grounds of obesity, is it directly applicable as between a Danish citizen and his employer, a public authority?

(3) Should the Court find that there is a prohibition under EU law of discrimination on grounds of obesity in the labour market generally or in particular for public-sector employers, is the assessment as to whether action has been taken contrary to a potential prohibition of discrimination on grounds of obesity in that case to be conducted with a shared burden of proof, with the result that the actual implementation of the prohibition in cases where proof of such discrimination has been made out requires that the burden of proof be placed on the respondent/defendant employer (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)?

(4) Can obesity be deemed to be a disability covered by the protection provided for in Council Directive 2000/78/EC … and, if so, which criteria will be decisive for the assessment as to whether a person's obesity means specifically that that person is protected by the prohibition of discrimination [on] grounds of disability as laid down in that directive?'

12. The FOA, acting on behalf of Mr Kaltoft, the Municipality of Billund, represented by Kommunernes Landsforening (association of Danish municipalities), the Kingdom of Denmark, and the Commission deposited written observations. All participated through their representatives at the hearing that took place on 12 June 2014.

III – **Analysis**

A – *Preliminary observations*

13. At the outset it is important to be mindful of the scope of the preliminary questions. The first preliminary question, and the two following questions, relate to the problem of whether obesity can be considered as a *self-standing* ground of discrimination which, according to Mr Kaltoft, is unlawful due to a general principle of EU law prohibiting all forms of discrimination in the labour market.

14. The fourth preliminary question, on the other hand, asks in essence whether obesity is always or in some cases *included* in the scope of the notion of '*disability*' in the sense of Directive 2000/78.

15. A negative answer to the first preliminary question will render unnecessary an answer to questions 2 and 3 in the form the national court has formulated them, given that they too relate to the, alleged, general prohibition in EU law covering all forms of discrimination in the labour market. In the following I shall come to the conclusion that there is no general principle of EU law prohibiting discrimination in the labour market, and that would encapsulate discrimination on grounds of obesity as a self-standing ground of unlawful discrimination. However, in my opinion obesity of a certain severity may amount to a disability under Directive 2000/78.

B – *Is there a general prohibition in EU law on all forms of discrimination that includes obesity? (question 1)*

16. There are four provisions of the Treaties that address the issue of disability. They are Article 10 TFEU, according to which '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on … disability …', Article 19 TFEU, which provides the legal basis for the European Union to take appropriate action to combat discrimination based on disability, Article 21 of the Charter of Fundamental Rights of the European Union ('EU Charter') which prohibits '[a]ny discrimination based on any ground such as … disability', and Article 26 of the EU Charter, which states that the 'Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.

17. In contrast, obesity is not mentioned as a prohibited ground of discrimination in any of the provisions detailed above, or in any other measure of EU law. However, Article 21 of the Charter is open-ended in that it prohibits 'discrimination based on any ground such as …'. Therefore, on the basis of the wording of this provision, taken on its own, it might be argued that there is a general principle of non-discrimination in EU law covering grounds not explicitly mentioned in Article 21 of the Charter. Examples of such prohibited grounds of discrimination might lie in physiological conditions such as appearance or size, psychological characteristics such as temperament or character, or social factors such as class or status.

18. If there is a general prohibition on discrimination in the labour market that is provided by EU law, it would have to be grounded on (i) the EU Charter provision on non-discrimination (Article 21),[5] or (ii) general EU law principles resulting from constitutional traditions common to the Member States or guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In support of the latter, Mr Kaltoft relies on Article 14 of the ECHR, Protocol 12 to the ECHR, and open-ended non-discrimination provisions in the Estonian, Netherlands, Polish, Finnish and Swedish constitutions.

19. However, it is important to bear in mind that the Court has affirmed that Article 6(1) TEU precludes recourse to the Charter to extend '*in any way* the competences of the European Union as defined in the Treaties',[6] while Article 51(2) of the Charter has been interpreted in a similar way.[7] These provisions set out an outer-boundary of EU fundamental rights law that is pertinent to the case to hand.

20. Pursuant to Article 51(1) of the EU Charter, it only binds the Member States when they are 'implementing' EU law. Under the case-law of the Court to date, the fact that discrimination occurs in a substantive field such as the labour market is an insufficient foundation for concluding that a Member State, and in this case Denmark, is 'implementing' EU law.[8] Equally, where the objective of the main proceedings does not concern the interpretation or application of a rule of EU law other than those set out in the Charter, the link will be insufficient.[9]

21. Rather, before a legal situation is covered by EU fundamental rights law, as reflected in the EU Charter, there must be a certain degree of connection with EU law above and beyond the fact that matters covered are closely related, or one of those matters has an indirect impact on the other.[10]

5 — I note that the Court has recently held that Article 26 of the EU Charter on integration of persons with disabilities 'cannot by itself confer on individuals a subjective right which they may invoke as such'. *Glatzel*, EU:C:2014:350, paragraph 78.

6 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 23 (my emphasis).

7 — Ibid. See also *Pringle*, C-370/12, EU:C:2012:756, paragraph 179.

8 — See notably the guidance provided in *Åkerberg Fransson*, EU:C:2013:105.

9 — *Torralbo Marcos*, C-265/13, EU:C:2014:187, paragraph 33.

10 — *Siragusa*, C-206/13, EU:C:2014:126, paragraph 24.

22. The requisite link will be established when there is a specific and identified provision of Member State law, and in this case the law of Denmark, falling within the (substantive) scope of an equally specific and identified provision of EU law, whether it be found in an EU legislative act, or in the Treaties themselves.[11] A dual identification exercise of this kind does not appear in the case file. Rather, reliance is placed on the existence of a general principle of EU law precluding all discrimination in the labour market.

23. Further, Articles 10 and 19 TFEU are, in my opinion, insufficient for establishing an incidence of Member State implementation of EU law in the sense of Article 51 of the Charter. Article 10 TFEU contains, as Advocate General Wahl observed in *Z*,[12] a general clause which articulates a particular policy aim to which the European Union is committed. I add that Article 19 TFEU only establishes a legal basis for EU anti-discrimination measures within its competences and cannot be applied to grounds of discrimination not spelled out therein.[13] The Court has recently reiterated that national legislation capable of indirectly affecting the operation of a common organisation of the agricultural markets cannot in itself constitute a sufficient connection between that legislation and EU law so as to trigger application of Article 51(1) of the Charter.[14] Similarly, the fact that a decision taken by a public authority of a Member State, and here a decision dismissing Mr Kaltoft, might be capable of affecting EU anti-discrimination policy, can no more supply the connection required by Article 51(1) of the Charter.

24. According to the explanations to the Charter, Article 21(1) thereof 'does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article'.[15] Moreover all EU legislative acts prohibiting discriminatory conduct are addressed to specific grounds of discrimination within specific subject areas, rather than precluding in a generalised manner any discriminatory treatment. Here I have in mind, in addition to Directive 2000/78, which establishes a general framework for equal treatment in employment and occupation by reference to religion or belief, disability, age and sexual orientation, measures such as Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[16] and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[17] These measures do not prohibit discrimination in a generalised way but on grounds spelled out in the acts concerned.

25. Thus, a contrary conclusion to the effect that a generalised link between Member State and EU labour markets law is sufficient to engage EU fundamental rights protection at national level, would breach the established boundary on the outer limit of EU fundamental rights law. Indeed, the Court has held that, while EU fundamental rights law encompasses the general principle of

11 — For example, see the analysis undertaken by the Court at paragraphs 24 to 28 of *Åkerberg Fransson*, EU:C:2013:105. See also *Texdata Software*, C-418/11, EU:C:2013:588, where the Court held at paragraph 44 that the situation to hand was 'specifically governed' by a (specified) directive. For examples of cases to date in which no link was established with EU law for want of satisfaction of the dual identification requirement, see *Vinkov*, C-27/11, EU:C:2012:326; order in *Pedone*, C-498/12, EU:C:2013:76; order in *Gentile*, C-499/12, EU:C:2013:77; order in *Sociedade Agrícola e Imobiliária da Quinta de S. Paio*, C-258/13, EU:C:2013:810.

12 — Opinion of Advocate General Wahl in *Z*, C-363/12, EU:C:2013:604, point 112.

13 — In this sense *Chacón Navas*, EU:C:2006:456, paragraph 55.

14 — *Siragusa*, EU:C:2014:126 paragraph 29, citing *Annibaldi*, C-309/96, EU:C:1997:631 paragraph 22, and *Kremzow*, C-299/95, EU:C:1997:254 paragraph 16

15 — OJ 2007 C 303, p. 17, explanation concerning Article 21.

16 — OJ 2000 L 180, p. 22.

17 — OJ 2006 L 204, p. 23.

non-discrimination, and binds the Member States where the national situation at issue falls within the scope of EU law, 'it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof'. [18]

26. Finally, I do not accept the arguments of Mr Kaltoft to the effect that the general principle of EU law precluding discrimination on grounds of age, which is now reflected in Article 21(1) of the EU Charter, and which can, in some circumstances, have horizontal direct effect between two private parties, assists his case in any way. [19] There is nothing in the relevant age-discrimination rulings pointing toward the existence of a general principle of law precluding discrimination in the labour market generally. Nor can constitutional provisions common to a handful of Member States, or a protocol to the ECHR, such as Protocol 12 to the ECHR (that entered into force on 1 April 2005) establish a general principle of law which would oblige Member States to combat discrimination on grounds which, unlike age, are not spelled out in the Treaties or in EU legislation. Moreover, Article 14 of the ECHR cannot expand the competence of the European Union with regard to the principle of non-discrimination as protected by Article 21 of the Charter.

27. For these reasons I propose that the Court should give a negative answer to question 1. From that it follows that it is not necessary to answer to questions 2 and 3 as they stand in the order for reference. [20]

C – *Can obesity be considered as a 'disability' (question 4)?*

1. The concept of disability under Directive 2000/78

28. I note at the outset that the meaning of the notion of a disability under Directive 2000/78 has been discussed extensively in the Court's case-law. The core elements of it are as follows.

29. The concept of 'disability' is not defined by Directive 2000/78, and nor does the directive refer to the laws of the Member States for its definition. [21] Thus, an autonomous and uniform interpretation of 'disability' has been developed in the Court's case-law, and more recently against the background of the United Nations Convention on the Rights of Persons with Disabilities, which the European Union approved by a decision of 26 November 2009. [22] The Convention forms an integral part of the EU legal order from its time of entry into force. [23] It is also worth emphasising that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention. [24] The Court has held that the purpose of Directive 2000/78, as regards employment and occupation, is 'to combat *all forms of discrimination on grounds of disability*' [25] (my emphasis.)

18 — *Chacón Navas*, EU:C:2006:456, paragraph 56. See also, for example, *Betriu Montull*, C-5/12, EU:C:2013:571, where at paragraph 73 the Court held that, at the time of the facts of the proceedings, there was no prohibition in the EC Treaty or in any other provision of EU law of discrimination between the adoptive father and the biological father in relation to maternity leave. At paragraph 72 the Court held that the situation before it did not fall within the scope of EU law.

19 — *Mangold*, C-144/04, EU:C:2005:709; *Kücükdeveci*, C-555/07, EU:C:2010:21

20 — I recall, however, that the issue of burden of proof in the application of Directive 2000/78 was extensively dealt with in *Coleman*, EU:C:2008:415.

21 — *Chacón Navas*, EU:C:2006:456, point 39.

22 — See Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35). Further, according to Annex II of Decision 2010/48, in the field of, inter alia, employment, Directive 2000/78 is one of the EU acts which refers to matters governed by the UN Convention. *HK Danmark*, EU:C:2013:222, paragraph 31.

23 — *HK Danmark*, EU:C:2013:222, paragraph 30 and case-law cited; *Glatzel*, EU:C:2014:350, paragraph 68.

24 — *HK Danmark*, EU:C:2013:222, paragraph 32; *Z*, EU:C:2014:159, paragraph 75. This was confirmed recently in *Glatzel*, EU:C:2014:350, paragraph 70, even though the Court reaffirmed in *Glatzel* at paragraph 69 that the provisions of the UN Convention 'do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the measure of EU law in the light of the provisions of that convention', citing *Z*, EU:C:2014:159, paragraphs 89 and 90.

25 — *Coleman*, EU:C:2008:415, paragraph 38.

30. The notion of 'disability' for the purposes of Directive 2000/78 must be understood as referring to limitations which result, in particular, from (i) long-term [26] (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers [27] (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers. [28] The Court has further held that the expression 'persons with disabilities' in Article 5 of Directive 2000/78 must be interpreted as encompassing all persons having a disability corresponding with this definition. [29]

31. The scope of Directive 2000/78 cannot, through reference to the general EU law principle of non-discrimination, be extended by analogy beyond the grounds of discrimination listed in Article 1 thereof. [30] Therefore sickness as such is not a ground of discrimination that is prohibited by Directive 2000/78. [31]

32. Hence, while there is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness, [32] it is established in the case-law that 'if a curable or incurable illness' entails a limitation corresponding with the definition above, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78, [33] if medically diagnosed, [34] and the limitation is a long term one. [35] The Court has held that it 'would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability'. [36]

33. Taking into account the objective of Directive 2000/78, which is, in particular, to enable a person with a disability to have access to or participate in employment, the concept of disability must be understood as referring to a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity. [37] The UN Convention acknowledges in recital (e) that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. Thus, in the second paragraph of Article 1 of the UN Convention the words 'in interaction with various barriers' refer to attitudinal and environmental barriers.

26 — This follows from the second paragraph of Article 1 of the UN Convention. The impairments do not, however, need to have a quality of permanence. They need only be 'long term'. See *HK Danmark*, EU:C:2013:222, paragraph 39.

27 — According to recital (e) to the UN Convention, these barriers can be attitudinal or environmental. See *HK Danmark*, EU:C:2013:222, paragraph 37.

28 — *Z*, EU:C:2014:159, paragraph 80, and *Commission* v *Italy*, EU:C:2013:446, paragraph 56, citing *HK Danmark*, EU:C:2013:222, paragraphs 38 and 39.

29 — *Commission* v *Italy*, EU:C:2013:446, paragraph 57 (my emphasis).

30 — *Chacón Navas*, EU:C:2006:456, paragraph 56.

31 — *Chacón Navas*, EU:C:2006:456, paragraph 57.

32 — *Chacón Navas*, EU:C:2006:456, paragraph 46. For a discussion of the relationship between sickness and 'disability' see the Opinion of Advocate General Geelhoed in *Chacón Navas*, C-13/05, EU:C:2006:184, points 77 to 80, and the Opinion of Advocate General Kokott in *HK Danmark*, EU:C:2012:775, points 30 to 38 and 46.

33 — *HK Danmark*, EU:C:2013:222, paragraph 41.

34 — *HK Danmark*, EU:C:2013:222, paragraph 47. See also the Opinion of Advocate General Kokott in that case at point 28.

35 — *HK Danmark*, EU:C:2013:222, paragraph 41.

36 — *HK Danmark*, EU:C:2013:222, paragraph 40. See also the Opinion of Advocate General Kokott in that case at paragraph 32.

37 — *Z*, EU:C:2014:159, paragraph 77, referring to *HK Danmark*, EU:C:2013:222, paragraph 44.

34. Hence, an illness or an anatomical or physiological defect such as the absence of an organ does not itself amount to a disability in the sense of Directive 2000/78 if it does not represent a limitation that hinders that person's *full and effective participation* in professional life *on an equal basis* with other workers. For example, absence of a bodily function or organ, or an illness requiring particular attention, continuous medication and control may be a physiological or psychological burden to the person concerned, but not render impossible the full and effective carrying out of work, or hinder participation on an equal basis in professional life in general. [38]

35. This explains why the Court held in *Z* that a woman who had no uterus, and who was refused maternity leave by an employer after becoming a mother via surrogacy, when maternity leave was available for women becoming mothers through birth and adoption, was not suffering from a disability within the meaning of Directive 2000/78. The Court held that it was 'not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity'. [39]

36. The Court had earlier held, in slight contradiction with paragraph 81 of the judgment in *Z*, that even carers of those that suffer from a disability also benefit from the protection afforded by Directive 2000/78. Thus in *Coleman* no connection was made between the disability in issue, and the particular work in issue (and nor for that matter did this connection appear in *HK Danmark*). In *Coleman* the Court considered whether Directive 2000/78 encompassed a situation in which an employee who was not disabled herself was discriminated against on the basis that she cared for a disabled child.

37. The Court found in *Coleman* that the principle of equal treatment in the area of disability did not apply to a particular category of persons but by reference to the grounds mentioned in Article 1 of the directive. Consequently, it did not follow that the principle of equal treatment it was designed to safeguard was limited to people who themselves had a disability within the meaning of the directive. Rather, Directive 2000/78 had the objective of creating within the Union a level playing field as regards equality in employment and occupation. [40]

38. Hence, it is sufficient that a long term condition causes limitations in full and effective participation in professional life *in general* on equal terms with persons not having that condition. No link has to be made between the work concerned and the disability in issue before Directive 2000/78 can apply.

39. So, for example, a wheelchair bound travel agent who is dismissed because a new owner sees her disability as inconsistent with a new image for the agency that he wishes to develop will not be precluded from relying on Articles 1 and 2 of Directive 2000/78 just because all her co-workers also perform the task required seated, so that the job in question is not affected by her condition. This is significant due to arguments made by the Municipality of Billund, Denmark, and the Commission appertaining to the successful execution by Mr Kaltoft of the job of childminder over the course of 15 years. I will address these in Part III C 2. below.

40. I complete my analysis of the key legal provisions by noting that, pursuant to recital 17, Directive 2000/78 imposes no obligation to maintain in employment an individual who is not competent to perform the essential functions of the post concerned, but this is without prejudice to the obligation appearing in Article 5 of Directive 2000/78 for reasonable accommodation to be provided in order to

38 — See in this respect *Z*, EU:C:2014:159, paragraphs 79 and 80. As Advocate General Geelhoed observed at point 62 in his Opinion in *Chacón Navas*, EU:C:2006:184, as 'long as the genetic defect has not been identified, the person in question faces no discrimination. This may change once it becomes known, because employers or insurers do not want to risk employing or insuring those concerned.'

39 — *Z*, EU:C:2014:159, paragraph 81. See also paragraph 80.

40 — *Coleman*, EU:C:2008:415, paragraphs 38 and 47.

guarantee compliance with the principle of equal treatment in relation to persons with disabilities. This means that employers are to 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, unless such measures result in the imposition of a disproportionate burden on the employer. [41]

41. As can be seen from the above discussion, the principles elaborated by the Court to determine the meaning of disability reflect a broad perspective on the types of conditions that fall within its ambit. In my view this means that the case-law, like the pertinent EU legislation, has adopted, following the approach of the UN Convention, a social and not a (purely) medical model of disability. [42]

2. The ability to carry out work does not exclude disability

42. As already noted, the Court's case-law has referred to impossibility of carrying out work or hindrance in the exercise of professional activity. [43] This reflects a distinction between absolute or relative incapacity in relation to specific work, and full and effective participation in professional life in general.

43. This distinction is important because the Municipality of Billund, Denmark and the Commission argue that it cannot be contended that Mr Kaltoft's obesity entails a limitation that may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers because he worked for 15 years as a childminder with the municipality, and he has participated in professional life on an equal footing with other childminders in their employ. In other words, Mr Kaltoft's obesity may not necessarily have impeded *his* work as a childminder.

44. It is true that in relation to the impossibility of, or the existence of obstacles to, the carrying out of specific work, the applicability of the concept of disability depends on the concrete circumstances of the work in question, not abstract medical or social insurance classifications concerning the degree of the impairment as such. As Advocate General Bot has recently observed, what is decisive is the 'obstacles' a person encounters when they come into contact with that environment. [44] However, there can be long-term physical, mental or psychological impairments that do not make impossible certain work, but which render the carrying out of that job or participation in professional life objectively more difficult and demanding. Typical examples of this are handicaps severely affecting mobility or significantly impairing the senses such as eye-sight or hearing.

45. To return, then, to the example mentioned above of a wheelchair bound travel agent. Working from a wheelchair is an obstacle to full and effective participation in professional life on equal terms with persons not having that condition, because of the physical difficulties that inevitably arise in performing tasks, even if it does not affect the capacity of the person concerned to carry out the specific work in question.

46. It is established that Directive 2000/78 aims in particular at ensuring that persons with disabilities have access to, and can participate in, employment. Therefore, the concept of disability must be understood as referring to a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity. [45] Moreover, the argument above put forward by the

41 — *Chacón Navas*, EU:C:2006:456, paragraphs 49 and 50.

42 — See on this distinction opinion of Advocate General Wahl in *Z*, EU:C:2013:604, points 83 to 85.

43 — *Z*, EU:C:2014:159, paragraph 81.

44 — Opinion of Advocate General Bot in *Glatzel*, C-356/12, EU:C:2013:505, point 36. See not dissimilarly the Opinion of Advocate General Kokott in *HK Danmark*, EU:C:2012:775, point 27, the Opinion of Advocate General Wahl in *Z*, EU:C:2013:604, point 84, and the Opinion of Advocate General Geelhoed in *Chacón Navas*, EU:C:2006:184, point 58, where he said that it 'cannot be excluded … that certain physical or mental shortcomings are in the nature of "disability" in one social context, but not in another'.

45 — *Z*, EU:C:2014:159, paragraph 77, referring to *HK Danmark*, EU:C:2013:222, paragraph 44.

Municipality of Billund, Denmark, and the Commission would have the absurd result of excluding from the scope of Directive 2000/78 persons who either already had a disability when they managed to secure a specific job, or who acquired a disability in the course of an employment contract, but who managed to keep working.

47. Hence, as I have pointed out above, it is sufficient that a long term condition causes limitations in full and effective participation in professional life *in general* on equal terms with persons not having that condition. Moreover, it follows from the Court's ruling in *Coleman* that the relevant disability can even have been acquired not by the person who is discriminated against, but by a person in the care of the employee, who seeks to rely on Directive 2000/78. Thus, it need not be impossible for Mr Kaltoft to carry out his work as a childminder with the Municipality of Billund before he can rely on the disability discrimination protection afforded by Directive 2000/78. The case-law merely requires him to meet the definition reproduced in paragraph 30.

48. For the sake of completeness I refer to the issue, discussed at the hearing, of whether falsely presumed disability, and discrimination resulting therefrom, is captured by Directive 2000/78. In other words, is there prohibited discrimination on grounds of a disability when an employer believes unjustifiably that an employee suffers from a disability and is thus limited in his or her capacity to perform tasks adequately and is mistreated as a result?[46]

49. In my opinion it is not necessary to take a stand on this difficult legal question in the context of the present preliminary reference. This is because it is not contested that Mr Kaltoft is obese. If the national court finds that his condition amounts to a disability, and that Mr Kaltoft has been dismissed because of it, then any difference in treatment will be on the basis of real and not only presumed disability.

3. Does obesity amount to a disability?

50. Obesity is usually measured with reference to body mass index (BMI) which is the result of a person's weight expressed in kilogrammes divided by square of the height in metres (kg/m^2). The WHO ranks obesity into three classes by reference to the BMI. Persons with a BMI of 30.00 to 34.99 are Obese class I, persons with a BMI of 35.00 to 39.99 are Obese class II, and persons with a BMI in excess of 40.00 are Obese class III,[47] which is sometimes referred to as severe, extreme or morbid obesity.

51. According to the preliminary reference and Mr Kaltoft's written observations, he has been obese for the whole of his employment with the Municipality of Billund. In 2007 his BMI was 54, representing extreme obesity. Mr Kaltoft explains further in his written observations that he has, during the course of his employment, been referred by medical professionals for a gastric operation that was aimed at reducing the volume of his stomach. The operation, however, could not be completed because of an acute medical incident that arose during it. In my opinion this needs to be taken into account by the national court in deciding whether Mr Kaltoft's illness has been medically diagnosed in conformity with the test laid down by the Court in *HK Danmark* on the circumstances in which long term illnesses can be considered to be disabilities.

46 — See paragraph 4.5 of the Report from the Commission to the European Parliament and the Council Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') COM (2014) 2 final.

47 — See http://apps.who.int/bmi/index.jsp?introPage=intro_3.html. See also http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5917a9.htm.

52. Mr Kaltoft argues that the WHO considers obesity to be a chronic and durable illness. Furthermore he points out in his written observations that obesity has been considered to be a disability under the law of the United States of America.[48] According to Mr Kaltoft, obesity can entail physical limitations that create obstacles to the full and effective participation in professional life, either because of reduced mobility or because of pathologies or symptoms that result from it, and it can equally entail limitations on the employment market by reason of prejudice on the basis of physical appearance.

53. The Government of Denmark and the Commission seem to agree that obesity of a certain severity may fulfil the criteria set out in the Court's case-law relating to the concept of a disability in the sense of Directive 2000/78, the establishment of which, however, is a matter for the national court.

54. I note that classification of obesity as an illness by the WHO is not as such sufficient to render it a disability for the purposes of Directive 2000/78. This is so because, as explained above, illnesses as such are not encapsulated by Directive 2000/78.

55. I am also of the opinion that, in cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.

56. However, 'mere' obesity in the sense of WHO class I obesity is insufficient to fulfil the criteria in the Court's case-law on 'disability' under Directive 2000/78. In fact, for a person of Mr Kaltoft's height (1.72 m) a weight of 89 kg is sufficient to lead to BMI over 30. In my opinion, most probably only WHO class III obesity, that is severe, extreme or morbid obesity, will create limitations, such as problems in mobility, endurance and mood, that amount to a 'disability' for the purposes of Directive 2000/78.

57. This position does not entail extension of the bases of discrimination listed exhaustively in Article 1 of Directive 2000/78, in the sense excluded by the judgment in *Chacón Navas*.[49] As the Court has already observed, recital (e) of the UN Convention acknowledges that disability is an evolving concept.[50]

58. Finally, as I have already mentioned in paragraph 32, the Court has held that it 'would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability'.[51] Therefore, in the context of obesity, it is irrelevant for the purposes of Directive 2000/78 whether the person concerned became obese due to simple excessive energy intake, in relation to energy expended, or whether it can be explained by reference to a psychological or metabolic problem, or as a side-effect of medication.[52] The notion of disability under Directive 2000/78 is objective and does not depend on whether it is 'self-inflicted' in the sense that the person has contributed causally to the acquisition of the disability. Otherwise, physical disabilities resulting from conscious and negligent risk-taking in traffic or in sports, for example, would be excluded from 'disability' in the sense of Article 1 of Directive 2000/78.

48 — He refers to the American Disabilities Act of 1990 and the judgment of the United States District, Eastern District of Louisiana, *E.E.O.C. v. Resources for Human Dev., Inc.* 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011)

49 — *Chacón Navas*, EU:C:2006:456, paragraph 56.

50 — *HK Danmark*, EU:C:2013:222, paragraph 37.

51 — *HK Danmark*, EU:C:2013:222, paragraph 40.

52 — For example, according to one study, '[w]eight gain is associated with the use of many psychotropic medications, including antidepressants, mood stabilizers, antipsychotic drugs, and may have serious long term consequences'. Abstract of Ruetsch and Others, 'Psychotropic drugs induced weight gain: a review of the literature concerning epidemiological data, mechanisms and management', *Encéphale*, 2005, cited on http://www.ncbi.nlm.nih.gov/pubmed/16389718.

59. At the hearing, the representative of the employer was concerned that admitting obesity in any form as being a disability would lead to intolerable results because alcoholism and drug addiction could then, as serious illnesses, be covered by that notion. In my opinion this concern is misplaced. It is true that, in medical terms, alcoholism and addiction to psychotropic substances are diseases. This does not, however, mean that an employer would be required to tolerate an employee's breach of his contractual obligations by reference to these diseases. For example, a dismissal because the employee comes to work intoxicated is not based on the disease of alcoholism or drug addiction as such, but is a breach of the employment contract which the employee could have avoided by abstaining from consuming alcohol or the substance in question. Any employer is entitled to expect such an employee to seek the medical treatment that is necessary for him to be able to properly perform his obligations under the contract of employment. It is worth recalling that Article 5 of Directive 2000/78 merely requires employers to provide 'reasonable accommodation' to persons with disabilities.

60. For these reasons I propose that question 4 is answered in the sense that only severe obesity can amount to a disability in accordance with Article 1 of Directive 2000/78, and only when it fulfils all the criteria set out in the Court's case-law on the concept of disability. It is for the national Court to verify whether this is the case with respect to Mr Kaltoft.

IV – **Conclusion**

61. For these reasons I propose that the Court should answer questions 1 and 4 of the of the order for reference of the Retten i Kolding as follows:

(1) EU law does not include a general principle prohibiting employers from discriminating on grounds of obesity in the labour market.

(2) Severe obesity can be a disability covered by the protection provided in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation if it, in interaction with various barriers, hinders 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 if this is the case with respect to the plaintiff in the main proceedings.