

JUDGMENT OF THE COURT (Fourth Chamber)

18 December 2014 (*)

(Reference for a preliminary ruling — Social policy — Dismissal — Grounds for dismissal — Obesity of the worker — General principle of non-discrimination on grounds of obesity — No such general principle — Directive 2000/78/EC — Equal treatment in employment and occupation — Prohibition of any discrimination based on a disability — Whether a ‘disability’ exists)

In Case C-354/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the retten i Kolding (Denmark), made by decision of 25 June 2013, received at the Court on 27 June 2013, in the proceedings

Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft,

v

Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2014,

after considering the observations submitted on behalf of:

- the Fag og Arbejde (FOA), acting on behalf of Mr Kaltoft, by J. Sand, advokat,
- the Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund, by Y. Frederiksen, advokat,
- the Danish Government, by C. Thorning and M. Wolff, acting as Agents,
- the European Commission, by M. Clausen and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2014,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the general principles of EU law and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

- 2 The request has been made in proceedings between the Fag og Arbejde (FOA), a workers' union, acting on behalf of Mr Kaltoft, and the Kommunernes Landsforening (KL) (national association of Danish municipalities), concerning the lawfulness of Mr Kaltoft's dismissal, allegedly on the basis of his obesity.

Legal context

EU law

- 3 According to recitals 1, 11, 12, 15, 28 and 31 in the preamble to Directive 2000/78:

'(1) In accordance with Article 6 [TEU], the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. ...

...

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

...

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should

not serve to justify any regression in relation to the situation which already prevails in each Member State.

...

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.'

4 Article 1 of that directive states:

'The purpose of this 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.'

5 Under Article 2(1) and (2) of the directive:

'(1) For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

(2) For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...'

6 Article 3(1)(c) of the directive provides:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay.'

7 Article 5 of the directive is worded as follows:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall 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, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is

sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.’

8 Article 8(1) of the directive provides:

‘Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.’

9 Article 10(1) and (2) of the directive provides:

‘(1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

(2) Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.’

Danish law

10 Directive 2000/78 was transposed into Danish law by Law No 1417 of 22 December 2004, amending the Law on the principle of non-discrimination in the labour market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.).

11 That law, in the version published by Consolidated Law No 1349 of 16 December 2008 (‘the Law on anti-discrimination’), provides in Paragraph 1(1) thereof:

‘Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the basis of race, skin colour, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.’

12 Paragraph 2(1) of that law provides:

‘An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.’

13 Paragraph 2a of the law provides:

‘This means that employers shall 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, or to undergo training. This burden shall not be regarded as disproportionate when it is sufficiently remedied by public measures.’

14 Paragraph 7(1) of the law provides:

‘Persons whose rights have been infringed by breaches of Paragraphs 2 to 4 may be awarded compensation.’

15 Paragraph 7a of that law is worded as follows:
‘When persons who consider themselves wronged by a failure to comply with Paragraphs 2 to 4 establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 On 1 November 1996, the Municipality of Billund, one of the Danish public administrative authorities, hired Mr Kaltoft on a fixed-term contract, as a childminder, to take care of children in his home.

17 The Municipality of Billund subsequently hired Mr Kaltoft on a permanent contract, as a childminder, with effect from 1 January 1998. Mr Kaltoft performed that function for approximately 15 years.

18 It is undisputed between the parties in the main proceedings that, for the entire period during which Mr Kaltoft was employed by the Municipality of Billund, he was ‘obese’ within the meaning of the definition of the World Health Organization (WHO), obesity being registered under code E66 of the ‘International Statistical Classification of Diseases and Related Health Problems’ of the WHO (ICD-10).

19 Mr Kaltoft made attempts to lose weight and the Municipality of Billund, as part of its health policy, provided him financial assistance between January 2008 and January 2009 in order for him to attend fitness and physical training sessions. Mr Kaltoft lost weight which he subsequently regained, as in his previous attempts.

20 In March 2010, Mr Kaltoft resumed his work as a childminder after having taken leave of one year, due to family reasons. Thereafter, he received several unexpected visits from the head of the childminders, who wished to inquire into his weight loss. During those visits, the head of the childminders observed that Mr Kaltoft’s weight had remained virtually unchanged.

21 Owing to the decrease in the number of children in the Municipality of Billund, Mr Kaltoft, from the 38th week of 2010, had only three children to take care of instead of four, the number for which he had received authorisation.

22 According to the order for reference, the education inspectors within the Municipality of Billund were requested to nominate a childminder for dismissal and the head of the childminders, in view of the proposals received, decided that Mr Kaltoft would be that individual.

23 On 1 November 2010, Mr Kaltoft was informed by telephone that the Municipality of Billund intended to dismiss him, which resulted in the

carrying out of a hearing procedure for the dismissal of public sector employees.

- 24 Later on that same day, during a meeting with the head of the childminders and in the presence of the staff representative, Mr Kaltoft asked why he was the only childminder to be dismissed. The parties in the main proceedings are in agreement that Mr Kaltoft's obesity was mentioned during that meeting. However, they are in disagreement over how his obesity was mentioned during the meeting and on the extent to which it had been a factor in the decision-making process leading to his dismissal.
- 25 By letter of 4 November 2010, the Municipality of Billund formally notified Mr Kaltoft of its intention to dismiss him and requested him to submit any observations in that regard. In that letter he was told that the planned dismissal was taking place 'following a specific assessment on the basis of a decline in the number of children, thus that of the workload, having severe financial implications on the childminding service and on its organisation'.
- 26 Mr Kaltoft was unable to ascertain in specific terms the reasons as to why he was the childminder who was chosen to be dismissed. He was the only childminder to be dismissed on the ground of an alleged decline in workload.
- 27 The Municipality of Billund having given him a time-limit for submitting his observations, Mr Kaltoft, by letter of 10 November 2010, expressed the view that his dismissal was motivated by his obesity.
- 28 By letter of 22 November 2010, the Municipality of Billund dismissed Mr Kaltoft, indicating that his dismissal was taking place following a 'specific assessment on the basis of a decline in the number of children'. The Municipality of Billund did not make any observation on the view expressed by Mr Kaltoft, in his letter of 10 November 2010, regarding the real reason for his dismissal.
- 29 The FOA, acting on behalf of Mr Kaltoft, brought an action before the retten i Kolding (District Court, Kolding) claiming that, during his dismissal, Mr Kaltoft had been discriminated against on the basis of obesity and that he ought to receive compensation for that discrimination.
- 30 In those circumstances, the retten i Kolding decided to stay proceedings and refer the following questions to the Court 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 ...?
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?

Consideration of the questions referred for a preliminary ruling

The first question

- 31 By its first question, the referring court is essentially asking whether EU law must be interpreted as laying down a general principle of non-discrimination on grounds of obesity as such as regards employment and occupation.
- 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).
- 33 In that connection, it should be stated that no provision of the TEU or TFEU prohibits discrimination on grounds of obesity as such. In particular, neither Article 10 TFEU nor Article 19 TFEU makes reference to obesity.
- 34 As regards more specifically Article 19 TFEU, it follows from the case-law of the Court that that article contains only the rules governing the competencies of the EU and that, since it does not refer to discrimination on grounds of obesity as such, it cannot constitute a legal basis for measures of the Council of the European Union to combat such discrimination (see, by analogy, judgment in *Chacón Navas*, EU:C:2006:456, paragraph 55).

35 Nor does European Union secondary legislation lay down a general principle of non-discrimination on grounds of obesity as regards employment and occupation. In particular, Directive 2000/78 does not mention obesity as a ground for discrimination.

36 According to the case-law of the Court, the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof (see judgments in *Chacón Navas*, EU:C:2006:456, paragraph 56, and *Coleman*, C-303/06, EU:C:2008:415, paragraph 46).

37 Consequently, obesity cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination (see, by analogy, judgment in *Chacón Navas*, EU:C:2006:456, paragraph 57).

38 In this case, the file provided to the Court contains nothing to suggest that the situation at issue in the main proceedings, in so far as it relates to a dismissal purportedly based on obesity as such, would fall within the scope of EU law.

39 In that context, the provisions of the Charter of Fundamental Rights of the European Union are likewise inapplicable in such a situation (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 21 and 22).

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 second and third questions

41 In view of the answer to the first question, there is no need to answer the second and third questions.

The fourth question

42 By its fourth question, the referring court is essentially asking whether Directive 2000/78 must be interpreted as meaning that the obesity of a worker can constitute a ‘disability’ within the meaning of that directive and, if so, what are the criteria which decide whether an obese worker may avail of the protection afforded by that directive against disability-based discrimination.

Admissibility

43 The Danish Government maintains that the fourth question is inadmissible since it is hypothetical in nature. It does not follow from the facts set out by the referring court that Mr Kaltoft was unable to carry out his functions during the period in which he was employed by the Municipality of Billund, still less that he was considered to be suffering

from a ‘disability’ within the meaning of Directive 2000/78. Therefore, the answer to that question is not of use in resolving the dispute in the main proceedings.

44 In addition, the Danish Government submits that the answer to the fourth question leaves no scope for reasonable doubt, in that it may be clearly deduced from the existing case-law of the Court. In the light of paragraph 47 of the judgment in *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222), the referring court could itself give a ruling in the case in the main proceedings on the definition of ‘disability’ within the meaning of Directive 2000/78.

45 In that regard, it should be recalled that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, judgments in *Åkerberg Fransson*, EU:C:2013:105, paragraphs 39 and 40, and *B.*, C-394/13, EU:C:2014:2199, paragraph 19).

46 In the present case, the referring court expresses doubt concerning the interpretation of the concept of ‘disability’ within the meaning of Directive 2000/78, and, by its fourth question, seeks to know whether such a concept applies to an obese worker who has been dismissed.

47 In such circumstances, it is not obvious that the interpretation of EU law sought by the referring court is unnecessary in order for it to resolve the dispute before it.

48 Moreover, a national court is not prohibited from referring to this Court for a preliminary ruling a question the answer to which leaves no scope for reasonable doubt (see judgment in *Painer*, C-145/10, EU:C:2011:798, paragraph 64 and the case-law cited).

49 The fourth question must therefore be regarded as admissible.
Substance

50 As a preliminary point, it should be recalled that the purpose of Directive 2000/78, as stated in Article 1 thereof, is to lay down a general framework

- for combating discrimination, as regards employment and occupation, on any of the grounds referred to in that article, which include disability.
- 51 According to Article 2(2)(a) of that directive, direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds, inter alia, of disability.
- 52 Pursuant to Article 3(1)(c) of Directive 2000/78, that directive applies, within the limits of the areas of competence conferred on the EU, to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to dismissals.
- 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).
- 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.

58 It should be noted that obesity does not in itself constitute a ‘disability’ within the meaning of Directive 2000/78, on the ground that, by its nature, it does not necessarily entail the existence of a limitation as referred to in paragraph 53 of this judgment.

59 However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of ‘disability’ within the meaning of Directive 2000/78 (see, to that effect, judgment in *HK Danmark*, EU:C:2013:222, paragraph 41).

60 Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.

61 In the present case, as has been observed by the referring court, it is undisputed that Mr Kaltoft was obese for the entire period he was employed by the Municipality of Billund, thus for a long period.

62 It is for the referring court to ascertain whether, in the case in the main proceedings, irrespective of the fact that Mr Kaltoft, as has been noted in paragraph 17 of the present judgment, carried out his work for approximately 15 years, his obesity entailed a limitation which meets the conditions set out in paragraph 53 of this judgment.

63 Should the referring court arrive at the conclusion that the obesity of Mr Kaltoft meets the conditions set out in paragraph 53 of this judgment, it must be recalled that, as regards the applicable burden of proof, pursuant to Article 10(1) of Directive 2000/78, Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is

for the respondent to prove that there has been no breach of that principle. According to Article 10(2), Article 10(1) does not prevent Member States from introducing rules on the burden of proof which are more favourable to plaintiffs.

- 64 Having regard to the foregoing considerations, the answer to the fourth question is that Directive 2000/78 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.

Costs

- 65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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.**

[Signatures]