

# A weighty issue

Chris Bryden & Michael Salter consider whether obesity is a disability



## IN BRIEF

► Mere obesity will not amount to a disability; however, where the obesity has reached a stage where it hinders full participation in professional life, it can amount to a disability.

Without apparent irony, the opening sentence of the Opinion of the Advocate General in the well-publicised case of *Kaltoft v the Municipality of Billund C-354/13*, 17 July 2014, notes that “obesity is a growing problem in modern society”. The question for consideration was to what extent European discrimination law applied to obesity.

### The case of Kaltoft

Mr Kaltoft was obese, and it was common ground that he had been so throughout the 15 years that he was employed by Billund as a childminder. At the time of his dismissal he weighed some 160kg, being a shade over 25 stone, or about the same as an ostrich. Kaltoft brought a claim relying on two inter-related grounds; first that his dismissal based on his obesity was a breach of the general prohibition of discrimination in the labour markets, and second, and more specifically, that obesity itself amounted

to a disability and thus infringed Directive 2000/78/EC.

Kaltoft’s employment as a childminder involved him being sent to the houses of parents who required such services. Billund had funded for a year beginning in January 2008 fitness and health classes for Kaltoft in an attempt to reduce his weight. However, in November 2010 Kaltoft was dismissed. There was a factual dispute as to the reason for his dismissal. While his obesity was discussed at a pre-dismissal meeting, this was not given as the reason for his dismissal, but rather he was told that he was being dismissed due to a general downturn in the number of children. He commenced proceedings, alleging that the reason for his dismissal was in fact his obesity, and the national court referred a number of questions to the Court of Justice of the European Union. These were whether it was contrary to EU law to discriminate on the grounds of obesity; whether that prohibition was directly applicable; where the burden of proof lay if so; and whether obesity could be termed a disability within the meaning of the Directive.

The Opinion of the Advocate General considered these four questions. It was noted that while obesity was not mentioned

specifically in the EU Charter, Art 21, dealing with discrimination, was opened, using the words “such as” before the specified examples. However, as the Charter applied only when a member state was “implementing” EU law, and the fact that discrimination occurs in a substantive field such as the labour market was not sufficient to demonstrate implementation. Therefore, while EU fundamental rights law encompasses the general principle of 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 Art 1 thereof”. The first three questions were therefore answered in the negative.

**“Langstaff P held further that while obesity did not itself amount to a disability, its existence may make it more likely that someone is disabled”**

### Is obesity a disability?

The Advocate General went on to consider the fourth question: can obesity itself be a disability. The English courts have previously given consideration to this question, notwithstanding the reaction of some elements of the British press to this apparent further ridiculous intrusion by Europe. In *Walker v Sita Information Networking Computing Limited* [2013] UKEAT 0097\_12\_0802, Langstaff P considered a case where a man weighing 21 stone suffered various consequential symptoms causing difficulties in his day to day life. At first instance the tribunal found that as there was no identifiable physical or mental cause, there was no disability falling within the Disability Discrimination Act 1995. This decision was overturned on appeal. Langstaff P did not accept that obesity was in itself a clinically recognised condition that therefore justified a finding of disability, but held that the focus on cause was an error; rather, the tribunal should ask itself whether there was an impairment, and whether that impairment was physical or mental. The absence of an identifiable cause was an evidential matter and not the focus of the statutory test.

Langstaff P held further that while obesity did not itself amount to a disability, its existence may make it more likely that someone is disabled. Again, this was a matter of evidential weight. The duration of the obesity was also potentially relevant: if someone was determined to lose weight and was likely to do so within 12 months, this would mean that there was no disability as the impairments would not last for more than 12 months. This is however in our view potentially a dangerous assumption for a tribunal to make, where the underlying cause of the symptoms is not known.

The Advocate General comes to broadly similar views. "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", and disability is an evolving concept. "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." Billung argued that Kaltoft had performed his duties for 15 years, and as such his obesity had not impeded his professional work and he could not therefore be disabled. However, the concept of disability applies to a hindrance in performing work, and not the impossibility of performing it.

#### Categories of obesity

The Advocate General made reference to the World Health Organisation (WHO) categories of obesity, noting that a person with a BMI of over 40 was classified as Obese class III, or morbidly obese. Kaltoft's BMI in 2007 was 54. He contended that obesity was considered by the WHO to be a chronic and durable illness, and noted that in the US it was recognised as a disability. The classification of obesity as an illness was not however determinative of it being a disability, as the Directive excluded illness from its scope. Mere obesity will not amount to a disability; however, where the obesity has reached a stage where it hinders full participation in professional life (and probably only Obesity class III will do so), it can amount to a disability.

In effect, this is another way of saying that national courts must apply the domestic law implementing the Directive, and

consider whether there is an impairment, by reference to the evidence. A person with morbid obesity may well not suffer hindrance when assessed purely on a BMI calculation. The touchstone remains whether evidentially there is an impairment; the fact that an employee is obese may support such a contention, but BMI of itself, or a consequent diagnosis of obesity is not determinative of the issue.

Interestingly, the Advocate General went on to address arguments as to whether, for example, alcohol addiction could as a result amount to a disability. He considered not. While such addictions amount to illness, an employer does not have to tolerate breaches of the terms of employment contracts, and a dismissal of a drunk employee would be for such breach, and not for the underlying condition. This raises the question of whether it is appropriate to include in contracts of employment restricting the intake of employees of fast food, or, less flippantly, mandatory fitness checks.

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