

OBESITY AS A DISABILITY: THE IMPLICATIONS OR NON-IMPLICATIONS OF *KALTOFT*

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INTRODUCTION

Although no exact figures are available, it is estimated that around 14 per cent of the population in Britain are properly defined as persons with a disability.¹ Although it would appear odd in modern Britain that discriminating on the basis of a person's disability was possible, protection against such treatment is relatively new to the field of non-discrimination, with the UK introducing their protections less than 20 years ago², and the EU, of which protection against discrimination is a central constitutional principle, only introducing a need for Member State action in 2000.³ Due to its relative juniority the definition of disability is constantly developing, with conditions, such as obesity, which have not received much consideration from an equality perspective, beginning to receive greater consideration in case law. At present, legal protection against less favourable treatment on the grounds of obesity is unclear.⁴

Indeed it is only this year that the Court of Justice of the European Union (hereinafter the 'CJEU') has had its first opportunity to grapple with the idea of whether obesity can be a disability for the purposes of non-discrimination protection. The UK's approach of treating obesity as a condition that does not satisfy the statutory definition of disability requires scrutiny and perhaps even reconsideration following Advocate General ('A-G') Jaaskinen's Opinion in *Kaltoft*⁵, which appeared, at least on the face of it, to be in conflict with the current UK approach; however, to what extent the two approaches differ will be considered in more detail below.

The central focus of this paper is on the definition of a disability as well as the relevant jurisprudence on whether obesity is or can be classified as a disability within the relevant legislation.

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¹ Hepple B, *Equality, the legal framework*, Hart Publishing 2014, at pg 41.

² The UK introduced its first substantive legislation dealing with disability discrimination through the Disability Discrimination Act 1995; however, it ought to be noted that there were other less substantial protections in this area introduced prior to the 1995 Act, which had questionable success, such as the Disabled Persons (Employment) Act 1944.

³ This was introduced through Framework Directive 2000/78/EC, with required transposition by 2003. For analysis of the development of disability policy at EU level see Mabbett, D., 'The Development of Rights Based Policy in the European Union: the example of disability rights' [2005] *Journal of Common Market Studies* 97.

⁴ There is research that suggests that there is discrimination against obese people in terms of access to employment as well as internal promotion, with some evidence that the extent of the less favourable treatment is also affected by gender, with obese women being treated less favourably when compared to obese men; however, this is not the focus of this paper. But in respect of such dual discrimination, it ought to be noted that even if obesity is classified as a disability then the Equality Act 2010 is not capable of dealing with dual discrimination following the current coalition government opting not to bring in to effect s.14, which would have allowed for such protection. The consequence of such is that an obese woman would have to bring claims in both disability discrimination and sex discrimination, with neither guaranteeing success in circumstances where it is neither single characteristic leading to the less favourable treatment, but a combination of the two: this certainly increases complexity in such claims.

⁵ A-G Jaaskinen's Opinion in *Kaltoft*, Case C-354/13, ECLI:EU:C:2014:2106.

The impact of obesity?

Before one considers the issue of protecting obesity as a disability, it is worth considering what is meant by this concept and its consequences, albeit briefly. Obesity is a general label used when an individual has excess body fat at such a level that it may have an impact upon a person's health. The body mass index ('BMI') is used to determine whether a person is medically classified as obese, with the World Health Organisation establishing the widely accepted model⁶, with the term obesity applying where a figure of 30 kg/m² plus is reached through dividing an individual's weight by the square of their height.⁷ Indeed the WHO classification provides three categories of obesity⁸:

1. BMI 30.00-34.99, class I obesity or moderate obesity;
2. BMI 35.00-39.99, class II obesity or severe obesity; and
3. BMI 40.00+, class III obesity, or very severe obesity.

The impact that obesity has on an individual should not be underestimated, with it being considered to not only impact upon the life expectancy of an individual⁹ but also being the cause of death.¹⁰

Although there are the obvious physical impairments associated with obesity, such as being short of breath, being unable to walk too long a distance, and orthopaedic issues such as back pain, there are also psychological impairments associated with the condition.¹¹ One of the most notable, and well researched is that of depression, with research suggesting that there is a reciprocal link between depression and obesity, with obesity considered to increase the risk of depression.¹² There is also evidence, albeit limited, to suggest that individuals who are properly defined as morbidly obese are more likely to have mental disorders which could also include bipolar disorder, and antisocial personality disorders.¹³ It is important for employers to be aware that the focus is on the effect rather than the cause of an impairment; in other words, if obesity causes other impairments, either

⁶ Although there is modifications to this model, with many Asian countries adopting slightly different BMI figures when classifying obesity.

⁷ Where the BMI is between 25-30 kg/m² then the individual is defined as overweight rather than obese.

⁸ WHO, Obesity: preventing and managing the global epidemic: Report of a WHO Consultation (WHO Technical Report Series 894), 2000, at p.9. a PDF download of the report is available from <http://apps.who.int/iris/handle/10665/42330>.

⁹ It is suggested that being classified as severely obese will reduce life expectancy by up to 10 years: see Whitlock G, et al "Body-mass index and cause-specific mortality in 900 000 adults: collaborative analyses of 57 prospective studies". [2009] *Lancet* pp.1083–1096.

¹⁰ It is even suggested that 7.7% of deaths in Europe each year can be attributed to obesity: see Tsigos C, et al "Management of Obesity in Adults: European Clinical Practice Guidelines". [2008] *The European Journal of Obesity*: pp.106–116, and; Fried M, et al "Inter-disciplinary European guidelines on surgery of severe obesity". [2007] *Int J Obes (Lond)* pp.569–577.

¹¹ Research suggests bi-directional associations between mental health problems and obesity: see *Obesity and mental health*, National Obesity Observatory, March 2011.

¹² Luppino FS, de Wit LM, Bouvy PF, et al. 'Overweight, Obesity, and Depression: A Systematic Review and Meta-analysis of Longitudinal Studies', *Arch Gen Psychiatry*. 2010, p.220. Furthermore the WHO report also identifies other psychological impairments, including eating disorders and body-shape dissatisfaction associated with obesity: see n.7, pp. 55-57. It is suggested that psychological impairments associated with obesity impact upon women more than men, and as such obese women may need greater consideration in the workplace than men: see Department of Health's Report *Equality Analysis: a call to action on obesity in England*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213721/dh_130511.pdf.

¹³ Black DA, Goldstein RB, Mason EE. 'Prevalence of mental disorder in 88 morbidly obese bariatric clinic patients' *Am J Psychiatry* 1992; p.227.

physical or mental, then the focus moves away from the causative obesity, which then renders the question of whether obesity is a disability or not irrelevant, as in such circumstances the duty to make adjustments may exist in relation to the other impairments.¹⁴

The importance of determining whether obesity can be classified as a disability is obvious given the increased media coverage that the condition has received, being viewed as a major societal problem over the past couple of decades with numerous reports¹⁵ having been released suggesting that nationally and globally there is a huge increase in individuals suffering from obesity. The most recent report that received significant media coverage¹⁶ is the McKinsey Global Institute Report¹⁷, which produced some quite alarming statistics:

- The economic cost of obesity globally is £1.3tn, with the cost to the UK being £47bn. These figures took into account the cost of health care, as well as wider economic costs such as lost working days;
- 30% of the world's population were overweight or obese, which could rise to 50% by 2030;
- Between 2-7% of all health-care spending in developed economies is on obesity, rising to up to 20% if obesity associated diseases are included

These predictions are not out of line with the predictions of the State of the Nation's Waistline Report¹⁸, which predicts that over 50% of the UK's population could be obese by 2050, with a cost to the UK of £50bn.¹⁹ This suggests a continued upward trend on the findings of the Health and Social Care Information Centre, which identified marked increases in obesity levels in England through the years 1993 and 2012, with an increase from 13.2% to 24.4% in men and 16.4% to 25.1% in females.²⁰

When one considers the increased numbers (and rising) of persons classified as obese, and one acknowledges that employers have a legal duty to make reasonable adjustments for their disabled workforce pursuant to section 20 of the Equality Act 2010 (hereinafter 'EqA 2010'), as well as the protection from discrimination arising from disability through section 15 EqA 2010²¹, it is easy to

¹⁴ Obviously this will depend on the secondary impairments satisfying the test for disability.

¹⁵ This includes the Royal College of Physicians, *Action on obesity: Comprehensive care for all*, January 2013, <https://www.rcplondon.ac.uk/sites/default/files/action-on-obesity.pdf>, and; National Obesity Forum, *State of the Nation's Waistline*, January 2014, <http://www.noaw.org.uk/wp-content/uploads/2014/01/State-of-the-Nations-Waistline-Obesity-in-the-UK-Analysis-and-Expectations.pdf>. Both last accessed on 24/11/2014.

¹⁶ Including on the BBC news website on 20 November 2014: <http://www.bbc.co.uk/news/health-30122015>.

¹⁷ McKinsey Global Institute, *Overcoming obesity: An initial economic analysis*: accessible from http://www.mckinsey.com/insights/economic_studies/how_the_world_could_better_fight_obesity [last accessed 23/11/2014].

¹⁸ See n.15.

¹⁹ This builds upon the research contained within the 2007 Foresight Report, *Tackling Obesities: Future Choices*, which found that by 2050 60% of men and 50% of women could be clinically obese, with obesity-related diseases costing an extra £45.5 bn per year. The Foresight Report can be downloaded from: http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/PublicHealth/HealthImprovement/Obesity/DH_079713.

²⁰ HSCIC, *Statistics on Obesity, Physical Activity and Diet - England, 2014*, Feb 26, 2014: available for download at: <http://www.hscic.gov.uk/catalogue/PUB13648>.

²¹ Although this is unlikely to have too great an impact in this area considering that if obesity is a disability then focus will be on the consequent conditions of obesity, which is already the focus in the Employment Appeal Tribunal, noted elsewhere in this paper, whereas if obesity is not held to be a disability when the European Court decides on the matter then s.15 EqA will have offer no protection. As such s.15 EqA 2010 will not be discussed any further in this paper.

appreciate the importance of this matter from an employer perspective, with a finding that obesity is a disability potentially imposing an extensive and costly duty on the employer.

This paper will commence by viewing the UK's approach to the concept of disability²², before appreciating how the concept was then developed further by the CJEU. Consideration will then turn to the approach of both the UK courts and the CJEU on the matter of whether obesity can be classified as a disability, before making conclusions on the implications for employers.

THE STATUTORY CONCEPT OF DISABILITY: THE UK APPROACH

The statutory definition of disability has remained fairly stable in the UK since it was first introduced in the Disability Discrimination Act 1995 (hereinafter 'DDA'), with the current approach in the EqA 2010 virtually mirroring the original definition:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.²³

The definition was carefully constructed to ensure that too legal an approach was avoided and that a more common sense approach was used, which would then be compatible with the generally acceptable societal perception of what is meant by the term disability.²⁴ It is only following consideration of the constituent parts of the definition that one can then determine whether an individual falls within the EqA 2010's scope under this protected characteristic. Interestingly, the UK's approach to the concept of disability, although appearing to promise a socio-legal and socially inclusive approach, introduced very much a medical approach, which arguably weakens the protections initially envisaged.²⁵

This paper now turns to consider the constituent parts of the definition of disability, with a particular focus on how the definition could apply to obesity.

(i) Physical or mental impairment

To assist with determining whether an individual has a disability Guidance²⁶ has been introduced²⁷, which provides that the term 'impairment' should be given its 'ordinary meaning'.²⁸ As with the

²² Which is now contained within the EqA 2010.

²³ This definition is contained within section 6 of the Equality Act 2010.

²⁴ Minister of State, Hansard, HC Standing Committee E, col 73.

²⁵ See Doyle B, Disabled Workers' Rights, the Disability Discrimination Act and the UN Standard Rules (1996) Industrial Law Journal 1. Similar criticism can be seen by Hepple: see n.1, p.44.

²⁶ Equality and Human Rights Commission, Equality Act 2010 Guidance:

Guidance on matters to be taken into account in determining questions relating to the definition of disability. Available at

http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/odi_equality_act_guidance_may.pdf [last accessed 24/11/2014].

previous approach under the DDA matters such as addictions to alcohol, nicotine or any other substance fall outside of the definition of disability, as does a tendency to set fires, steal, physically or sexually abuse other persons, exhibitionism or voyeurism.²⁹

When considering the concept of impairment the focus of the investigation is to be on the effect that it has on an individual, rather than on the underlying cause. Not only is this evident in case law³⁰, but this is further elucidated in the Guidance.³¹ This focus on effect introduces practical considerations which must be taken into account when considering impairments: firstly, conditions which themselves cannot be properly deemed an impairment as they appear to explicitly fall outside of the definition must still be carefully evaluated, to evaluate whether any consequent effects themselves can be properly deemed an impairment. A good example of this is in the *Walker* case, where the EAT gave consideration to the matter of reduced mobility as a potential physical impairment, although this was a consequence of obesity, which the EAT held not to fall within the meaning of a disability³²; secondly, focus on the effect intimates that the issue of impairment must be re-evaluated as circumstances change, especially in those circumstances where the effect of an impairment may increase or decrease at different points of time; this is again relevant to obesity, given that an individual's BMI is subject to fluctuation and change.

When considering obesity there are clear impacts on the individual's mental wellbeing that must also be considered, given that the focus is on the effects of the condition³³. The previous strict approach introduced by the DDA, requiring a mental impairment to be a 'clinically well-recognised illness' was removed on 5 December 2005, bringing the analysis of mental impairment to look at the effect rather than the condition, in line with physical impairment.³⁴ This change of approach means that pre-Dec 2005 case law must be considered with caution, including case law suggesting that 'anxiety', 'stress' and 'depression' may be terms that are too generic to establish an impairment.³⁵ The focus under the DDA, and thus presumably under the EqA 2010 is a functional one, considering

²⁷ The Guidance was issued by the Secretary of State pursuant to s.6(5) EqA, and came into force on 1 May 2011. It must be noted that although the Guidance does not impose legal obligations as such, specific aspects of it which are relevant to determining the potential disability of an individual must be taken into account.

²⁸ Paragraph A3.

²⁹ These exclusions are all contained within the EqA (Disability) Regulations, SI 2010/2128, and is simply a re-enactment of the Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455, which introduced the same exclusions to the DDA.

³⁰ See Langstaff P in *Walker v Sita Information Networking Computing Ltd* UKEAT/0097/12, [2013] *EqLR* 476, where he held that 'an impairment may be caused as a consequence of a condition which is itself excluded from the scope of the definition of disability'.

³¹ At para A8 it states that 'it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although addiction to alcohol is expressly excluded ... what is important to consider is the effect of an impairment not its cause'.

³² The *Walker* case is considered fully below.

³³ The most obvious mental impact is that of depression, noted above.

³⁴ This was signalled as the correct approach by the Court of Appeal in *McNicol v. Balfour Beatty Rail Maintenance Ltd* [2002] *EWCA Civ* 1074.

³⁵ *Morgan v Staffordshire University* [2002] *IRLR* 190, *EAT*; the need for caution was spelled out by the EAT in *J v DLA Piper UK LLP* [2010] *IRLR* 936, at para 44.

the impact that the impairment has on an individual on a practical level³⁶; or in other words the effect of it rather than its origins.

Obesity is one of those difficult conditions that bring with it not only physical impairments, but with a possibility of concurrent mental impairments. Employer's need to be careful not to simply consider that all the consequences of that particular condition, due to being caused by obesity as the source, amount to the same thing, and thus a singular obesity policy can be adopted.³⁷ The focus in the case law and the Guidance on effect is crucial, as individuals will inevitably be effected in different ways and to different severities. Careful management of individuals with conditions that appear to impact upon them in numerous ways will be required, with each separate impairment, as well as the conditions considered cumulatively, needing to be assessed.

(ii) *Normal day to day activities*³⁸

Before the adoption of the EqA 2010, a list of 'normal day to day activities' was provided, which an employer could evaluate an individual against. Although at first glance the removal of this list may be considered detrimental in that it in essence removes part of the focus of any investigation, this does not appear to be the case. Once more the Guidance is illustrative. Despite indicating that 'it is not possible to provide an exhaustive list of day to day activities'³⁹, a list of examples are provided, which cover:

"A total inability to walk, or difficulty walking other than at a slow pace or with unsteady or jerky movements,

Difficulty in going up and down steps, stairs or gradients, for example because movements are painful, uncomfortable or restricted in some way.

Difficulty going out of doors unaccompanied, for example because a person has a phobia.

Difficulty co-ordinating the use of a knife and fork at the same time.

Difficulty preparing a meal because of problems doing things like opening cans or other packages, peeling vegetables, lifting saucepans and opening the oven door."

It is worth noting that these examples are not a radical departure from the list previously provided under the DDA, and it is in fact remarkably similar, which is unsurprising given that the Guidance does intimate that the approach under the EqA 2010 is not expected to be a significant departure from the approach adopted previously. The only measurable difference appears to be introducing the examples as a non-exhaustive list, which will enable expansion of the activities to be considered in due course where necessary. This ought to be applauded given that it is not restrictive, and can be

³⁶ This functional approach is evident in a number of decisions, including: *Ministry of Defence v Hay* [2008] IRLR 928; *College of Ripon and York St John v Hobbs* [2002] IRLR 185, and; *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 711.

³⁷ This view is made on the assumption that a disability has been established.

³⁸ There are exceptions to the general approach to substantial adverse effect on normal day to day activities, which are not wholly important in the context of obesity as a disability, such as progressive conditions. For a brief discussion on the position of progressive conditions see Deakin & Morris, *Labour Law (Sixth Edition)*, Hart Publishing, p.763.

³⁹ Para D2

considered more of a socially inclusive approach to the definition. It is certainly easy to envisage that obesity, at least when it reaches a particular level, could easily impact upon the first two day-to-day activities on the list cited above; a person with BMI 40.00+ and is considered morbidly obese is likely to have their mobility impacted upon, both on flat surfaces and when going up or down stairs/gradients.

In deciding whether an activity is a normal day-to-day activity the focus should be on whether it is an activity that is carried out by a large number of people on a fairly regular basis. This in effect removes activities that are peculiar to an individual; however, this does not mean that it precludes activities that are peculiar to a specific group.⁴⁰ This part of the definition has a specific utility; it ensures the protection cannot be stretched to cover those with specialised skills or activities, as that was not the purpose of the protection.⁴¹ In relation to this component part the EAT provided useful guidance when considering the definition under the DDA in *Goodwin v Patent Office*⁴²:

"What is a day-to-day activity is best left unspecified: easily recognised, but defined with difficulty. Thus it is not directed to the person's own particular circumstances, either at work or home. The fact that a person cannot demonstrate a particular skill, such as playing the piano, is not an issue before the tribunal, even if it is considering a claim by a musician. Equally, the fact that a person had arranged their home to accommodate their disability would make inquiries as to how they managed at their particular home not determinative of the issue."

There is one important point to note with regards the Goodwin approach: there appears to be no distinction between activities in the home or at work when considering normal day-to-day activities.⁴³ This requirement to consider the activities of individuals as a whole is reiterated in the Guidance, which indicates that day-to-day activities can include both work-related activities as well as activities away from work; however, it is clear from *Goodwin* and the Guidance that activities at work and at home are merely put in the mix for consideration, with establishing an impact on either not necessarily being required.⁴⁴

(iii) *Substantial adverse effect*

Determining whether the effect is substantial is a matter of judgment, and requires an evaluation as to whether the effect is 'more than minor or trivial'⁴⁵. This is further expressed within the Guidance,

⁴⁰ For example, activities that are primarily done by women, and not men, such as applying makeup or putting rollers in their hair, will still be considered to be a normal day-to-day activity according to the EAT in *Ekpe v. Metropolitan Police Commissioner* [2001] IRLR 605, where it was stated that normal day-to-day activities should cover all those activities so long as they were not anything which was 'abnormal or unusual'. The Guidance also provides breastfeeding as an example, see para D5.

⁴¹ And this would certainly take the definition beyond the common sense approach that was intended by Parliament.

⁴² *Goodwin v Patent Office* [1999] IRLR 4.

⁴³ This is an important point when one considers the European approach to the definition of disability, which is discussed below.

⁴⁴ Consideration of professional life and being able to participate in the labour market have become increasingly important following the CJEU'S intervention in *Chacon Navas* and *HK Danmark*, which are discussed in detail below.

⁴⁵ This focus was first seen in *Goodwin*, see n.30, but is now contained in the interpretation section of the EqA at s.212(1).

where it is stated that ‘the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people.’⁴⁶ There is an interesting point to make here with regards obesity, bearing in mind the McKinsey Report. The report suggests that by 2030 50% of the world population will be obese. Bearing this in mind, and the requirement to review effects on normal day-to-day activities by reference to society as a whole, there may become a point, taken to its extreme, where the normal abilities of society are limited by conditions associated with obesity, and as such would no longer satisfy this part of the definition: if 50+% of the population were immobile, then lack of mobility would unlikely satisfy the need of having a ‘substantial effect’.

Determining this component part requires a careful balancing exercise, focus and analysis being on activities which the individual cannot do or can only do with difficulty as a result of the impairment.⁴⁷ The Guidance offers further assistance on this, indicating that factors such as how long an activity takes an individual⁴⁸, or alternative means adopted to carry out an activity⁴⁹, when compared to individuals not suffering from the impairment can be taken into account. Interestingly, the Guidance also provides for the cumulative effect of a number of impairments to be taken into account⁵⁰; this will be of relevance to the issue of obesity, given its ability to cause a number of different effects.

(iv) Long term

At the time of the alleged discriminatory act the impairment must be considered long-term to satisfy the definition of disability.⁵¹ To be considered a long-term effect the impairment must have lasted at least 12 months, or is likely to last that long.⁵²

The employment tribunal in the UK is very much guided by medical evidence when determining whether an individual satisfies the definition of disability pursuant to the EqA 2010; however, Tribunals have to be careful not to place too heavily a reliance on medical opinion, otherwise this may be deemed an error of law.⁵³ Despite this a medical practitioner’s diagnosis of an impairment and views on the effects the impairment has on normal day-to-day activities along with prognosis and effects of medical treatment, unless specifically contested, may not simply be disregarded by the tribunal in favour of their own views⁵⁴, does strongly influence the overall conclusion of the question of disability.

⁴⁶ The Guidance Para B1.

⁴⁷ Simply identifying activities that that individual can still do despite the impairment cannot be used to negate a finding of a disability.

⁴⁸ The Guidance Para B2.

⁴⁹ The Guidance Para B3.

⁵⁰ See the Guidance Para B6. However, according to pre-EqA 2010 case law that only connected impairments can be aggregated. See for example *College of Ripon and York St John v. Hobbs* [2002] IRLR 185, and *McNicol v. Balfour Beatty Rent Maintenance Ltd* [2002] IRLR 711.

⁵¹ *Cruikshank v VAW Motorcast Ltd* [2002] ICR 729.

⁵² There are exceptions to this 12 month requirement that do not appear relevant to the matter of disability, including where the impairment is likely to last the rest of the individual’s life. As such these matters are not discussed in this paper.

⁵³ *Vicary v BT* [1999] IRLR 680.

⁵⁴ *Kapadia v. London Borough of Lambeth* [2000] IRLR 699

Interestingly, the UK approach is to disregard corrective measures, such as medical treatment or prosthesis, when considering the position of a disability⁵⁵; however, where there is a permanent improvement, the effects of treatment should be taken into account, given that this removes the need for treatment or corrective measures to continue.⁵⁶ However, this raises two further points worth noting: firstly, past disabilities are protected under the EqA 2010⁵⁷, and; secondly, it must be ensured that it is indeed a permanent improvement, as if the impairment is likely to recur, it still continues to fall within the definition of disability.⁵⁸ This clearly raises difficulties when one bears in mind that obesity is, or at least can be, a fluctuating condition.

THE CJEU: A SLIGHT CHANGE OF FOCUS?

For the most the UK's approach to the concept of disability aligns closely with that developed by the CJEU, with one significant distinction, with the CJEU requiring consideration of the impact that an impairment has on an individual's professional life as part of the overall evaluation. This requirement was first acknowledged by the CJEU in *Chacón Navas*⁵⁹ in which 'disability' was defined to cover those who have a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'. This requirement was reiterated in *HK Danmark*⁶⁰:

'...the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers'.⁶¹

Indeed as seen in both *Chacón Navas* and *HK Danmark*, and applied to the detriment of the applicant in *Z v A Department*⁶², there is more than a need for this factor to be considered, the Court needs to be convinced that the impairment does have an impact on the full and effective participation in the professional life of the person concerned.⁶³

So although the UK's approach to the concept of disability appears to be largely untouched by CJEU jurisprudential developments, there is one key noteworthy development, there now being a

⁵⁵ *Ibid*, where this corrective measures can include counselling.

⁵⁶ *Abadeh v. BT* [2001] ICR 156.

⁵⁷ This is important in a number of contexts such as criteria used in selection for redundancy, or with writing references for future employers; in such circumstances employer's need to tread carefully. On past disabilities see generally The Guidance, Para B17.

⁵⁸ EqA 2010, Sch.1, para.2(2). Also see *SCA Packaging Ltd v. Boyle* [2009] IRLR 54.

⁵⁹ Judgment in *Chacón Navas*, Case C-13/05, ECLI:EU:C:2006:456

⁶⁰ Judgment in *HK Danmark*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

⁶¹ *Ibid* para 38.

⁶² Judgment in *Z v A Department*: case C-363/12, ECLI:EU:C:2014:159.

⁶³ The facts of *Z v A Department* really brought this requirement home, with Z, who had no uterus so had a child through a surrogacy arrangement, was held not to have a disability, since although her impairment may well have been a great source of suffering to her, it in no way hindered her full and effective participation in professional life when compared to other workers.

requirement to take into account the impact that an impairment has on participation in professional life.⁶⁴

OBESITY: A DISABILITY?

The UK Court's Approach: *Walker v Sita*⁶⁵

The EAT gave consideration of whether obesity is a disability in the case of *Walker v Sita*. Mr Walker suffered from a complex range of symptoms, which had a severe impact upon him. His symptoms included asthma, knee problems, diabetes, high blood pressure, chronic fatigue syndrome, bowel and stomach problems, anxiety and depression, persistent cough, recurrent fungal infections, carpal tunnel syndrome, eye problems and sacro-iliac joint pains. There was a difficulty in Mr Walker's manifested symptoms in that a recognizable pathological or mental cause for them could not be identified, leading to them being described as 'functional overlay', the effect of which, according to medical opinion, was compounded by Mr Walker's obesity.

These conditions gave rise to various symptoms, which included pains in the head, knee, abdomen, lower back, left shoulder, left arm, left knee, left leg, both feet and in the anal area, loss of control causing his leg to give way, bowel symptoms including constipation and diarrhoea, difficulty in swallowing, shortness of breath, constant fatigue and poor concentration and memory. It was accepted, in line with evidence presented by an occupational physician, that Mr Walker suffered from a 'chronic permanent condition which affected his daily living'.⁶⁶ The question faced by the ET was therefore whether somebody suffering from functional overlay accentuated by obesity could claim to be disabled. Is obesity an impairment within the sense of the statute?⁶⁷ The ET judge, on considering the submissions for both parties, held that Mr Walker did not suffer from a disability within the framework of the DDA.⁶⁸ The ET judge concluded⁶⁹ that as no mental condition could be identified, nor any physical or organic cause to Mr Walker's conditions⁷⁰, other than obesity, then Mr Walker did not satisfy the definition of disability.

On appeal, the EAT found that the Employment Tribunal had erred in its approach of focussing on the cause of Mr Walker's impairments⁷¹, which led to a finding that he did not satisfy the definition

⁶⁴ Although the statutory definition, or the Guidance do not appear to reflect this requirement to consider participation in professional life, there is case law that does appear to have taken the CJEU's approach into account, including *Paterson v Metropolitan Police Comr* [2007] IRLR 763, EAT; *Chief Constable of Dumfries and Galloway Constabulary v Adams* [2009] IRLR 612, EAT; *Sobhi v Commissioner of Police of the Metropolis* [2013] EqLR 785, EAT.

⁶⁵ *Walker v Sita* [2013] UKEAT 0097_12_0802.

⁶⁶ n.65 para 4.

⁶⁷ This is as summarised at para 5 of the EAT.

⁶⁸ Which was the regulating statute at the time the claim was issued.

⁶⁹ See paragraphs 11 and 12 of the ET judgment, repeated at para 7 of the EAT judgment.

⁷⁰ This was based on evidence provided by Dr Davies, an occupational health specialist, who concluded that Mr Walker's symptoms could not be explained by a pathological process or physical structural changes, and that a wide range of his symptoms were caused by a 'functional/behavioural component'.

⁷¹ It was recognised by the EAT at para 17 that the ET had relied on authority that was pre-2005, including *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ. 1074 and the cases of *Rugamer v Sony Music Entertainment (UK)*, *McNicol v Balfour Beatty Rail Maintenance Ltd*, [2002] ICR 381, which focussed on the

of disability. As a consequence, the EAT allowed Mr Walker's appeal against the ET's decision, and focussed on the effect of his impairments.⁷² Interestingly, although finding that Mr Walker did satisfy the definition of disability due to the range of impairment he suffered from, the EAT made a finding that obesity itself, although increasing the likelihood of a person having a disability, was not an impairment that could lead to a finding that a person had a disability.⁷³

The EAT appears to have separated Mr Walker's 'other' impairments from his obesity condition, despite their obvious links when considering the issue of disability; this appears somewhat artificial given that the other conditions appear to simply be the ultimate effects of Mr Walker's obesity. The artificiality of the separation appears even greater when one appreciates comments made by Langstaff P, who further intimated that an ET will be permitted to more readily conclude that an individual satisfies the definition of disability where obesity is a factor.⁷⁴ This leaves us with a strange position of obesity being precluded from being a disability itself, but where it affects other impairments, or has effects that manifest itself in other recognised ways, or is simply present, then it becomes a relevant consideration.

Langstaff P also gives insight into some of the practical difficulties that obesity in the context of disability may cause to ET's. In particular, the Guidance provides that:

B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability.

In other words, if reasonable efforts could lead to a reduction in the BMI of an individual this may will be a relevant consideration. Langstaff P provided the example of an individual who showed determination to lose weight, which may be a relevant consideration if a confident prediction could be made that an individual would return to a normal BMI within 12 months, which would lead to the effect of a linked impairment ceasing, such as breathing difficulties; in such circumstances it would be open to an ET to find that no disability existed.⁷⁵

Although the EAT held that obesity itself was not a disability, it would be very rare that if an individual has a BMI such that to be described as severely or morbidly obese⁷⁶ they would have no other impairments effecting their day-to-day lives. This is where focusing on the effect of the impairment rather than the cause clearly has its advantages for individuals, at least in a social model. If the focus was on the cause, identifying the underlying origin of the physical or mental impairments linked to obesity may be difficult (or even impossible) as evidenced by the ET in *Walker*, and even worse, would themselves then be precluded from protection if they were identified as being caused

need to identify a recognised mental illness before a mental impairment was recognised for the purposes of determining a disability.

⁷² This is accepted as the correct approach at para 15, and is in line with the analysis of impairment presented earlier in this paper.

⁷³ n.65 para 18.

⁷⁴ n.65 para 18.

⁷⁵ n.65 para 18. This would clearly be on the basis that the impairment would not satisfy the long-term aspect of the definition.

⁷⁶ That is having a BMI that is within the WHO Class III obesity, which requires a BMI of 40.00+.

by obesity itself, given the EAT's exclusion of obesity as a disability. However, focussing on the effect of an impairment allows a focus on ancillary conditions, which are more likely than not to exist in severely obese individuals, and as such to some extent does offer protection to individuals where their obesity reaches extreme levels. So although the *Walker* decision appears to preclude obesity from disability discrimination protection, it certainly provides indirect protection where the obesity reaches such levels that it causes other secondary conditions.

The CJEU's Approach: Kaltoft

Kaltoft was employed as a child-minder in the Municipality of Billund, Denmark from 1996 up until he was dismissed on 22 November 2010. During his employment, consequent to his recognised obesity, Kaltoft was provided financial assistance between January 2008 and January 2009 to fund fitness and physical training sessions as part of the local authority's health policy. Although it was disputed by the local authority whether his obesity formed part of the reasons behind his dismissal⁷⁷, Kaltoft brought an action founded upon unlawful disability discrimination, contending that obesity was a disability and that he was dismissed by reason of being too obese⁷⁸ to carry out his employment obligations.⁷⁹ When faced with this matter the Danish court opted to make a preliminary reference, seeking guidance on the following questions:

1. Is it contrary to EU law 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?
3. Is the assessment 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? 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?

In essence the first three questions are touching upon a similar point, seeking guidance on whether obesity itself can be considered a protected ground of discrimination in its own right in accordance

⁷⁷ The written notice of dismissal did not contain any reference to obesity, but based the dismissal on 'following a specific assessment on the basis of a decline in the number of children'. In other words it was a dismissal by reason of redundancy. There were fewer children in need of care, and thus maintaining the same number of child-minders was not sustainable; however, the notice failed to identify reasons to explain why Kaltoft had been selected for dismissal over other child-minders.

⁷⁸ It was agreed by both parties that throughout the employment relationship Kaltoft had been obese as defined by WHO for the duration of his 15 years employment with the Municipality.

⁷⁹ This appears to have been due to Kaltoft's obesity having been discussed at the official dismissal hearing, although it remains in dispute as to how it came to be discussed.

with the general principle of EU law prohibiting discrimination in the labour market.⁸⁰ The fourth question is asking something somewhat different, and raising the question as to whether obesity, in some circumstances, can be considered as a disability and thus be protected through the disability provisions of the Framework Directive. This was the CJEU's first opportunity to determine which provisions of EU law, if any, would offer protection to discrimination on the grounds of obesity.

A-G Jaaskinen provided a detailed and logical analysis in rejecting obesity as a freestanding characteristic that was to be afforded non-discrimination protection in its own right. He recognised that out of the four Treaty provisions⁸¹ that addressed the issue of disability, the only one that could potentially cover obesity as a separate ground was Article 21 of the Charter of Fundamental Rights (hereinafter 'the Charter') due to its open ended nature, which it was accepted as potentially offering strength to submissions that a general principle of non-discrimination in EU law could exist, which covers matters that could include obesity.⁸² However, taking into account the limit of the competences conferred on to the EU to deal with discriminatory matters, which includes Article 6(1) of the Charter which precludes recourse to the Charter to extend '*in any way* the competences of the European Union as defined in the Treaties'⁸³, A-G Jaaskinen opined that developing Article 21 or the general principle of Equality to include obesity would be stretching the protection too far, and would exceed the EU's competences.⁸⁴

Mr Kaltoft had more success with his submissions when A-G Jaaskinen considered the fourth question. The concept of 'disability'⁸⁵ has developed against the background of the United Nations Convention on the Rights of Persons with Disabilities⁸⁶, with the developed definition requiring evidence of limitations which are:

- (i) long-term⁸⁷
- (ii) physical, mental or psychological impairments
- (iii) 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.

Interestingly, this follows quite closely the definition of disability in the UK under the EqA, with the notable exception of requiring focus on 'effective participation in professional life'; or put in other

⁸⁰ Para 13 A-G Jaaskinen's Opinion.

⁸¹ A-G Jaaskinen referred to Article 10 TFEU, Article 19 TFEU, Article 21 and Article 26 of the Charter of Fundamental Rights of the European Union as those sources

⁸² Para 17 A-G Jaaskinen's Opinion.

⁸³ Reference was also made to Article 51 of the Charter which likewise has been interpreted in conformity with Article 6(1).

⁸⁴ See paragraphs 20-27 A-G Jaaskinen's Opinion.

⁸⁵ At EU level A-G Jaaskinen, following analysis of the development of the definition, concluded that a social model, rather than purely medical model had been adopted: see para 41.

⁸⁶ Which was approved by the European Union by a decision of 26 November 2009: See Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35).

⁸⁷ This corresponds with the second paragraph of Article 1 of the UN Convention.

words a disability must be understood as referring to ‘a hindrance to the exercise of professional activity, not only to the impossibility of exercising such activity’.⁸⁸

A-G Jaaskinen considered that there will be a level at which obesity will be so impairing that it may amount to a disability for the purposes of discrimination law; however, the threshold being suggested was where an individual falls within WHO class III obesity (BMI 40.00+), which covers severe, extreme or morbid obesity. Where the BMI of an individual reaches these levels, then their condition will “create limitations, such as problems in mobility, endurance and mood, that amount to a ‘disability’”.⁸⁹ In line with the approach currently adopted by the UK, A-G Jaaskinen intimated that focus was to be on the effect of the condition rather than the cause.⁹⁰

Although the headline of the *Kaltoft* case to date appears to be that the CJEU has ruled that obesity is a disability⁹¹, this is not strictly true, and there are a couple of points that need to be taken account of in this regard: firstly, this is only the Opinion of the Advocate General. As such this is not binding law, and merely serves as guidance for the CJEU. Although the CJEU often follows the Opinion of the Advocate General, this is not always the case, as the CJEU is free to adopt or reject this guidance. There has been no CJEU decision as yet, so it remains to be seen whether the European approach is to include obesity as a potential disability, and; secondly, there are strict limitations imposed upon obesity being a disability within A-G Jaaskinen’s Opinion. Reference is made to a high threshold on the WHO classification. As a consequence, if the CJEU does agree with the Opinion it will not render all those classified as obese to be disabled and thus protected under relevant national legislation, including the EqA 2010, but instead will only have an impact upon those extreme cases.

CONCLUSIONS

There is little doubt that there is a rising problem with obesity levels not only nationally but globally, with great cost to both society and the economy as a consequence. There was potential for this endemic problem to have further implications in employment law, given the recent cases of *Walker* and *Kaltoft* involving submissions on obesity being a disability for the purposes of non-discrimination protection. The potential implications concerned the vast numbers, if it was decided that obesity was a disability, of workers that would then be subject to reasonable adjustments within the workforce. For example, if determined a disability this may require practical changes to the working arrangements such as reconsideration of the types of machinery that an individual could operate, the size of workstations or more appropriate seating, or even priority parking to ensure shorter walking distances to the office. Alongside this structural change may have been needed including reassessment of work stations and environments, reworking of work policies, including harassment policies and training. All of which would be at the expense of the employer.

⁸⁸ Para 33 A-G Jaaskinen’s Opinion.

⁸⁹ Para 56 A-G Jaaskinen’s Opinion

⁹⁰ Para 58 A-G Jaaskinen’s Opinion.

⁹¹ For example see <http://rt.com/uk/173940-obese-employer-rights-europe/>; <http://www.telegraph.co.uk/news/worldnews/europe/eu/10973240/Bosses-must-treat-severely-fat-workers-as-disabled-says-EUs-legal-adviser.html>, and; <http://www.express.co.uk/news/uk/489601/EU-court-obesity-disability>.

Interestingly, when one analyses the position adopted by the EAT in *Walker* and compares this to the position adopted by A-G Jaaskinen in his Opinion in *Kaltoft* there is very little difference. Through restricting obesity as a potential disability to the most extreme of cases such that their condition will “create limitations, such as problems in mobility, endurance and mood, that amount to a ‘disability’”, as suggested by A-G Jaaskinen, if followed by the CJEU, then the decision will not alter that already present in the UK. The only difference will be that the UK will focus on the consequential effects of obesity such as mobility, endurance and mood, evaluating each impairment individually and cumulatively to see whether a disability exists, whereas the CJEU would require focus to be on the condition of obesity, with the same effects being considered against the disability framework; the end result would be identical.

The consequence of both A-G Jaaskinen’s Opinion in *Kaltoft* and the EAT’s decision in *Walker* is that where an individual suffers from obesity at such a level that it causes secondary related impairments, where these secondary impairments satisfy the definition of disability, then the non-discrimination protections are invoked. In such circumstances the s.20 EqA2010 duty to make reasonable adjustments will need to be considered, but not, unless there is a radical departure from A-G Jaaskinen’s Opinion by the CJEU, for all workers who are considered obese. What looked like a potentially ticking time-bomb for employers appears to have fizzled out somewhat.