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Obesity may constitute a disability even if it is falsely presumed (BE)

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Summary

For the first time, a Belgian court has relied on the *Kaltoft* case, which holds that obesity may constitute a disability. That case gives rise to protection against discrimination, according to the Labour Tribunal of Liège, even if it is falsely presumed. This is the case where an employer sends an email to an applicant stating that the applicant cannot be hired because his or her obesity is a disability in relation to the job.

Facts

On 9 February 2014, the claimant applied for a position as a driving instructor at a driving school. The manager of the driving school replied positively to his application and invited him for an interview on 19 February 2014. On 21 February 2014, the manager sent the claimant an email stating as follows:

> "*After our interview, I have given a lot of thought but unfortunately, your physical profile for the job of driving instructor in my company is not appropriate. Have you already thought about losing weight? […] I think it is a handicap for this job. Good luck in your search.*"

On the same day, the claimant replied that he was disappointed that his physical profile might be an issue. He said that he had tested the Ford Fiesta used in another driving school and noticed that there was enough room not to disturb students. He was aware that his weight might be a disability and that is why he was only applying to driving schools that had spacious cars.

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The claimant then brought the matter before the Interfederal Centre for Equal Opportunities (the 'Centre'). A meeting was organised with a view to reaching an amicable settlement with the manager of the driving school, but to no avail.

On 12 February 2015, the claimant filed a claim against the driving school before the Labour Tribunal of Liège. On 15 July 2015, the Centre filed a request for intervention and became a party to the proceedings. A doctor's certificate issued on 2 December 2015, attested that the claimant had been morbidly obese since February 2014.

On 1 April 2015, the claimant started a new job in another driving school, where he used his own car, because the driving school's own cars were too small.

Judgment

The Labour Tribunal highlighted that the Act of 10 May 2007 prohibits discrimination based on a number of factors, including disability and physical characteristics (Article 3). The Labour Tribunal stated that according to the preparatory work for the Act of 10 May 2007, discrimination may occur on the basis of a characteristic assigned to a person, even if this is erroneous. To support its reasoning, the Labour Tribunal briefly referred to the case law of the ECJ, in particular, the cases of *Coleman* (C-303/06) and *Chez* (C-83/14).

The Labour Tribunal also approached obesity from the perspective of the *Kaltoft* case (C-354/13). This case found that EU law does not say that that there can be no discrimination based on obesity with regard to employment. Directive 2000/78, establishing a general framework for equal treatment in employment, must be interpreted as meaning that obesity is a 'disability' if it results in long-term physical, mental or psychological impairments, which in interaction with various barriers, may hinder the full and effective participation of a person in professional life on an equal basis with others (C-354/13).

For the Labour Tribunal, the main difficulty in the case at hand related to the notion of 'reasonable adjustments/accommodation', the refusal of which constitutes prohibited discrimination against a disabled person by virtue of Article 14 of the Act of 10 May 2007. The Labour Tribunal referred to this Article and, in accordance with Directive 2000/78, defined reasonable adjustments as follows:

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> "*Appropriate measures, taken in accordance with the needs of a concrete situation, allowing a disabled person to access, participate and progress in the fields for which this Act is applicable, except if these measures impose for the person who must adopt them a disproportionate burden. This burden is not disproportionate when it is sufficiently compensated by measures existing in the framework of the public policy conducted concerning disabled persons.*"

The Labour Tribunal also stressed ECJ case law, in particular, the joined cases of *Jette Ring* (C-335/11) and *Lone Skouboe Werge* (C-337/11), in which the ECJ ruled in favour of a wide definition of the concept of reasonable adjustments or accommodation, as follows:

> "*49. As [Article 5 of Directive 2000/78] states, the employer is required to take appropriate measures, in particular to enable a person with a disability to have access to, participate in, or advance in employment. Recital 20 in the preamble to the directive gives a non-exhaustive list of such measures, which may be physical, organisational and/or educational […]*
>
> *53. In accordance with the second paragraph of Article 2 of the UN Convention, 'reasonable accommodation' is 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'.*
>
> *54. Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.*
>
> *55. As recital 20 in the preamble to Directive 2000/78 and the second paragraph of Article 2 of the UN Convention envisage not only material but also organisational measures, and the term 'pattern' of working time must be understood as the rhythm or speed at which the work is done, it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive.*" (author's underlining throughout)

In view of the above, the Labour Tribunal considered that the claimant had suffered direct discrimination based on obesity, which it considered as a disability, or at least as a physical characteristic protected by Article 1 of the Act of 10 May 2007.

The defendant argued that there was no real proof that the claimant suffered from morbid obesity. However, the Labour Tribunal found that morbid obesity was attested to by a medical certificate – and that even if that were not the case, there is discrimination when someone is treated unfavourably based on a protected characteristic, if the person discriminating is mistaken in attributing that characteristic to the person affected. Therefore, whether the claimant was actually morbidly obese or not was not important. The important thing was that the defendant believed the claimant was morbidly obese and that his condition constituted a disability in relation to the job of a driving instructor.

As to whether the direct discrimination could be justified, the Labour Tribunal examined whether lack of obesity was a genuine and determining occupational requirement which was necessary in pursuit of a legitimate objective. It found that the claimant was not invited to test the cars used by the driving school to assess if there were safety issues, as the car he had driven to obtain his instructor's certificate was of a similar size to those used by the driving school. But, during the interview, they discussed allowing him to teach theory, as this would not raise any safety issues.

In terms of reasonable adjustments, the Labour Tribunal found that the defendant did not try hard enough to find out if he could have taken any measures to enable the claimant to work as a driving instructor. They could have explored buying a bigger car, setting him up to teach theory or assigning him students of a normal weight, for example. Teaching theory was discussed during the interview but the defendant did not take this idea any further.

Consequently, the Labour Tribunal determined that the claim for discrimination was substantiated and sentenced the defendant to pay a lump sum equal to six months' salary to the claimant and one symbolic Euro for undermining its core mission to the Centre.

Commentary

This is the first time to the author's knowledge, that a Belgian court has relied on the *Kaltoft* case to hold that obesity may constitute a disability. This case also illustrates how difficult it is to decide when the threshold from ordinary to disabling obesity has been crossed. The Labour Tribunal seems to consider that Class III (morbid) obesity constitutes a disability if it is established on the facts of the case.

Obesity is usually measured by reference to body mass index (BMI), which is person's weight expressed in kilogrammes divided by the square of the person's height in metres (kg/m2). The World Health Organisation (WHO) ranks obesity into three classes by reference to BMI. Those with a BMI of 30.00 to 34.99 are Obese Class I; those with a BMI of 35.00 to 39.99 are Obese Class II; and those with a BMI in excess of 40.00 are Obese Class III, which is sometimes referred to as severe, extreme or morbid obesity.

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In his opinion on the *Kaltoft* case, Advocate General Jääskinen held that "'*mere' obesity in the sense of WHO Class I obesity is insufficient to fulfil the criteria in the Court's case-law on 'disability' under Directive 2000/78*", while "*most probably only WHO Class III obesity, that is severe, extreme or morbid obesity, will create limitations, such as problems in mobility, endurance and mood, that amount to a 'disability' for the purposes of Directive 2000/78*" (paragraph 56). However, the boundaries are not so neatly drawn in practice and so it is often difficult to decide which side of the fence a particular kind of obesity should be on.

The Labour Tribunal believed it did not need to take a stand on this sensitive issue, as in this case the defendant believed that the claimant was obese enough for it to prevent him from performing his job. This was sufficient for the Labour Tribunal because obesity may constitute a disability giving rise to protection against discrimination *even if it is falsely presumed*. The Labour Tribunal took its cue from the preparatory work in the Act of 10 May 2007. It was also influenced by the case law of the ECJ and more particularly the *Coleman* (C-303/06) and *Chez* (C-83/14) cases.

In *Coleman*, the ECJ held that the prohibition against direct discrimination was not limited to people who were themselves disabled, but could extend to an employee who was the primary carer of a disabled child. In *Chez*, the ECJ went further, considering that the concept of discrimination on grounds of ethnic origin applied in circumstances in which all the electricity meters in an urban district mainly lived in by people of Roma origin were placed on pylons at a height of between six and seven metres, whereas the same meters were placed at a height of less than two metres in other districts. This was found to be discriminatory irrespective of whether the collective measure also affected some people who were not of Roma origin, but lived in that district.

Both cases rely on the concept of 'discrimination by association'. The Labour Tribunal in the case at hand went one step further by accepting that a person could be discriminated against based on a false perception. The ECJ has yet to rule on 'discrimination by perception' but it is likely that it would accept this further extension of the scope of anti-discrimination law, since the difference between association and perception is mainly one of degree. For in both cases, discrimination emerges based on a protected criterion even if, in the case of discrimination by association, the victim claims protection because he or she is somehow connected with a person possessing a protected characteristic, whereas in the case of discrimination by perception, although no one actually possesses the protected characteristic, the victim is tarred with that brush.

In any event, the Labour Tribunal stated that obesity, even if not of a disabling kind, constituted a physical characteristic protected by the Act of 10 May 2007. This is specific to Belgium, as physical characteristics do not rank among the criteria protected by Directive 2000/78. This highlights the wide-ranging scope of application of Belgian anti-discrimination law. Even if (falsely presumed) disability cannot be demonstrated, obesity as a physical characteristic may still be invoked.

Even though this was not discussed in the case under review, it is possible also to make the case that obesity threatens the current and future state of health of the person affected (another criterion protected by the Act of 10 May 2007, but not by Directive 2000/78), so that differential treatment on that basis would also be prohibited. This is interesting to note, since the latter two criteria are much less constraining than disability *per se*. Any physical impairment would suffice and it does not need to have long-term effects or hinder full and effective participation in professional life. However, were such criteria to be used in a case of direct discrimination in the field of employment, any objective justification could be accepted, whereas direct discrimination based on disability may only be justified if the existence of a genuine and determining occupational requirement is established.

In that respect, the Labour Tribunal rejects the existence of a genuine and determining occupational requirement for lack of evidence that the hiring of an obese driving instructor would raise safety issues. Even if objective safety issues were established, the defendant would have to try to make reasonable adjustments. The Labour Tribunal reminds us that the duty to try to find reasonable adjustments is far reaching, in the sense that it requires consideration of a wide range of possibilities beyond workplace adaptation. Yet, there is no indication that the prospect of taking any such measures was seriously considered in this case.

Therefore, the Labour Tribunal found that the claim for discrimination was substantiated and ordered the defendant to pay compensation to the claimant.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans): First, there is the issue of *perceived* disability. The Dutch courts have no problem in accepting that discriminating against someone on the grounds of a perceived disability constitutes direct disability discrimination. In 2015 a court of appeal confirmed this on the basis of the following reasoning. Initially, one of the Acts that transposed Directive 2000/78 into Dutch law – the Act on Disability Discrimination – explicitly equated perceived disability to actual disability. The Act had to be amended in 2011 in order to address criticism by the European Commission that had nothing to do with this aspect (the Commission had a problem with the way in which

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Dutch law defined unequal treatment). For some reason, the amended Act dropped the reference to 'perceived', but this was clearly not done with the intent to allow perceived disability discrimination. Therefore, the Act as it now stands must still be deemed to prohibit both actual and perceived discrimination, even though it no longer says this.

To my knowledge no Dutch court has taken the trouble to explain the reasoning behind equating perceived disability to actual disability. The Belgian court in the case reported here referred to *Coleman* and *Chez* and the author of the report seems to concur. I admit that *Coleman* and *Chez* came to mind when I put my thoughts to this issue, but on further reflection, I do not see that the difference between actual and perceived disability is merely one of degree, nor that discrimination by perception is only one step further than discrimination by association. To me, these concepts are distinct.

My second comment has to do with the demarcation line between direct and indirect disability discrimination. Turning down an application "because you are morbidly obese" is clearly direct discrimination and therefore not subject to justification. Does the same apply to turning down an application "because you are more likely than average to call in sick", where the reason for this concern is based on the applicant's morbid obesity? I am inclined to answer affirmatively. In *Dekker*, the ECJ equated anticipated absence to pregnancy, where the anticipated absence resulted from pregnancy, and, in turn, to gender.

Finally, this case addresses the issue of reasonable accommodation. The court suggests that buying a larger car and letting the plaintiff perform other work than that for which there was a vacancy (theoretical lessons) could have been reasonable accommodations. I can imagine that the defendant may have objected to such measures.

Germany (Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH): Section 7.1 of the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG') states, that the prohibition of discrimination is also valid if an employer simply presumes the existence of a forbidden ground of discrimination. Whether the attribute is in fact fulfilled by an employee is irrelevant. The legislature took into consideration that people are often discriminated against purely because of their characteristics and behaviour, including outward appearance.

To that extent, German law chimes with the Belgian ruling, but in terms of the ruling of discrimination on grounds of an alleged disability, the German courts might have found differently.

The German Regional Labour Court ('LAG') recently stated that even morbid obesity is not always a forbidden ground of discrimination under the AGG. The plaintiff in that case was suffering from Class III obesity. He was hired as an unimog-driver. After his fixed-term contract was not extended, he made a claim for discrimination. The LAG ruled that his obesity – unlike in the Belgian case – could not be treated as a disability under Section 1 of the AGG. The decisive circumstances were that his weight did not impede him during his daily work routine. As a result, neither the German definition of disability in the sense of the AGG, nor the ECJ's definition applied. Both definitions require that a physical, mental or psychological impairment prevents the employee from full, equal and effective participation in social and professional life.

It is therefore debatable whether a German Labour Court would have assumed there was a disability in the case at hand, particularly as claimant was not completely prevented from carrying out his profession as a driving instructor. The car in which he obtained his instructor certificate was of a similar size to those used by the driving school. Despite his weight, the claimant could easily have worked as a driving instructor at the defendant's driving school. It might also have been possible for him to use his own car to help him fully, equally and effectively participate in his professional life as a driving instructor. Taking all this into account, it is highly likely that a German court would not have concluded that the plaintiff was disabled.

Austria (Erika Kovács, Vienna University of Economics and Business): To the author's knowledge the Austrian Supreme Court has not yet ruled on whether different treatment based on obesity in an employment relationship can constitute discrimination on grounds of disability. However, such a judgment will probably been made sooner or later in Austria too.

Protection against discrimination based on disability is not regulated under the Equal Treatment Act (Gleichbehandlungsgesetz), which covers other protected grounds of discrimination, but appears in the Disability Employment Act (Behinderteneinstellungsgesetz). The scope of this protection broadly complies with EU Directive 2000/78.

The preparatory work of the government for the Disability Employment Act indicates that the term 'disability' (section 3) must be defined broadly. A finding that someone has a disability does not depend on reaching a particular level of disability, but is based on how far the impairments to health hinder a person's participation in working life. For there to be discrimination, the discriminatory act must relate to the person's health condition. Therefore, it is not the medical condition of the person *per se*, but its social implications that matter.

However, in Austria a physical characteristic without an impairment to health does not rank as a prohibited ground for dismissal, protected by the Equal Treatment Act or the Disability Employment Act. Therefore, if a person's weight does not reach an unhealthy level (to be proved by a medical certificate), it cannot constitute a

disability. In Austria, disability is not associated with unusual or obvious physical traits, such as obesity if they do not impair physical or mental functions. Therefore, for example, insulting someone about their weight would not constitute discrimination based on disability, unless the weight impaired the person's ability to function on a day-to-day level.

Subject: Discrimination; disability

Parties: Mr X and the Interfederal Centre for Equal Opportunities – v – Company Y

Court: *Tribunal du Travail de Liège* (Labour Tribunal of Liège)

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