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Does Disability Begin at 40?
*Karsten Kaltoft v Kommunernes Landsforening (KL), acting on
behalf of the Municipality of Billund (Advocate General's Opinion)*
[2014]

Katy Ferris and James Marson

INTRODUCTION

Anti-discrimination legislation based on disability has been in existence in the United Kingdom since 1995 with the Disability Discrimination Act.¹ In the UK, the first major legislation action to outlaw discrimination began with sex and race,² and the effects of the UK's membership of the EU accelerated the extent and scope of the law, and these, along with the other protected characteristics³ have subsequently been codified in domestic law through the Equality Act (EA) 2010. Of the protected characteristics articulated in EA 2010, disability has been defined as where 'A person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.'⁴ Does this definition extend to individuals who are obese and suffer associated problems due to medical complications? This question is pertinent as nearly 25% of the UK adult population are classified as clinically obese (have a Body Mass Index of 30 or more) and regardless of the effect this has on the NHS and medical profession generally,⁵ for employers, it is becoming an increasing problem - 'Obesity imposes a significant human burden of morbidity, mortality, social exclusion and discrimination.'⁶ Obesity also has a negative impact on the national economy, leading to a reduction in the national output, reductions in tax revenues, with increased spending on benefits such as incapacity and unemployment payments.⁷

Whilst the Employment Appeal Tribunal (EAT) held in *Walker v Sita Information Networking Computer Ltd* [2013]⁸ that obesity, of itself, would not amount to disability, it did conclude that being obese is more likely to result in that person suffering a disability-related condition. In *Kaltoft v The Municipality of Billund*,⁹ the Advocate-General (A-G) to the Court of Justice of the European Union (Court of Justice) has provided an opinion that those individuals who are 'severely' or 'morbidly' obese (i.e. those with a Body Mass Index (BMI) of 40+) *may* be treated as disabled. They will be able to avail themselves of legal protection in the event of being dismissed or treated less favourably because of their condition, as a consequence of the impairments they suffer from being obese, but not because they are obese. As such, the law has not changed following the ruling by the A-G, but it does give employers pause for thought in how to ensure reasonable adjustments are made for individuals who are morbidly obese and thereby may (but not will) come under the remit of disability laws.

1. BACKGROUND

Excessive energy intake is what A-G Jääskinen referred to it as.¹⁰ In layman terms it's still overeating. In the US, being obese and being protected against discrimination on the basis of the condition and associated effects has, for over 25 years been an established form of law. In the EU, there has been some reluctance to give this form of affliction the legal status of a disability and hence protection in the Framework Directive 2000/78¹¹ or in domestic law (either the English, or in relation to the case of Mr Kaltoft, Danish legal systems). Obesity and its impact on employment has been subject to research for many years, particularly in the US where the links between obesity and the onset of many illnesses merely associated with the condition rather than directly related to obesity itself have been drawn - including type-2 diabetes, asthma, cancer, depression, stress,¹² heart disease,¹³ stroke, angina and osteoporosis whilst it further has negative implications including additional medical costs¹⁴ and disability generally.¹⁵ Research has also demonstrated that adulthood obesity leads to an increased risk of disability in later life, and it can lead to absenteeism due to disease-related illnesses.

Obesity is a phenomenon that has increased substantially in the Western world and is a cause for concern when it is considered that, as of 2011, 65% of men and 58% of women in England were identified as being in the overweight or obese category.¹⁶ Alongside the increasing numbers of individuals who appear in the obesity statistics there is evidence that obese individuals suffer from discrimination in employment¹⁷ and there is an increasing stigmatisation¹⁸ of obesity evidenced in people's attitudes.

Discrimination from employers is increasingly being evidenced and reported in the literature,¹⁹ whether this is conscious or subconscious and based on generalisations such as the obese having lower productivity rates (with a reduction in workforce participation, increased tendencies to experience work limitations²⁰ etc.).²¹ According to Flint and Snook '... the implications for UK business and society is that obesity is a factor that might cause preconceived notions about indolence, negative customer attitudes and stereotypical responses from workers to both emerge and become grounded as acceptable in organisations.'²² Further, it is also reported that overweight and obese individuals complain about workplace discrimination at a rate higher than individuals in the normal weight range.²³

This background is presented to briefly set the scene that a greater proportion of the general population in the West are being classified as obese, and consequently, more individuals in employment will be obese. They also suffer from discrimination on the basis of their physical appearance. They require protection if the law is to be used as a means of controlling the behavior of others whilst enabling the obese to engage with employment through the employer

making the 'reasonable adjustments' to their work and working conditions. The case of *Kaltoft* was based on two main arguments - first, that obesity falls within a general prohibition in EU law covering all forms of discrimination in the labour market (and this rule being breached by the employer's dismissal of Mr Kaltoft); and secondly, 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.²⁴

2. THE FACTS

At the time of his dismissal, Mr Karsten Kaltoft was 5 feet 7 inches tall and weighed a little over 25 stone. He had worked for 15 years for the Municipality of Billund as a childminder until his employment was terminated. Mr Kaltoft argued this amounted to discrimination on the grounds of disability. Kaltoft had been employed since 1996 and at no time during his employment had his weight dropped below 25 stone. As part of the Municipality's health policy, it provided Kaltoft with financial assistance between 2008-9 for him to attend fitness training sessions in order to lose weight.

On 22 November 2010, Kaltoft was dismissed from his employment following a hearing where, although there was a disagreement between the parties as to the content of the meeting and the reasoning of the employer, Kaltoft's obesity was discussed and this formed part of the reason for his dismissal. The employer argued that the dismissal was due to a decline in the business, although it gave no justification for Kaltoft's dismissal when several other childminders employed were not so selected. Kaltoft claimed that he had been unlawfully discriminated against because of his obesity and, being linked with his dismissal, the Municipality of Billund must pay him damages for the discrimination suffered.

On the basis of this claim, the Retten i Kolding referred questions to the Court of Justice for a preliminary ruling.

3. THE POINTS OF LAW AND QUESTIONS REFERRED

- (1) Is it contrary to EU law, as expressed, for example, in Article 6 Treaty on European Union 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?²⁵

- (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?

The issue at stake was whether obesity, on its own, can be considered as a self-standing ground of discrimination which is prohibited by EU law, and secondly, albeit contained in the fourth question cited above, whether obesity is always or merely in some cases included within the scope of 'disability' for the purposes and interpretation of Directive 2000/78?²⁶

4. THE ADVOCATE-GENERAL'S DECISION

A-G Jääskinen began answering question one at paragraph 16 of his opinion. Here he outlined the provisions in the Treaties that cover anti-discrimination on the basis of disability - Art 10 of the (Treaty on the Functioning of the European Union (TFEU); Art 19 TFEU; Art 21 of the Charter of Fundamental Rights of the European Union (the EU Charter), and in Art 26 of the EU Charter. These sources identify that the EU has a legal basis to take appropriate action to combat discrimination based on disability, and that as a general principle, the EU recognises and respects the rights 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. In none of the articles identified above, however, is there any express mention or reference to obesity. Art 21 of the EU Charter articulated the prohibition of discrimination 'based on any ground,' and therefore an argument could be presented that the general principle of non-discrimination and the list of areas where the EU is to prohibit discrimination is not to be interpreted as being exhaustive. This, argued the A-G, meant that examples such as discrimination which lay in 'psychological conditions such as appearance or size, psychological characteristics such as temperament character, or social factors such as class or status'²⁷ may be included.

Having established this general principle argument, the A-G went on to describe why Kaltoft's argument must fail in this particular instance. The EU Charter was unable to extend in any way the competencies of the EU as defined in the treaties,²⁸ and Arts 10 and 19 TFEU were insufficient grounds for establishing incidents of Member State implementation of EU law in the sense of Art 51 of the

EU Charter.²⁹ Art 19 TFEU for instance, only establishes a legal basis for anti-discrimination measures within its competences and cannot be applied to grounds of discrimination not expressed therein. Therefore, the A-G gave a negative answer to question 1. On that basis, neither questions 2 or 3 needed to be addressed or to be answered.

When considering question four - namely whether obesity could be considered as a disability, this required an assessment of 'disability' under the remit of Directive 2000/78. Disability is not defined in the Directive and neither does the Directive provide the Member States to establish their own definition. It has been through the Court of Justice's case law,³⁰ and against the background of the United Nations Convention on the Rights of Persons with Disabilities, which the EU approved in November 2009,³¹ that such a definition has been provided. This is important because Directive 2000/78 is required, as far as is possible, to be interpreted in a consistent manner with the UN Convention.³²

Directive 2000/78 considers disability to refer to limitations which result 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 in professional life on an equal basis with other workers. In this interpretation, the A-G considered that disability must be understood as referring to a hindrance to the exercise of professional activity, not to the impossibility of exercising such activity, and further, that the interpretation of 'in interaction with various barriers' referred to attitudinal and environmental barriers. This clearly does not result in an employer being required to continue employing a worker who is not competent to perform the essential functions of the job, however for the purposes of Directive 2000/78, the employer must make reasonable accommodation to guarantee compliance with the principle of equal treatment in relation to persons with disabilities to enable the person to have access to, participate in, or advance in employment, unless such measures result in the imposition of a disproportionate burden on the employer.³³

The result of this approach to the definition of disability is that in the EU, case law has adopted, following the broad approach within the UN Convention, a social and not a medical model of disability.³⁴ The fact that an individual will or has access to, and can participate in, employment does not prevent that individual from being disabled for the purposes of Directive 2000/78. It need not be impossible for an individual to be able to carry out his or her job before they can rely on the disability discrimination protection afforded by the Directive. To conclude otherwise would make an absurdity of the law.

Finally, the A-G sought to answer the direct question whether obesity amounts to a disability. Here, the A-G referred to the medical identification of obesity which is based on the individual's BMI. This results from an assessment of the individual's weight in kilograms divided by the square of their height in metres. The World Health Organisation (WHO) categorises obesity into three classes - Class I is a

person with a BMI between 30-34.99; Class II is a person with a BMI between 35-39.99; and Class III includes persons with a BMI in excess of 40.³⁵ This latter category is also referred to as severe or morbid obesity. Kaltoft had been obese the entirety of his employment. In 2007 his BMI was 54, he was referred to medical professionals for a gastric operation, but this failed due to other medical complications. This evidence was taken into account to confirm that here was an individual with a long-term illness. Kaltoft also referred in his submission that obesity has been defined as a disability in the United States³⁶ and further, that the nature of the condition entails physical limitations that create obstacles to the full and effective participation in professional life either because of reduced mobility, the symptoms that result from obesity, and/or the limitations on entry and participation into the employment market by reasons of prejudice on the basis of physical appearance.

The A-G agreed with many of the points presented, however, he also concluded that whilst the WHO defines obesity as an illness, it is not sufficient to render it a disability for the purposes of Directive 2000/78 (due to illnesses not being included in the remit of the Directive). This does not mean that obesity cannot present symptoms which would satisfy requirements for a disability, it is simply that the mere identification of the individual as obese would not render the individual disabled for those purposes. Continuing, the A-G remarked that in his opinion, individuals who were in the category of Class III would probably suffer limitations of mobility, endurance and mood that **would satisfy** the definition of disability.

At para 61 he offered his conclusion that the Court of Justice answer questions 1 and 4 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.

5. THE COURT OF JUSTICE

The Court of Justice will provide its ruling on 18 December 2014. It is expected that the Court will follow the A-G in determining that obesity of itself does not amount to a disability, rather it is the effects which will satisfy that criteria. It is also probable that an individual who satisfies the definition of Class III obesity will

also suffer the ill-effects which have been demonstrated in both *Walker* and *Koltoft*. Hence, whilst obesity is not technically a disability, at Class III, to all intents and purposes, it is.

6. THE IMPLICATIONS FOR THE INTERPRETATION OF DISABILITY

So far, we have the A-G's opinion on the issue who concluded that, in his view, obesity *may* amount to a disability for the purposes of protection under anti-discrimination laws. Anti-discrimination laws in the EU have developed over a number of years, most recently being codified in the UK through the EA 2010. The English law, through adherence to its EU parent Directives, provides a list of 'protected characteristics' with which an individual may personally be categorized as possessing, they may be associated with another person who possesses the characteristic, or indeed they may be perceived to possess. These characteristics, clearly identified in ss. 4-12 EA 2010, include disability (s. 6), but this is not specifically defined to include obesity. Further, whilst the A-G has opined that although obesity may be held as a disability, this is not to say that it actually does, will, or even that disability will usually be the outcome of obesity. Indeed, he went so far as to identify that there is no general rule on the prohibition of discrimination on grounds of a person's obesity in relation to EU law. Applying this to Mr Kaltoft's situation, the fact that he was dismissed because he was overweight did not make the dismissal unlawful for that reason. However, in relation to the facts of the particular case, the A-G did find that in instances of extreme, severe or morbid obesity where an individual's BMI is 40+, it is possible for the effects associated with this level of weight to establish problems which would fall into the category of disability for the purposes of anti-discrimination laws.³⁷ Where it affected the individual's mobility, their ability to walk long distances, an employer, for example, would be legally obliged to make the required reasonable adjustments as with any other form of disability to avoid discrimination against the individual.

A further issue which was quite interesting from the point of view of the A-G was that to satisfy the requirements of disability due to obesity, it was irrelevant to consider how the individual became obese. There are medical, psychological and simple – excessive energy intake – reasons for an individual to gain weight to such an extent as to make them obese. In any future assessment of disability, the focus of a court or tribunal would be in relation to the effect of the individual's weight and not the cause. It is also worthy of note that whilst this case revolved around a man who weighed in excess of 25 stone, and the A-G referred throughout to a BMI of 40 or greater, he identified that 40 should not be an arbitrary figure. Where similar effects applied to a person with a BMI of, for example, 38 or 39, where the effects on their health were the same, it would be inappropriate for a domestic court or tribunal to disqualify the claimant on such a matter.

7. THE UK APPROACH

Legislators have had difficulty in, on the one hand protecting individuals against discrimination based on a disability, whilst on the other ensuring the promotion of the needs of businesses for whom costs and regulation have been often arduous and viewed, perhaps, as unnecessary.³⁸

In the UK, the Disability Discrimination Act 1995, and then the EA 2010 identified discrimination on the grounds of disability and also, in schedule 1 of the EA 2010, provided guidance as to what would constitute a 'substantial and long-term effect' to warrant the definition of disability. This requires the effects and the impairment which is adversely affecting the individual's ability to exercise activities (e.g. workplace performance) to last over 12 months or for the rest of the person's life. A shorter period than the 12-month requirement does not satisfy this test and hence there will be no impairment for the purposes of the Act. Secondly, the definition given to 'substantial' has been 'more than trivial' and will affect the individual's ability to carry out normal 'day-to-day' activities. These issues had been raised in the Employment Tribunal, and latterly in the EAT in *Walker* where the claimant had suffered a number of problems relating to the condition of being obese. A substantial list was presented at the tribunal but it is sufficient for the purposes of this case note to identify that diabetes, high blood pressure, depression, joint pain, and bowel and stomach complaints were all symptoms of Walker's obesity. The EAT considered that medical language and labels did not necessarily assist in identifying whether a person should be held as possessing a disability. Langstaff P held that whilst obesity itself does not render an individual disabled, it does make it more probable that the symptoms the person possesses due to the obesity will make that individual disabled.³⁹

It can be seen that the A-G has largely followed a similar principle that was established in the EAT last year. However, this should not give employers any false sense of security and it is incumbent upon managers and employers to ensure policies are present to prevent potential claims on the basis of discrimination due to disability where an obese person applies for employment, becomes obese during their employment, or continues to be obese during employment. Training, assessments, appraisals and vigilance is required to ensure individuals who may suffer a disability because of their obesity are protected at work against victimization or harassment, and that the employer makes the necessary reasonable adjustments to comply with the EA 2010 and the associated EU parent laws. Further, the EA 2010 protects individuals with the protected characteristic of a disability from perceived discrimination. Whether an employer will be able to accurately judge an individual's BMI to be 38-40, or be able to physically see any substantial and long-term effects associated with the person's weight is unlikely. Hence, care at recruitment and interview is necessary (along with the necessary training to ensure no transgression of the law through direct discrimination are committed).

8. SOCIAL V MEDICAL MODELS OF DISABILITY

The major distinction between domestic law (the EA 2010) and the UN Convention, as alluded to by the A-G at para 41, is that whilst the Convention adopts a social model of disability which identifies disability as the interrelationship between individual and society, the EA 2010, on the other hand, adopts a medical model whereby the disability is identified as being intrinsic to that individual. Hence the EA 2010 questions whether the individual's condition is sufficiently serious to necessitate protection. For example, an individual who claims to be disabled would be assessed on the basis of his or her ability to carry out day-to-day activities such as general forms of mobility, ability to perform tasks of work and so on. Where the adverse effect is sufficiently substantial that it affects their ability to carry out these day-to-day activities is the point where an assessment is made as to evidence or not of discrimination. The other way to assess discrimination is from the Convention's perspective which enquires whether the individual who possesses a particular condition is *treated* in a way which leads to him or her suffering inequality. So, for example where the physical and organisational structure of employment makes it more difficult for a person to participate in that employment or working environment, this may trigger discrimination because the individual is being treated differently, adversely and to their detriment rather than it simply being a situation of objectively looking at the individual's condition. As Sargeant puts it 'Thus the medical model is concerned with providing a wheelchair for a person with a disability that affects their mobility; the social model would be more concerned about making access to transport and buildings as wide as possible. If a person in a wheelchair cannot access the building, it is society's responsibility, not that of the disabled person.'⁴⁰ These approaches are not necessarily mutually exclusive, but they do result in looking at the issue of disability in different ways and one is significantly more narrow than the alternative.

9. CONCLUSIONS

The A-G has arrived at a logical, if also a safe, conclusion to the issue of obesity, disability and discrimination. A-G Jääskinen's opinion is not binding on the Court of Justice, but it is unlikely that the Court will rule differently or make any substantive changes to the EU's laws on equality and anti-discrimination by extending this principle explicitly to obesity. The opinion may be considered to extend somewhat on the EAT's ruling in *Walker* because here the A-G was willing to concede that obesity may amount to a disability where it is of such a degree that it renders the individual's ability to participate fully in professional life on an equal footing with other individuals as being substantially affected (and over a long-period). The EAT did not go that far and hence the ruling of the Court of Justice will make interesting reading to parties where the worker (or a candidate for employment) is morbidly obese.

¹ Whilst anti-discrimination law is a relatively recent phenomenon, The Papists Act 1778 was legislation designed to mitigate some of the more extreme manifestations of official discrimination against Roman Catholics in Britain.

² The Sex Discrimination Act 1975 and the Race Relations Act 1976.

³ The nine protected characteristics are age, disability, gender reassignment, marriage or civil partnership (in employment only), pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

⁴ s 6(1).

⁵ In 2002 the total cost of obesity (for persons with a BMI of 30 or greater) in England was approximately £3340–3724 million (House of Commons Health Select Committee. *Obesity: Third Report of Session 2003/04*. The Stationery Office: London, 2004).

⁶ McCormick, B., Stone, I. and Corporate Analytical Team 'Economic costs of obesity and the case for government intervention' (2007) *Obesity Reviews* 8: 161–164, 161.

⁷ House of Commons Health Select Committee. *Obesity: Third Report of Session 2003/04*. The Stationery Office: London, 2004.

⁸ Equality Law Reports 476 (EOR 236).

⁹ FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund Kaltoft (Advocate General's Opinion) [2014] EUECJ C-354/13_O ECLI:EU:C:2014:2106.

¹⁰ Para 58.

¹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000).

¹² Magallares, A. Morales Francisco, J. and Angel Rubio, M. 'The Effect of Work Discrimination on the Well-Being of Obese People' (2011) *International Journal of Psychology and Psychological Therapy* 11: 255-267.

¹³ Mokdad, A.H., Ford, E.S., Bowman, B.A., Dietz, W.H., Vinicor, F., Bales, V.S., and Marks, J.S. 'Prevalence of Obesity, Diabetes, and Obesity-Related Health Risk Factors 2001' (2003) *JAMA* 289: 76–9.; US Department of Health and Human Services. *The Surgeon General's Call to Action to Prevent and Decrease Over-Weight and Obesity*. Washington, DC: Government Printing Office, US Department of Health and Human Services; 2001; Mokdad, A.H., Serdula, M.K., Dietz, W.H., Bowman, B.A., Marks, J.S., and Koplan, J.P. 'The Continuing Epidemic of Obesity in the United States' (2000) *JAMA* 284: 1650–1.

¹⁴ Sturm, R. 'The Effects of Obesity, Smoking, and Drinking on Medical Problems and Costs: Obesity Outranks both Smoking and Drinking in its Deleterious Effects on Health and Health Costs' (2002) *Health Affairs* March 21: 245–53.

¹⁵ Cawley J. 'An Instrumental Variables Approach to Measuring the Effect of Body Weight on Employment Disability' (2000) *Health Services Research* 35: 1159 –79.

¹⁶ The Health and Social Care Information Centre 2013.

¹⁷ See Caliendo, M., and Lee, W. 'Fat Chance! Obesity and the Transition from Unemployment to Employment' (2013) *Economics & Human Biology* 11: 121-133; and Pomeranz, J.L., and Puhl, R.M. 'New Developments in the Law for Obesity Discrimination Protection' (2013) *Obesity* 21: 469-471.

¹⁸ See Latner, J.D., and Stunkard, A.J. 'Getting Worse: The Stigmatization of Obese Children' (2003) *Obesity Research* 11: 452-456; and Puhl, R.M. and Brownell, K.D. 'Bias, Discrimination and Obesity' (2001) *Obesity Research* 9: 788-805.

¹⁹ Puhl, R., and Brownell, K.D. 'Bias, Discrimination, and Obesity' (2001) *Obesity Research* 9: 788–805.

²⁰ Tunceli, K., Li, K. and Keoki Williams, L. 'Long-Term Effects of Obesity on Employment and Work Limitations Among U.S. Adults, 1986 to 1999' (2006) *Obesity* 14: 1637-1646.

²¹ McCormick, B., Stone, I. and Corporate Analytical Team (2007), Economic costs of obesity and the case for government intervention. *Obesity Reviews*, 8: 161–164.

²² Flint, S.W. and Snook, J. 'Obesity and Discrimination: The Next 'Big Issue'?' (2014) *International Journal of Discrimination and the Law* 18: 1-11.

²³ Roehling, M.V., Roehling, P.V., and Pichler, S. 'The Relationship between Body Weight and Weight-Related Perceived Employment Discrimination: The Role of Sex and Race' (2007) *Journal of Vocational Behavior* 71: 73-90.

²⁴ Article 1 of Directive 2000/78, identifies that 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 - the latter being subject to the proviso of objective justification.

²⁵ 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.

²⁶ Paras 13 and 14.

²⁷ Para 17.

²⁸ Art. 6(1) TEU.

²⁹ Art. 51 reads – '1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

³⁰ *HK Danmark v Dansk almennyttigt Boligselskab* [2013] EUECJ C-335/11 IRLR 571.

³¹ 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 employment, Directive 2000/78 is one of the EU acts which refers to matters governed by the UN Convention (per *HK Danmark* n.30 at para 31.

³² (Case C 356/12) *Wolfgang Glatzel v Freistaat Bayern* [2014] EU:C:2014:350, para 70.

³³ (Case C-13/05) *Chacón Navas v Eurest Colectividades SA* [2006] IRLR paras 49 and 50.

³⁴ Para 41.

³⁵ http://apps.who.int/bmi/index.jsp?introPage=intro_3.html. See also

<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5917a9.htm>.

³⁶ American Disabilities Act of 1990 and the judgment of the United States District, Eastern District of Louisiana, *EEOC v Resources for Human Dev., Inc.* 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011).

³⁷ Similarly, in *Saad v University Hospital Southampton NHS Trust and another* [2014] UAEAT/0184/14/DM the EAT has recently held that an individual who suffered from depression and anxiety was not disabled due to the fact that the subsequent impairment he experienced did not have a substantial adverse affect on the claimant's normal day-to-day activities.

³⁸ See Hamilton, J. "Disability' and 'Discrimination' in the Context of Disability Discrimination Legislation: The UK and Australian Acts Compared' (2000) *International Journal of Discrimination and the Law* 4: 203-243.

³⁹ In the US the Equal Employment Opportunity Commission identifies individuals who are 'morbidly obese' as physically impaired. Further, the American Medical Association upgraded obesity from a 'condition' to a 'disease' which might be an argument that obesity is no more a 'minor' impairment.

⁴⁰ Sargeant, M. '*Discrimination and the Law*' (2013) Routledge, Oxon, p. 58.