Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law

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The Court of Justice's Definition of Disability and Non-Discrimination Law

Lisa Waddington*

ABSTRACT

This article explores and reviews the approach of the Court of Justice of the EU to defining disability under the Employment Equality Directive and concentrates, in particular, on the two most recent cases which were decided in 2014: Z *and* Kaltoft *and the relevance of the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party. The article argues that the Court's approach to defining disability, as applied in practice, is not compatible with either the wording or spirit of the CRPD, and there is a real danger that the CJEU's mistaken approach will also trickle down to national courts. This is in spite of the fact that the Court pays lip service to the social contextual model of disability as outlined in the CRPD in its judgments.*

Keywords: Court of Justice of the EU; definition of disability; non-discrimination; UN Convention on the Rights of Persons with Disabilities

* European Disability Forum Chair, Maastricht University (NL). This chapter was written whilst the author was on research sabbatical at Melbourne University. The author is grateful to the Melbourne Social Equity Institute and Melbourne University School of Law for hosting her whilst on sabbatical, and to Melbourne University School of Law for providing financial support through the International Research Visitor's Scheme. The author is also grateful to an anonymous reviewer for helpful comments on an earlier draft.

§1. INTRODUCTION

The Employment Equality Directive,[1] which prohibits employment-related discrimination on a number of grounds, is a framework directive. This means that whilst some provisions, such as those defining the various forms of prohibited discrimination,[2] are relatively elaborate and clear, other provisions are not accompanied by a detailed definition and guidance. Member States and, on occasions, the Court of Justice of the European Union (CJEU) are left to interpret, apply and develop such provisions within the general framework set by the Directive. One element which is not elaborated to any degree in the Directive are the grounds on which discrimination are prohibited. The Directive addresses discrimination on the basis of religion or belief, disability, age and sexual orientation but no further guidance on what is meant by these categories is provided. Indeed, no EU equality law provides guidance on the meaning of the relevant protected grounds. Nevertheless, in general this has not led to a significant number of preliminary references to the CJEU from national courts seeking clarification as to the definition of the protected grounds and who is protected.[3] The exception to this trend concerns disability. The majority of the preliminary references which have reached the CJEU concerning disability and the Employment Equality Directive have related, in some way, to the concept of disability and the question of who falls within the protected category. In response, the Court has developed a definition of disability for the purposes of the Directive.

This article will explore and review the Court's approach to defining disability under the Directive and concentrate, in particular, on the two most recent cases which were decided in 2014: *Z*[4] and *Kaltoft*[5] and the relevance of the UN Convention on the Rights of Persons with Disabilities (CRPD),[6] to which the EU is a party. The article will first introduce the Court's case law which preceded these two judgments.

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1 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

2 Article 2.

3 One notable exception is Case C-249/96 *Lisa Jacqueline Grant v. South-West Trains Ltd.*, EU:C:1998:63, concerning the scope of the protection provided by a prohibition of sex discrimination under EU law. Grant argued that the EU prohibition of sex discrimination (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment, vocational training and promotion, and working conditions (Equal Treatment Directive), [1976] OJ L 39/40) covered the situation of a worker who experienced discrimination on the grounds that she had an unmarried partner of the same sex, in the situation in which a worker who had an unmarried partner of a different sex experienced better treatment. Specifically, Grant's same sex partner was unable to benefit from travel concessions offered by the train company which Grant worked for, whilst an unmarried partner of the opposite sex would have been able to benefit from such concessions. The Court of Justice found that such discrimination was not prohibited by the Equal Treatment Directive. This situation has since been addressed by the Employment Equality Directive, which does prohibit employment-related discrimination on the grounds of sexual orientation.

4 Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, EU:C:2014:159.

5 Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2463.

6 UN Convention on the Rights of Persons with Disabilities, A/RES/61/106, 24 January 2007.

§2. THE CJEU'S FIRST ATTEMPT AT DEFINING DISABILITY: *CHACÓN NAVAS* (2006)[7]

The first case to reach the Court of Justice regarding the definition of disability was *Chacón Navas*. This 2006 case concerned a woman who, as a result of illness, had not been able to work for her employer for some time. She was dismissed after a period of absence. Ms Chacón Navas challenged the decision to dismiss her inter alia on the grounds that it was incompatible with the Employment Equality Directive. The national court decided to stay the proceedings and referred two questions to the Court of Justice. In essence, the national court asked whether the provision of the Directive which prohibits disability discrimination also included within its protective scope a worker who had been dismissed solely because she was sick. In the alternative, could sickness 'be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?'.[8] These questions therefore concerned the personal scope of the Directive.

In response, the Court stated the Employment Equality Directive was designed to combat employment discrimination and defined disability in that context as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[9] For any limitation to be regarded as a 'disability', 'it must be probable that it will last for a long time'.[10] In addition, the Court held that for the purposes of the Directive, 'disability' is different from 'sickness',[11] and there was nothing in the Directive 'to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness'.[12]

The Court's approach raised a number of questions, which were only addressed in its later judgment of *HK Danmark* (*Ring and Skouboe Werge)*.[13] Specifically, it was not clear if illness could sometimes be equated with a disability[14] or whether there was a

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7 Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, EU:C:2006:456. This section is based on extracts from L. Waddington, 'Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006', 44 *Common Market Law Review* (2007), p. 487, and draws, in particular, on a text found in L. Waddington, 'Equal to the Task? Re-examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in L. Waddington, G. Quinn and E. Flynn (eds.), *European Yearbook of Disability Law, volume 4* (2013, Intersentia), p. 169.

8 Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, para. 25.

9 Ibid., para. 43.

10 Ibid., para. 45.

11 Ibid., para. 44.

12 Ibid., para. 46.

13 Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge),* EU:C:2013:222. See the next section of this article for a further discussion of this judgment.

14 An approach explicitly favoured by the Court in its later judgment of Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge).*

clear distinction between the two categories, with individuals who were sick never being able to qualify as disabled. In the latter case, long-term and chronic sickness, however defined, would not be included within the concept of disability, and therefore protection from discrimination would not be extended to people who fall into this category.

In *Chacón Navas* the Court further stated that its definition of disability was 'autonomous and uniform'.[15] Finally the Court held that sickness could not be added to the list of grounds covered by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty (now TFEU).[16]

The Court's definition of disability is relevant for determining the personal scope of the Directive, and therefore determines who is protected by the Directive. The definition developed by the Court in *Chacón Navas* was based on the medical or individual model of disability. According to the definition developed by the Court, the cause of the disadvantage (or the 'limitation') is the 'impairment' which an individual has, and it is the 'impairment' which hinders participation in professional life. Therefore, the problem lies in the impaired individual, and not in the reaction of society to the impairment or the organization of society.

This model can be contrasted with a social-contextual model of disability. The social-contextual model is based on a socio-political approach which argues that disability stems primarily from the failure of the environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment.[17] According to this model, disability is the result of an interaction between an impairment and an inaccessible and discriminatory environment, rather than being the consequence of a medical condition which results in reduced ability. This model underlies the UN Convention on the Rights of Persons with Disabilities, as discussed below.

§3. SECOND TIME ROUND AND THE INFLUENCE OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: *HK DANMARK (RING AND SKOUBOE WERGE)* (2013)[18]

Like *Chacón Navas*, this case concerned two individuals who had been absent from work and on sick leave, and who were subsequently dismissed. The Advocate General therefore

15 Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*, para. 40 and 42.

16 Ibid., para. 55–57.

17 For further discussion on these models see M. Oliver, *Understanding Disability: From Theory to Practice*, (2nd edition, Palgrave, 2009); and M. Priestley, 'Constructions and creations: Idealism, materialism and disability theory', 13 *Disability and Society* (1998), p. 75.

18 This section of the paper draws on L. Waddington, 'Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', 17 *European Anti-Discrimination Law Review* (2013), p. 11.

noted in her Opinion that the question that lay at the 'heart' of the preliminary ruling proceedings was:

> When is there a disability within the meaning of Directive 2000/78/EC (…) and how is the concept of disability to be distinguished from that of sickness?[19]

Danish law[20] allowed for dismissal with a shortened period of notice if a worker had been absent from work on paid sick leave for a total of 120 days over a twelve month period. Both Ms Ring and Ms Skouboe Werge, who were represented by their trade union in this case, were dismissed in accordance with this law. Ms Ring experienced back pain which could not be treated whilst Ms Skouboe Werge was assessed as having a loss of working capacity of 65% following her dismissal.

The trade union submitted that both employees had a disability and were consequently protected by the Danish anti-discrimination law,[21] which itself transposes the Employment Equality Directive. In response, the employers claimed that both workers were not disabled within the meaning of the Employment Equality Directive, since 'the only incapacity that affects them is that they are not able to work full-time'.[22]

In response to this set of facts, the Danish court submitted several preliminary questions to the CJEU. The most elaborate set of questions related to the concept of disability, and essentially sought clarification as to the meaning of this concept in light of the *Chacón Navas* judgment. The Danish court asked whether a condition caused by either a medical diagnosed incurable illness, or a medically diagnosed temporary illness, could be regarded as a disability within the meaning of the Directive.[23] The court also asked whether a person who, because of a physical, mental, or psychological impairment could not, or could only to a limited extent, carry out his work, where it was probable that this situation would last for a long time, was covered by the Directive.[24] The Danish court further asked whether a person who had a permanent reduction in functional capacity which did not lead to a need for special aids, but simply led to the individual being unable to work full-time, could be regarded as disabled for the purposes of the Directive.[25]

Prior to considering the response of the CJEU, it is important to note that a very important development, not directly related to the Employment Equality Directive,

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19 Opinion of Advocate General Kokott in Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, EU:C:2012:775, para. 1. Footnotes omitted from quotation.

20 Law on the legal relationship between employers and salaried employees (*Lov om retsforholdet mellem arbejdsgivere og funktionærer*), para. 5(2).

21 Law No 1417 amending the law on the prohibition on the labour market (*Lov om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*).

22 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 24.

23 Reference for a preliminary ruling from the Sø- og Handelsret (Denmark) lodged on 1 July 2011 – HK Danmark, acting on behalf of Lone Skouboe Werge v Pro Display A/S in liquidation, [2011] OJ C 269/32, Questions 1(b) and (c).

24 Ibid., Question 1(a).

25 Ibid., Question 2.

had occurred since *Chacón Navas* had been decided in 2006. In December 2010, the European Union concluded the CRPD, which entered into force for the EU a month later, in January 2011. The CRPD is a mixed agreement in international law, meaning that both the Member States and the EU share competences in many of the covered areas. Attached to the instrument of formal confirmation which the EU deposited with the Secretary General of the UN when concluding the CRPD is a Declaration of Competences, which contains a list of areas in which the EU shares competence with the Member States.[26] Amongst these are combating discrimination on the grounds of disability. The Declaration also contains a list of EC legislative instruments which illustrate the competence of the EC/EU with regard to fields falling under the CRPD, and this list refers to the Employment Equality Directive.

Following the conclusion of the Convention, the EU is bound by the obligations therein to the extent of its competences.[27] Amongst the core principles of the CRPD are equality and non-discrimination, and these find repeated references throughout the Convention. The CRPD also provides guidance on the concept of disability in Article 1. The Convention clearly embraces the social-contextual model of disability, recognizing that persons with disabilities include those individuals who have an impairment which, in interaction with various barriers, hinders their participation in society. The role of environmental factors is therefore crucial in creating disability.

HK Danmark (Ring and Skouboe Werge) was the first significant disability discrimination-related preliminary reference to reach the Court following the conclusion of the CRPD by the EU, and it was therefore the first opportunity for the Court to expand on the significance of the Convention for the interpretation of the Employment Equality Directive. In the judgment, the Court noted, as a preliminary observation, that under Article 216(2) TFEU international agreements concluded by the EU are part of EU law and are binding on its institutions and prevail over acts of the EU.[28] In addition, given the primacy of international agreements over instruments of EU secondary law, such law must be interpreted in a way which is consistent with international agreements as far as possible.[29] Based on this, the Court stressed that the UN Convention forms 'an integral part of the European Union legal order'[30] and the Employment Equality Directive must be interpreted 'in a manner consistent with that convention'.[31]

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26 See Council Decision (EC) on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 20 March 2007, 7407/07.

27 See L. Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences', 18 *Maastricht Journal of European and Comparative Law* (2011), p. 431.

28 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 28.

29 Ibid., para. 29. See also D. Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective', in L. Waddington and G. Quinn (eds.), *European Yearbook of Disability Law, volume 2* (Intersentia, 2010), p. 47, 66–68 in particular.

30 Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para. 30.

31 Ibid., para. 32.

The Court then addressed the questions posed by the Danish court and recalled its judgment in *Chacón Navas*, which it stressed was decided before the EU became a party to the CRPD.[32] The Court proceeded to refer to provisions in the Convention which elaborate on the concept of disability, including Article 1 which states that 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[33] Drawing closely on Article 1 CRPD, the Court held that the concept of 'disability' for the purpose of the Directive must be understood as:

> 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 person concerned in professional life on an equal basis with other workers.[34]

Unlike the CRPD, which uses participation in society as a reference point, the Court's judgment in *HK Danmark (Ring and Skouboe Werge)* requires that a person is hindered in participation in the more limited field of professional life. The Court confirmed that the impairment must be 'long-term', once again referring to Article 1 CRPD[35] and, following the advice of its Advocate General, held that a curable or incurable illness which led to the required degree of limitation on a long-term basis did fall within the concept of 'disability' within the meaning of the Directive.[36] It clarified its ruling in *Chacón Navas*, and stated that an illness which did not entail such a limitation was not covered by the concept of 'disability'.[37]

Turning to the second question identified above, the Court stressed that a disability does 'not necessarily imply complete exclusion from work or professional life'.[38] The Court noted that a 'disability' must be understood as a 'hindrance' to the exercise of professional life, and a person with a disability who was only able to work part-time was capable of being covered by the concept.[39] The Court also held that there was no requirement that an individual require accommodation measures, such as the use of special equipment, in order to be regarded as disabled.[40] It noted that the Directive does provide an obligation to make a reasonable accommodation to disabled individuals, and stated that accommodation measures are 'therefore the consequence, not the constituent element, of the concept of disability'.[41]

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32 Ibid., para. 37.
33 Ibid.
34 Ibid., para. 38.
35 Ibid., para. 39.
36 Ibid., para. 41.
37 In fact the judgment states that 'an illness not entailing such a limitation is not covered by the concept of "discrimination" within the meaning of Directive 2000/78'. Ibid., para. 42.
38 Ibid., para. 43.
39 Ibid., para. 44.
40 Ibid., para. 45.
41 Ibid., para. 46.

One can conclude that the CRPD, and Article 1 in particular, set the tone for how disability was defined by the Court in this case. The CRPD's view of disability very much reflects the social-contextual approach, and understands disability as resulting from an interaction between an impairment and the environment. Unlike the medical view, which underlay the judgment in *Chacón Navas*, disability is not assessed purely in terms of the existence of an impairment, which restricts the functional ability of an individual, but the relevance of social and environmental factors in limiting – or disabling – people are to be taken into account. In short, one could expect the definition embraced by the Court in *HK Danmark (Ring and Skouboe Werge)* to lead to a reconceptualizing of what disability is for the purposes of the Employment Equality Directive, and a movement away from a narrow impairment based perspective. Indeed, one of the Court's Advocates General has described the judgment in *HK Danmark (Ring and Skouboe Werge)* as marking 'a paradigm shift in the Court's case-law'.[42] However, as subsequent judgments have shown, it is questionable to what extent the Court has really embraced the social-contextual model of disability.

§4. EMBEDDING THE DEFINITION OF *HK DANMARK (RING AND SKOUBOE WERGE): Z* AND *KALTOFT* (2014)

This definition of disability for the purposes of the Employment Equality Directive has since been repeated twice by the Court in *Z v. A Government Department and the Board of Management of a Community School* and, most recently, in *Kaltoft*. The definition therefore seems to be rather set. However, an examination of these two cases shows that the Court may not be embracing or fully comprehending the significance of a definition of a disability based on the social-contextual model found in the CRPD. *Z* seems to demonstrate a failure to appreciate the relevance or importance of the role which environmental or socially constructed features play in creating disability, whilst *Kaltoft* shows that it may not always be easy for national courts to work with the Court's definition, and nor may the definition always be 'fit for purpose', given that a goal of the Directive is to combat *discrimination* on the ground of disability. The Court's approach to disability in this case may exclude individuals who do not have an actual limitation directly related to their impairment, but who nevertheless experience disability discrimination,[43] from protection under the Directive.

Z concerned a woman who had no uterus and was unable to become pregnant. Ms Z and her husband arranged for a surrogate mother in California to carry their genetic child. Following the birth of the child, Ms Z's employer in Ireland refused her a period of

42 Opinion of Advocate General Wahl in Case C-363/12 in *Z. v. A Government Department and the Board of Management of a Community School*, EU:C:2013:604, para. 88.

43 In such a case the discrimination would result from the discriminator's false assumption about the individual's limited abilities.

paid leave equivalent to maternity or adoption leave, on the grounds that she qualified for neither and the law did not provide for paid leave following the birth of a child through surrogacy. Whilst Ms Z's rights under the Equal Treatment Directive (recast),[44] which concerns sex discrimination and employment, were addressed by the Court, this article will only consider the judgment's relevance for the definition of disability under the Employment Equality Directive.

The Court in *Z* reiterated the importance of interpreting EU law in a manner compatible with the CRPD, and restated its definition of disability set out in *HK Danmark (Ring and Skouboe Werge)*. The Court also once again noted that the concept of disability not only refers to the impossibility of exercising a professional activity, but also to 'a hindrance to the exercise of such an activity'.[45] The Court recognized that Ms Z's lack of a uterus and the inability to give birth naturally amounted to an impairment and stated:

> it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her.[46]

However, implicitly recalling its own definition of disability, the Court stated: 'the concept of 'disability' within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers'.[47] The Court proceeded to agree with its Advocate General,[48] finding that:

> the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z's condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.[49]

As a result, the Court found that Ms Z did not have a 'disability' within the meaning of the Directive.[50] It seems that the Court recognized that Ms Z may have been disabled, and indeed implied that she may have been recognized as disabled under the CRPD to

44 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, [2006] OJ L 204/23.

45 Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 77.

46 Ibid., para. 79.

47 Ibid., para. 80.

48 See Opinion of Advocate General Wahl in Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 82–98.

49 Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 81.

50 Ibid., para. 82.

which the EU is bound,[51] but did not find that her condition amounted to a disability for the purposes of the Employment Equality Directive, because it did not impact on her ability to work. In spite of embracing the CRPD based definition of disability developed in *HK Danmark (Ring and Skouboe Werge)*, which recognizes that disability results from an interaction between an impairment and 'various barriers' which may 'hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers', it is submitted that the Court once again[52] resorted to a medical or individual model of disability in practice. Looked at from a limited medical or individual perspective, it is undoubtedly true that Ms Z's impairment had no impact on her ability to work. However, in taking this approach, the Court arguably failed to take into account the fields in which discrimination is prohibited under the Directive and the impact Ms Z's impairment had on her access to employment-related benefits. The Directive prohibits disability-based discrimination with regard to, inter alia, 'employment and working conditions, including dismissals and pay'.[53] This is part of the material scope of the Directive.

Taking this into account, one can see that Ms Z did experience a limitation (indirectly) resulting from an impairment in interaction with various barriers, and was consequently disabled within the meaning of the Court's definition. Those barriers were the absence of a statutory regime providing for a period of paid leave following the birth of a child through surrogacy. This relates to employment conditions. Such a barrier was particularly likely to affect someone in Ms Z's position who was unable to have a child naturally, and could therefore be regarded as indirectly discriminatory. In brief, whilst the Court certainly paid lip service to the CRPD and the social-contextual approach to disability in this judgment, it is submitted that it failed to follow through on the implications of its own definition, and failed to apply it correctly.

The most recent judgment of the CJEU concerned Mr Karsten Kaltoft, who was dismissed from his job as a childminder, after 15 years of employment, by a Danish local authority.[54] Mr Kaltoft is obese, weighing over 150 kilos, and having a body mass index of 54, with 20–25 generally being regarded as a healthy body mass index.[55] The parties disputed whether Mr Kaltoft's obesity was related to the decision to dismiss him, although there was certainly evidence that the employer had had concerns about Mr Kaltoft's weight for some time. According to the employer, Mr Kaltoft was dismissed because of

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51 This was also recognized by Advocate General Wahl in his Opinion. See Opinion of Advocate General Wahl in Case C-363/12 *Z. v. A Government department, The Board of management of a community school*, para. 93.

52 As in Case C-13/05 *Chacón Navas v. Eurest Colectividades SA*.

53 Article 3(1)(c). This was quoted in the judgment at para. 23.

54 This section draws on L. Waddington, 'Case note to Case C-354/13, CJEU 18 December 2014 (Kaltoft)', 16 *EHRC* (2015), p. 226–230.

55 B. Waterfield, '"I don't feel my weight is a big problem" says Dane in EU obesity ruling', *Daily Telegraph* (2014), www.telegraph.co.uk/health/dietandfitness/11302442/I-dont-feel-my-weight-is-a-big-problem-says-Dane-in-EU-obesity-ruling.html.

a decline in the number of children requiring care. He was the only childminder to be dismissed on this ground, and he had not been given specific reasons as to why he had been chosen for dismissal.

Mr Kaltoft claimed that his obesity had no negative impact on his ability to do his job.[56] The reason for the dismissal, and the relevance of Mr Kaltoft's weight, is a matter of fact, and is therefore for the Danish court to decide on. However, in making the preliminary reference to the CJEU, that Danish court clearly regarded the obesity as a potentially relevant factor in the decision to dismiss.

Before proceeding to determine whether obesity could be regarded as a disability for the purposes of the Employment Equality Directive, the CJEU addressed the question of whether EU law should be interpreted as laying down a general principle of non-discrimination on grounds of obesity with regard to employment and occupation. The Court noted that there was no provision of EU Treaty law which prohibits discrimination on the grounds of obesity[57] and EU law does not lay down a general principle of non-discrimination on grounds of obesity.[58] The Court noted that the Employment Equality Directive does not refer to obesity as a prohibited ground of discrimination,[59] and that the scope of the Directive should not be extended by analogy to cover grounds not mentioned therein.[60] The EU Charter of Fundamental Rights was also inapplicable.[61] As a result, the Court found that there was no general principle of non-discrimination on grounds of obesity with regard to employment and occupation under EU law.

Turning to the definition of disability, and the question of whether obesity could be regarded as a particular form of disability, the Court ultimately repeated its definition of disability which it had first given in *HK Danmark (Ring and Skouboe Werge)*. However, the Court also provided some further clarification as to who was to be regarded as disabled, and the causes of any disability. As in *HK Danmark (Ring and Skouboe Werge)* and *Z*, the Court stated that a person could be regarded as 'disabled' if they were only hindered, but not prevented, in exercising a professional activity.[62] The Court also clearly stated that the origin of the 'disability', including the question of whether a person contributed to the onset of the 'disability' him or herself, was irrelevant.[63] Both of the elements imply a broad understanding of the concept of disability.

With regard to the specific issue of obesity, the Court held that obesity does not in itself constitute a 'disability' since it does not necessarily involve a limitation which

56 Ibid.
57 Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, para. 33–34.
58 Ibid., para. 35.
59 Ibid.
60 Ibid., para. 36.
61 Ibid., para. 39.
62 Ibid., para. 54.
63 Ibid., para. 55–56. In fact, this echoes the statement in Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, para.40, that it 'would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability'.

results from an impairment and which, in interaction with various barriers, hinders participation in professional life.[64] However, where obesity does lead to such a limitation, it should be regarded as a disability. The Court said this would be the case, for example, if an obese worker was affected by reduced mobility or medical conditions related to his obesity which prevented him from carrying out his work or caused him discomfort when working.[65] The Court concluded by holding that obesity constitutes a 'disability' within the context of the Employment Equality 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'.[66]

The CJEU's definition of disability once again refers to a limitation resulting from an impairment which, in interaction with other barriers, hinders professional participation. The examples given of hindrances by the Court in this case concern physical limitations directly caused by the obesity. Mr Kaltoft claims he has no such limitations, and is perfectly able to do his job. However, if this is true, and he was nevertheless dismissed because of his obesity, then he clearly did face a barrier – in the form of negative attitudes and prejudices of his employer. Many disabled people face such barriers – in essence discrimination resulting from false assumptions about ability and stigma – and it is clear that the CRPD, to which the EU is a party, is designed to address this.[67]

The Court did not state in its judgment that the 'various barriers which hinder the full and effective participation of the person concerned in professional life' include or exclude such discriminatory attitudes. However, as in *Z*, the Court's approach places an emphasis on the need for limitations resulting from impairments (which in interaction with various barriers hinder participation in professional life), and the examples given of such limitations in the context of obesity are clearly physical, and directly connected to obesity or a related medical condition. This seems to render it difficult to interpret the Court's definition of disability as embracing individuals who experience no physical limitation, but who are only hampered by the discriminatory attitudes of others, discriminatory rules or provisions.[68] In essence, it seems an individual who is 'disabled' by the false assumptions and prejudice of others – by discrimination – but who does

64 Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, para. 58.

65 Ibid., para. 60.

66 The Advocate General in this case opined that only the most severe form of obesity (WHO class III obesity, or severe, extreme or morbid obesity) would always meet the definition of disability developed by the Court. See Opinion of Advocate General Jääskinen in Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, EU:C:2014:2106, para. 56. The Court was not so prescriptive or precise in its judgment.

67 In line with this, the CRPD requires 'States Parties to undertake to adopt immediate, effective and appropriate measures "to combat stereotypes, prejudices and harmful practices relating to persons with disabilities."' (Article 8(1)(b)).

68 The role of discrimination and prejudice with regard to people who are obese was raised by Mr Kaltoft. Mr Kaltoft's argument was noted by Advocate General Jääskinen in his Opinion in the following way: 'it [obesity] can equally entail limitations on the employment market by reason of prejudice on the basis of

not experience a physical limitation, may be excluded from protection from disability discrimination. Such individuals would only be protected if they did experience a limitation in combination with various barriers which hindered their participation in professional life. This is reflected in the finding of Advocate General Jääskinen in *Kaltoft* in which he stated:

> (…) absence of a bodily function or organ, or an illness requiring particular attention, continuous medication and control may be a physiological or psychological burden to the person concerned, but not render impossible the full and effective carrying out of work, or hinder participation on an equal basis in professional life in general.[69]

Once again, in spite of the paying lip service to the social-contextual model of disability reflected in the CRPD in its definition of disability, it seems the Court is struggling to recognize and apply the model in practice.

As a result, Mr Kaltoft may find he is not protected under the Employment Equality Directive, although this is a matter for the referring Danish court to decide on – however others, including those with visible scars or injuries but no physical or mental impairment, and other impairments which do not impact on ability to work, such as asymptomatic HIV, may also be in the same position. Ms Z certainly found herself in this position. This may also be true for people of particularly low or high stature – who do not experience limitations directly related to their height, but do experience limitations when interacting with an inaccessible physical environment. It is not clear if individuals in such a position would be regarded differently, and as disabled, in comparison with persons who experience limitations as a result of prejudice, stigma, discrimination and other environmental factors.

In short, the way in which the CJEU applies its definition of disability may mean that the Employment Equality Directive fails to protect individuals from disability discrimination unless they actually have some identifiable limitation related to an impairment which also impacts on their ability to work.[70] Being exposed to

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physical appearance'. Opinion of Advocate General Jääskinen in Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, para. 52.

69 Ibid., para. 34.

70 However Advocate General Jääskinen in his Opinion stated that 'it is sufficient that a long term condition causes limitations in full and effective participation in professional life *in general* on equal terms with persons not having that condition. No link has to be made between the work concerned and the disability in issue before Directive 2000/78 can apply'. (Ibid., para. 38. Emphasis in original). He continued '[s]o, for example, a wheelchair bound travel agent who is dismissed because a new owner sees her disability as inconsistent with a new image for the agency that he wishes to develop will not be precluded from relying on Articles 1 and 2 of Directive 2000/78 just because all her co-workers also perform the task required seated (sic), so that the job in question is not affected by her condition'. (Ibid., para. 39). The Advocate General later explained in relation to this example: '[w]orking from a wheelchair is an obstacle to full and effective participation in professional life on equal terms with persons not having that condition, because of the physical difficulties that inevitably arise in performing tasks, even if it does not affect the capacity of the person concerned to carry out the specific work in question'.

discrimination which is based on disability, or perhaps even facing barriers in the form of an inaccessible environment, may not be enough for an individual to be entitled to protection under the Directive.[71]

One way round this restriction in the case of Mr Kaltoft may be for the Directive to be interpreted as protecting individuals who experience disability discrimination on the basis that they are wrongly assumed to have a disability by the discriminator. The Court did not consider this issue and nor was it asked to do so. The Advocate General in his Opinion on the case did address this matter, but held

> it is not necessary to take a stand on this difficult legal question in the context of the present preliminary reference. This is because it is not contested that Mr Kaltoft is obese. If the national court finds that his condition amounts to a disability, and that Mr Kaltoft has been dismissed because of it, then any difference in treatment will be on the basis of real and not only presumed disability.[72]

The Advocate General did not continue by recognizing that the national court may find Mr Kaltoft to not have a disability, but to find that it was possible that his employer viewed him in such light. In such a scenario, clear guidance on the issue of assumed disability would have been both appropriate and 'necessary'.

If the Directive were to protect individuals from discrimination where they are wrongly assumed or perceived to have a disability, national courts would still have to apply the Court's definition of disability – not to the alleged victim of discrimination, but in the context of what the alleged discriminator believed about the abilities of the alleged victim. This would not seem to be an easy task. Nevertheless, in order to protect individuals fully from disability discrimination, the law must provide protection to those who are wrongly assumed to have a disability and experience discrimination for this reason, and any definition of disability used in anti-discrimination law must be capable of being used for this purpose.[73]

(Ibid., para. 45). It therefore seems if, according to the Advocate General, a person can be regarded as disabled if they experience limitations in carrying out some jobs (a wide variety of jobs?), but not the actual job in which they are employed or apply for.

71 For another case in which the CJEU failed to recognize the 'disabling' nature of rules or environmental provisions see Case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, EU:C:2014:350; and commentary by C. O'Brien, 'Driving Down Disability Equality?', 21 *Maastricht Journal of European and Comparative Law* (2014), p. 723, 728–729. This case did not concern the Employment Equality Directive and is therefore not explored further in this paper, although there are similarities in the Court's approach to the concept of disability with the cases discussed here. The case concerned EU Directives setting down rules for the issuing of driving licences which excluded people with certain visual impairments from acquiring certain types of driving licences.

72 Opinion of Advocate General Jääskinen in Case C-354/13 *FOA v. Kommunernes Landsforening (KL) (Kaltoft)*, para. 49.

73 Legislation in some jurisdictions, including the Americans with Disabilities Act, does provide protection from disability discrimination where an individual is 'perceived' (or assumed) to have a disability. However Chai Feldblum has argued that American courts have limited the interpretation

§5. CONCLUSION

The CJEU has certainly taken seriously its obligations under the CRPD, and the related obligations of the EU, in that it has amended its definition of disability for the purposes of the Employment Equality Directive quite radically, ostensibly in order to bring it into line with the Convention. The definition first developed in *HK Danmark (Ring and Skouboe Werge)*, and repeated in the cases of *Z* and *Kaltoft* moves away from the medical or individual model of disability reflected in the *Chacón Navas* judgment, and seemingly embraces the social-contextual model of disability. However, as noted above, unlike the CRPD, which uses participation in society as a reference point, the Court's definition of disability requires that a person is hindered in participation in the more limited field of professional life. According to Advocate General Wahl of the CJEU, 'that difference is dictated by the scope of Directive 2000/78 which is determined by the policy choices made by the legislator in this particular field'.[74]

However, it is submitted that the Directive's material scope, or the areas in which the Directive applies, are already limited to the fields of employment and vocational training and it is not necessary to impose a further limitation on the personal scope, by restricting protection from discrimination to only those disabled people who are hindered in their participation in professional life. The Directive therefore only prohibits discrimination with regard to certain employment-related activities, and this limitation is already sufficient to ensure that only discrimination with regard to professional life is addressed. A second limitation, requiring that only people who are hindered in their participation in professional life is unnecessary and excessively exclusionary. Instead, the broad group of disabled people, in line with the guidance found in Article 1 CRPD, should be protected from discrimination under the Directive.

Moreover, as the *Z* case clearly demonstrated, and elements of the *Kaltoft* judgment hinted at, the Court requires that an individual has an impairment which hinders professional participation. The second key element of the definition, namely that the limitation (impairment), in interaction with 'various barriers', hinders professional participation is repeatedly stated by the Court in its definition, but the Court seems reluctant to regard as disabled an individual whose 'disability' is the result of those

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of disability under the ADA under this heading by requiring that, in order to be perceived as having a disability, an individual had to be perceived to be limited in a major life activity other than the activity, e.g. job, for which the individual was excluded by the defendant. See C.R. Feldblum, 'Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?', 21 *Berkeley Journal of Employment & Labor Law* (2000), p. 91. See also L. Waddington, '"Not Disabled Enough": How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability', '"Pas suffisamment handicapé": comment les cours européennes filtrent les actions en discrimination par une apprehension étroite de la notion de handicap', 15 *European Journal of Human Rights* (2015), p. 11.

74 Opinion of Advocate General Wahl in Case C-363/12 in *Z. v. A Government Department and the Board of Management of a Community School*, para. 91.

socially created barriers. Indeed, the Court's judgments seem to underplay the significance of socially created barriers. An individual may be impaired without this impacting on their ability to work – but, this does not mean that such a person is able to participate in the labour market, and access all employment-related benefits, on an equal basis with others. They may still face discrimination, prejudice, stigma and an inaccessible environment, all of which serve to exclude them or limit their options. If the Court were to take its own definition of disability seriously, such individuals would, it is submitted, be protected under the Employment Equality Directive. However, as long as the Court clings to the remnants of the medical or individual model it applied in *Chacón Navas*, such individuals find themselves in a precarious position. The CJEU is clearly 'talking the talk' of the social-contextual model of disability found in the CRPD, but it is struggling to 'walk the walk' and apply that model in practice.

This may have important consequences at the national level, too. Almost all EU Member States have ratified the CRPD,[75] and whilst the legal impact of the Convention will differ within the various domestic systems, courts often endeavour to interpret and apply domestic law in a manner which is compatible with a state's international human rights obligations. Those same courts will also be bound to apply the interpretation of the CJEU when applying national law transposing the Employment Equality Directive. National judges may well feel that they will both be complying with EU law and acting in accordance with the CRPD if they follow the CJEU's definition of disability. However, it is submitted here that the Court's approach in practice, in spite of paying lip service to the CRPD, is not compatible with either its wording or spirit, and there is a real danger that the CJEU's mistaken approach will also trickle down to national courts.

[75] 25 of the 28 Member States have ratified the CRPD to date – with only Finland, Ireland, and the Netherlands yet to ratify.