



# Discrimination based on obesity

- Implications of the FOA case, C-354/13

Jacob Sand | 1 June 2015

## The facts of the case

## The FOA case, case C-354/13

- Karsten Kaltoft was employed from 1996-2010 as a childminder with the Municipality of Billund. He had **performed his job to the satisfaction of the employer and the parents**
- During the entire employment Karsten Kaltoft was clinically obese (160+ kg), **BMI of 54 as a minimum**. In 2007 he attempted a gastric sleeve operation that was unsuccessful
- The head of the local municipality approached Karsten Kaltoft on the matter of his weight 3 times during the last 8 months of the employment (March 2010, 16 June 2010, and 18 October 2010)
- Barely two weeks after the meeting in October, i.e. on 1 November 2010, the childminder was informed that the municipality was contemplating his dismissal
- Karsten Kaltoft was dismissed on the 22 November 2010 as **the only one out of approx. 135 childminders**

## The FOA case, case C-354/13

- **Justification: “You were challenged to lose weight and work out and you did not take up this challenge”**
- The core issue of the case was
  - whether employees in pursuance of EU law are protected against discrimination due to clinical obesity based on a general principle of non-discrimination
  - whether obesity may constitute a disability

# Fundamental rights

## The Lisbon Treaty – article 6

- 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties
- The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties
- The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions
- 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties
- 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law

## Provisions

### Convention for the Protection of Human Rights and Fundamental Freedoms

- Article 14 – Prohibition of discrimination:
  - The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination on any ground such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

### Charter of Fundamental Rights of the European Union

- Article 21 – Non-discrimination
  - **Any discrimination based on any ground such as** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

## Case C-5/88 – Hubert Wachauf

- 17. **The Court has consistently held**, in particular in its judgment of 13 December 1979 in Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727, **that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community.** International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law
- 18. **The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function.** Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights

## Case C-4/73 Nold

- 13. As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures
- In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States
- Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law
- The submissions of the applicant must be examined in the light of these principles

## The view of the trade union in the FOA case

- It is the view of the trade union representing the employee that the judgments of the CJEU must be interpreted to mean that **the European Union respects all fundamental rights as long as the right is guaranteed by the constitution of one Member State**
- Several constitutions of Member States in the European Union have general prohibitions against discrimination, e.g. the Netherlands, Finland, Poland and Estonia

## Prohibition against discrimination

- All European constitutions encompass a principle of equality of the law
- Some Member States have general prohibitions against discrimination in their constitutions
- Accordingly, is a general prohibition against discrimination (at the work place) a fundamental right?

## The CJEU in the FOA case, judgment of 18 December 2014, ECLI:EU:C:2014:2463

- 32 According to the case law of the Court, **the fundamental rights**, which form an integral part of the general principles of EU law, include the general principle of non-discrimination. That principle is therefore binding on Member States **where the national situation at issue in the main proceedings falls within the scope of EU law** (see, to that effect, judgment in *Chacón Navas*, C-13/05, EU:C:2006:456, paragraph 56)
- ...
- 40 Having regard to the foregoing considerations, the answer to the first question is that EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation

## The opinion of Advocate General Jääskinen delivered on 17 July 2014, ECLI:EU:C:2014:2106

- 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’, while Article 51(2) of the Charter has been interpreted in a similar way. **These provisions set out an outer-boundary of EU fundamental rights law that is pertinent to the case to hand**  
  
...
- 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.

## Advocate General Jääskinen continued

- 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 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’  
  
...
- 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 questions 2 and 3 as they stand in the order for reference

## Conclusions

- The CJEU recognizes the existence of fundamental rights in the EU – also with regard to the general principle of non-discrimination related to obesity
- However, such prohibition against discrimination based on obesity does not fall within the scope of EU law and consequently the CJEU cannot enforce this fundamental right regarding anti-discrimination even though the fundamental right exists
- Before the Danish city court, the Danish trade union, on behalf of Mr Kaltoft, claims that international convention obligations (which were also pleaded before the CJEU) include fundamental rights regarding anti-discrimination, including a prohibition against discrimination based on obesity. These convention obligations can be enforced by the Danish courts, as Denmark has incorporated or adopted the conventions in question

## The FOA case before the Danish courts

- It is our expectation that the Danish city court will deliver its judgment by the end of 2015
- Subsequently, the judgment can be appealed by both parties to the Danish high court



# Opinion of Advocate General Jääskinen delivered on 17 July 2014, ECLI:EU:C:2014:2106

## Opinion delivered on 17 July 2014 – C-354/13

- IV – Conclusion
- 61. For these reasons I propose that the Court should answer questions 1 and 4 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

## The notion of disability

- 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 (ii) physical, mental or psychological impairments which in interaction with various barriers (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers**. 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

## General limitations in the professional life

- 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

## Hindrances and not necessarily impossibilities

- 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**. Moreover, the argument above put forward by the 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

## Obesity can constitute a disability

- 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

## Self-inflicted disability

- 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**’. 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. **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
- **Conclusion: Severe disability is presumed to constitute a disability, cf. “plainly” in paragraph 55**

## Judgment of the Court of the European Union (CJEU), C-354/13 of 18 December 2014, ECLI:EU:C:2014:2463

## Conclusions

- 1. EU law must be interpreted as **not laying down a general principle of non-discrimination** on grounds of obesity as such as regards employment and occupation
  
- 2. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the obesity of a worker constitutes a ‘**disability**’ within the meaning of that directive **where 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

## The CJEU

- 53 Following the ratification by the European Union of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35), the Court held that the concept of ‘disability’ must be understood as referring to a **limitation which results 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** (see judgments in HK Danmark, EU:C:2013:222, paragraphs 37 to 39; Z., C-363/12, EU:C:2014:159, paragraph 76; and Glatzel, C-356/12, EU:C:2014:350, paragraph 45)
  
- 54 That concept of ‘disability’ must be understood as referring **not only to the impossibility** of exercising a professional activity, but also to a **hindrance** to the exercise of such an activity. Any other interpretation would be incompatible with the objective of that directive, which aims in particular to enable a person with a disability to have access to or participate in employment (see judgment in Z., EU:C:2014:159, paragraph 77 and the case-law cited)

## The cause of the disability and “appropriate measures”

- 55 Moreover, 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** (see judgment in HK Danmark, EU:C:2013:222, paragraph 40)
- 56 The concept of ‘disability’ within the meaning of Directive 2000/78 **does not depend on the extent to which the person may or may not have contributed to the onset of his disability**
- 57 In addition, the definition of the concept of ‘disability’ within the meaning of Article 1 of Directive 2000/78 comes before the determination and assessment of the **appropriate accommodation measures** referred to in Article 5 of the same directive. According to recital 16 of Directive 2000/78, such measures are intended to accommodate the needs of disabled persons **and they are therefore the consequence, not the constituent element, of the concept of ‘disability’** (see, to that effect, judgment in HK Danmark, EU:C:2013:222, paragraphs 45 and 46). Therefore, the mere fact that such accommodation measures may not have been taken in respect of Mr Kaltoft does not mean that he could not be a disabled person within the meaning of the directive referred to

## Discrimination by association

## The oral pleading in Luxembourg

- In focus was the situation where an employer dismisses an employee because the employer **falsely presumes** that the employee – due to his disability/obesity – is less effective compared to other employees

## Report from the Commission to the European Parliament and the Council of 17 January 2014 COM(2014)2

- A headline on page 10 of the report: **"Discrimination by association, assumption and perception"**

“As suggested by existing national case law, the Commission considers that the **Directives also prohibit a situation** where a person is directly discriminated against on the basis of 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/she is of a specific ethnic origin or homosexual”

## How to Present a Discrimination Claim: Hand-book on seeking remedies under the EU Non-discrimination Directives

- Published by the European Commission, Directorate-General for Justice, July 2011, page 25:  
”Real, assumed or associated ground

In many cases the victim is told clearly on what ground she faces discrimination: ‘we do not serve Travellers’ (ethnic origin or race), ‘sorry, no guide dogs’ (disability), ‘young female staff sought’ (multiple sex and age discrimination).

However, there are also instances where victims feel that assumptions have been made about a protected ground, but is not clearly stated. **Discrimination based on an assumed ground – whether or not true in reality – is equally prohibited under European law.** If an employee is assumed to be gay, Jewish, Muslim or pregnant and is therefore not employed, not promoted or laid off, she can seek protection under European law. It does not matter whether or not she is really gay, Jewish, Muslim or pregnant”

## The view of the trade union representing the employee

- The **effectiveness** of Directive 2000/78 will be **disregarded** if an employee as Mr Kaltoft cannot call on the protection of the directive when he has provided facts from which it may be presumed that he has been discriminated due to the fact that the employer presumed that he was disabled

– **What did the CJEU state?**



## Presumed disability

- The CJEU does not clarify the situation!
- The Advocate General stated the following:
- 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?**
- 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

Thank you

Thank you

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## Discussion



Gorrissen Federspiel

ERA seminar in Trier

June 2015

Thank you

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## Contact information



**Jacob Sand**

[jas@gorrissenfederspiel.com](mailto:jas@gorrissenfederspiel.com)

Direct +45 86 20 74 04

Mobile +45 24 28 69 09



Gorrissen Federspiel

Gorrissen Federspiel

Thank you

## Where to find us

### Copenhagen

H.C. Andersens Boulevard 12  
1553 Copenhagen V  
Denmark

T +45 33 41 41 41

F +45 33 41 41 33



Gorrissen Federspiel

### Aarhus

Silkeborgvej 2  
8000 Aarhus C  
Denmark

T +45 86 20 75 00

F +45 86 20 75 99



ERA seminar in Trier

### Online

[www.gorrissenfederspiel.com](http://www.gorrissenfederspiel.com)

[contact@gorrissenfederspiel.com](mailto:contact@gorrissenfederspiel.com)



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