'All About That Bass'? Is non-ideal-weight discrimination unlawful in the UK?

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Abstract

People of non-ideal-weight (overweight or severely underweight) are subjected to discrimination, in the workplace and elsewhere, based on attitudinal assumptions and negative inferences from their membership of a group, such as that they are insufficiently self-motivated to make good employees. But is that discrimination unlawful in the UK? The Equality Act 2010 offers only a very tenuous route for protection, because the Act is based largely on a 'medical model' of disability. EU law, which embraces a 'social model' of disability, drawing from the UN Convention on the Rights of Persons with Disabilities, offers more, at least in theory. But the mechanisms for enforcing individual EU law rights mean that entitlements in EU law are likely to be enforceable in practice only against state employers. This situation leaves a gap in the law which is remediable only by legislative reform.

A Introduction

Our awareness of general attitudinal biases against people of 'non-ideal-weight' was given added focus when our daughters introduced us to Meghan Trainor's pop song 'All About that Bass'.

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Trainor's clever lyrics draw attention to the unspoken but pernicious assumptions about the qualities of people based on the irrelevant criterion of their membership of a particular group – that of people who are perceived to be overweight. Several decades of research[1] confirm patterns of persistent discrimination against people of 'non-ideal-weight',[2] in the workplace, and in other contexts. One US study, which controlled for other factors such as race and educational attainment, showed that overweight women earn on average $9000 a year less than women of average weight. For obese women, the average is a shocking $19000 a year less.[3] Nor is disadvantage limited to pay.

[1] See, for instance, S. E. Jackson et al, 'Perceived Weight Discrimination in England: a population-based study of adults aged ≥ 50 years' (2014) *International Journal of Obesity* 107; X. Liu and E. Sierminska, 'Evaluating the Effect of Beauty on Labor Market Outcomes: A review of the literature' IZA Discussion Paper, October 2014 http://ftp.iza.org/dp8526.pdf; M. Caliendo and W. Lee, 'Fat chance! Obesity and the transition from unemployment to employment' (2013) 11 *Economics & Human Biology* 121; R. M. Puhl et al, 'The stigma of obesity: a review and update' (2009) 17 *Obesity* 941; C. Baum and W. Ford, 'The Wage Effects of Obesity: A Longitudinal Study' (2004) 13 *Health Economics* 885; J. Cawley, 'The Impact of Obesity of Wages' (2004) 39 *Journal of Human Resources* 451; J. Pagan and A. Davila, 'Obesity, Occupational Attainment, and Earnings' (1997) 78 *Social Science Quarterly* 756; D. Hamermesh and J. Biddle, 'Beauty and the Labour Market' (1994) 84 *American Economic Review* 1174.

[2] The phrase 'non-ideal-weight' captures the notion of the (unspoken) norm from which a notional 'ideal weight' deviates as an *idea*, rather than something objectively measurable. It includes both over- and under-weight individuals, although the former is significantly more common. Whether body mass index (BMI) or some other indicator is an appropriate measure of weight is irrelevant; what matters here is the *perception* of those initiating or perpetuating discriminatory behaviour.

[3] S. McGee, 'For women, being 13 pounds overweight means losing $9,000 a year in salary' *The Guardian* 30 October 2014, citing Shinall, above n 1, and J. B. Shinall, *Occupational Characteristics and the Obesity Wage Penalty* (Working paper, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379575 (last accessed 15 July 2015).

There is also evidence, for instance, that weight is a factor in hiring decisions.[4] The statistics are comparable in European contexts,[5] although some studies show that the relationships between weight and disadvantage are more complex than initial studies suggested.[6] The evidence of bias and negative assumptions relates to people who are 'merely' overweight, as well as to those who are obese and to those who would be classified as morbidly obese.[7] Only at the levels of morbid obesity

[4] J. M. Fletcher, 'Beauty vs Brains: Early labor market outcomes of high school graduates' (2009) 105 *Economics Letters* 321; J. Larkin and H. Pines, 'No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preference' (1979) 6 *Work and Occupations* 312.

[5] G. Brunello and B. d'Hombres, 'Does Body Weight Affect Wages? Evidence from Europe' (2007) 5 *Economics and Human Biology* 1; S. Morris, 'The impact of obesity on employment', (2007) 14 *Labour Economics* 413; J. Garcia and C. Quintana-Domeque, 'Obesity, Employment and Wages in Europe' in K. Bolin and J. Cawley (eds), *Advances in Health Economics and Health Services Research, The Economics of Obesity* (Amsterdam: Elsevier, 2006); A. Paraponis et al, 'Obesity, Weight Status and Employability: Empirical evidence from a French national survey' (2005) 3 *Economics and Human Biology* 241; S. Sarlio-Lahteenkorva and E. Lahelma, 'The association of Body Mass Index with social and economic disadvantage in women and men', (1999) 28 *International Journal of Epidemiology* 445.

[6] M. Caliendo and M. Gerhsitz, 'Obesity and the Labor Market: A Fresh Look at the Weight Penalty' IZA Discussion Paper, February 2014 http://ftp.iza.org/dp7947.pdf (last accessed 15 July 2015); B. Harper, 'Beauty, Stature and the Labour Market: A British Cohort Study' (2000) 62 *Oxford Bulletin of Economics and Statistics* 771 (this study found that once ability was controlled for, the 'beauty premium' disappears).

[7] The World Health Organisation defines a person as overweight if their body mass index (a person's weight divided by the square of their height) exceeds 25, and obese if it exceeds 30. Severe, morbid or type ii obesity (the terms are used interchangeably) begins at BMI 40. WHO, *Obesity: preventing and managing the global epidemic Report of a WHO Consultation* (Geneva: WHO Technical Report Series 894); WHO, *Obesity and Overweight: Fact Sheet Global Strategy on Diet, Physical Activity and Health*, (Geneva: World Health Organization, 2003).

do significant functional limitations to mobility, bending or lifting arise.[8] And although much of the research concerns overweight people, there is also evidence that people who are underweight suffer similar disadvantage.[9]

Given that people of non-ideal-weight suffer from discrimination, are they protected from that discrimination by the law in the UK? Being overweight, or even obese, is not in itself a prohibited ground of discrimination in UK law, or in the law of the European Union, which is the source of many non-discrimination entitlements in the UK. But discrimination on the grounds of *disability* has been expressly prohibited by statute since the Disability Discrimination Act of 1995. So the central question for this article is whether people of non-ideal-weight can properly be described as disabled, in the sense of the applicable law. If so, then our investigation offers a possible route for legal protection through litigation, without the need for statutory law reform. If this is not the case, then the law as it currently stands offers no protection. We do not concern ourselves here whether that position is appropriate, from rational economic, ethical, or deontological perspectives, although we acknowledge that even pursuing this research agenda implies a view that such protection would be appropriate.[10]

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[8] See, eg, M. A. Stefan, M. W. Hopman and J. F. Smythe 'Effect of activity restriction owing to heart disease on obesity' (2005) 159 *Archives of Pediatrics and Adolescent Medicine* 477.

[9] See, eg, D. S. Hamermesh, *Beauty Pays: Why Attractive People are More Successful* (Princeton: Princeton University Press, 2013), 52-54, 103-108; D. Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford: OUP, 2010).

[10] Some countries already protect from discrimination in some contexts on the grounds of physical appearance, for instance France's Labour Code Art L 112-45. For discussion, see L S. Burri and S. Prechal, 'Comparative approaches to gender equality and non-discrimination within Europe', and S. Laulom, 'French legal approaches to equality and discrimination for intersecting grounds in employment relations', both in D. Schiek and V Chege, (eds), *European Union Non-Discrimination Law* (Abingdon: Routledge, 2009).

We investigate in turn two possible routes for demonstrating that non-ideal-weight discrimination is disability discrimination in the UK: under domestic law as it currently stands; and by applying EU law. Our overall argument is that the former, while possible, constitutes a rather unsatisfactory and tenuous approach. Domestic law cleaves to what is known as a 'medical model' of disability. The direction of travel of the latter, on the other hand, is away from the medical model towards what is known as a 'social model'. Crucially, the social model includes attitudinal barriers among those barriers the effects of which must be tackled by anti-discrimination law. It is such attitudinal barriers, including assumptions about the capacities, qualities and characteristics of individuals on the basis of their perceived membership of a particular group, which lead to non-ideal-weight discrimination in the workplace and elsewhere. EU law, which embraces a 'social model' in its definition of disability discrimination, therefore offers more promise than domestic legislation to those who suffer non-ideal-weight discrimination in the UK.[11]

Secondly our analysis offers an insight, drawing on an important example, into the practical interactions between international human rights law, EU law and domestic statute law. What are the obligations on the UK judiciary to interpret domestic statutes where EU legislation applies? Do these differ where the EU law itself embodies international human rights obligations, reflected in the EU's Charter of Fundamental Rights? How do British courts comply with duties of deference to the UK Parliament, with the consequences implied by the obligations of statutory interpretation, at the

[11] In adopting this approach to the social model, we are referring to 'attitudinal barriers' arising from the views and perceptions of people who do not have disabilities (for instance, employers), rather than the attitudes of people with disabilities themselves. By contrast, O'Brien has argued that the EU's definition of disability is based on 'the language of the social model of disability, but adhering to a predominantly medical model … a market-medical model in which the "attitudinal barriers" are those of the disabled people themselves', see C. O'Brien, Union citizenship and disability: restricted access to equality rights and the attitudinal model of disability' in D Kochenov, ed, *Citizenship and Federalism in Europe: The Role of Rights* (CUP, 2016). See further below.

same time as duties in EU law to secure enforceability of rights found in EU Directives, and human rights found in the EU's Charter of Fundamental Rights? We will consider whether, in the light of a theoretical but entirely plausible factual matrix, fundamental rights, derived from these instruments and treated as a general principle of EU law, have begun to be the driver for an important change in the hitherto broadly settled constitutional arrangements between EU and national courts. Furthermore, we will ask how the UK courts are to deal with the EU's under-developed jurisprudence on the constitutional consequences of the need to give full effect to fundamental rights. Here, we will see, textbook or traditional accounts of the relationships between EU and national law, and the consequences for judicial behaviour, fall short of capturing the sort of 'judicial gymnastics' involved, where first instance and appellate judges seek to comply with EU law without doing disproportionate damage to the language of a domestic statute. Where such litigation is at least potentially concerned with the protection of the human right to non-discrimination, what appear to be mundane claims of individuals (for instance, of employees against their private employers) take on a constitutional quality and significance.

Finally, we uncover the limits of the theoretical possibilities described above. In particular, we will seek to describe the complex challenges which may arise as a consequence of a successful assertion of a particular fundamental right (to non-discrimination on grounds of disability) in the face of non-compliant national legislation. Those challenges range from a threat to the entire structural integrity of the relevant national law to complex forensic and conceptual difficulties resulting from an inherent imprecision of the right in question. We offer tentative solutions to some but not all of the difficulties and in so doing pave the way for future discussion as to what, if any, is the best way for the UK to give full effect to the fundamental rights of persons with disabilities more generally and persons with non-ideal weight in particular.

A <u>The domestic law: the Equality Act (2010) (the Act)</u>

B The history and origins of the Act

The legislation which currently provides protection from discrimination in the UK is the Equality Act 2010 (the Act). It is the instrument by which the United Kingdom gives effect to Directive 2000/78/EC establishing a general framework for equal treatment for employment in employment and occupation (the Framework Directive).[12] It is also the instrument through which the UK complies with non-discrimination obligations in international law, such as under the United Nations Convention on the Rights of Persons with Disabilities (UNCRD) 2006.[13] The Act is a consolidating statute, bringing together several earlier Acts and Regulations.[14] One of the Acts which it repealed in the process of consolidation was the Disability Discrimination Act 1995 (DDA). With the exception of the broadening of the term 'day-to-day activities', the new Act made no change to the definition of disability in the DDA.

The history of the disability discrimination provisions in the Equality Act thus lies in that of the DDA.[15] In the early and mid-1990s, when the UK was considering the introduction of a prohibition against discrimination in the workplace on the ground of disability, there were, essentially, two

[12] OJ 2000 L 303/16.

[13] UNCRD (adopted 13 December 2006, entry into force 3 May 2008) 2515 UNTS 3. The UNCRD is not itself directly enforceable in UK law, see *R (on the application of SG and others (previously JS and others))* v *Secretary of State for Work and Pensions* [2015] UKSC 16, although note the dissenting opinions of Hale and Kerr (in the minority).

[14] For example the Sex Discrimination Act 1975 , the Race Relations Act 1976, the Employment Equality (Sexual Orientation) Regulations 2003 and the Equality (Age) Regulations 2006.

[15] For further discussion of the history of the DDA, see B. Doyle, 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995' (1997) 60 *Modern Law Review* 64.

options open to the legislature. These are still most commonly referred to as a 'medical model'[16] and a 'social model'. The former holds that the effect of an 'impairment' upon function is what creates the disability. So a person who has impaired mobility is disabled because their ability to walk is limited. The latter, which has been expressed in a variety of ways, some more radical than others, instead points to the interaction between impairment and barriers erected by society which create the disability. A person with a mobility impairment is disabled by some aspect of society (say, the built environment) which makes it difficult or impossible to mobilise without the ability to walk. Further, people with impairments face stigmatisation and barriers to their full participation in society as a result of their minority group status or stereotypical assumptions, in the same way as people from BME communities or women.[17] Here, we use the term 'social model' to refer to any model which seeks to define disability as arising out of the barriers erected by a society which, in interaction with their physical or mental impairments, limit disabled persons' full participation in that society.

The World Health Organisation's *International Classification of Impairments Disabilities and Handicaps* (ICIDH) 1980 defined disability adopting a medical model thus

[16] For reasons which will become apparent, we also refer to this as a 'functional deficit' model.

[17] An early use of the term 'social model' is found in P. Hunt, *Stigma: The Experience of Disability*, (London, Geoffrey Chapman, 1966). For further discussion, see M. Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: Palgrave Macmillan 1996 and 2009); I. Solanke, 'Stigma: A limiting principle allowing multiple-consciousness in anti-discrimination law' in Schiek and Chege, above n 10; J. L. Roberts, 'Healthism and the Law of Employment Discrimination' (2014) 99 *Iowa Law Review* 571, 584-587; L. Waddington, ' "Not disabled enough": How European Courts filter non-discrimination claims through a narrow view of disability' (2015) *European Journal of Human Rights* 11.

> 'In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'.[18]

Whereas, in contrast, the Union of the Physically Impaired Against Segregation (UPIAS), building on Hunt's work,[19] asserted in 1976, relying on a social model, that disability is:

> 'the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities'.[20]

Several jurisdictions adopted definitions of disability based on the concept of 'impairment'. Those adopting a 'medical model' require that the 'impairment' adversely affects the ability to carry out day-to-day activities.[21] In contrast, some definitions[22] pay little or no regard to what effect the

[18] Section 3, Classification of Disabilities, p 143.

[19] above n 17.

[20] Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability*, (London: UPIAS, 1976).

[21] The 1990 Americans with Disabilities Act (ADA) defines a person with a disability as a person who has, or has had, a physical or mental impairment that substantially limits one or more major life activities, and certain people 'perceived' to meet the definition. Title 42 Chapter 126 s 12102. Hamermesh suggest that 'ugly' people could be protected under the ADA, see supra n 9, 151. Successful litigation under the ADA, however, involves more than merely being overweight, there must be a restriction of a 'major life activity' (ie the medical model). Contrast, for instance, *Coleman* v *Georgia Power Co* 81 F Supp 2d 1365 (N.D.Ga 2000) with *Cook* v *Rhode Island Dept of Mental Health, Retardation and Hospitals* 10 F.3d 17 (1st Cir 1993). See J. L. Roberts, 'Healthism and the Law of Employment Discrimination' (2014) 99 *Iowa Law Review* 571. Germany (Act on the Equalisation of Disabled People 2002, Art 3), Austria (Bundes- Behindertengleichstellungsgesetz 2005, Art 3), and Switzerland (Behindertengleichstellungsgesetz 2002 Art 2(1)) have also adopted the medical model, see T. Degener, 'The

impairment would have to have in order to be disabling. In consequence, the courts and executives of those countries have felt free to approach the definition as allowing scope for a social model, where the impairment's interaction with the social environment creates the disadvantage.[23]

These competing models each found expression in legislation seeking to protect people with disability from discrimination. The drafters of the DDA chose a model of disability which is primarily medical.[24] Satisfaction of the definition in the DDA requires the existence of an impairment, mental

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Definition of Disability in German and Foreign Discrimination Law' (2006) 26 *Disability Studies Quarterly* 11. The South African Employment Equity Act No 55, 1998, s 1 defines people with disabilities as 'people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into or advancement in employment', see further J. M. Hoskins, *Incapacity, disability and dismissal : the implications for South African labour jurisprudence* (University of Western Cape http://etd.uwc.ac.za/xmlui/handle/11394/1729).

[22] For instance, the Canadian Charter of Rights and Freedoms 1982, section 15 (1); the Australian Disability Discrimination Act 1992 s 4; the New Zealand Human Rights Act No 82, 1993, s 21; and the Irish Employment Equality Act 1998 s 2(1). See G. Quinn, M. McDonagh and C. Kimber, (eds), *Disability Discrimination Law in the US, Australia and Canada* (Dublin: Oak Tree Press 1993).

[23] See for example, the Canadian Supreme Court in *Eldridge v British Columbia (AG*) [1997] 3 SCR 624*;* Q*uebec* v *Montréal*; *Quebec* v *Boisbriand* [2000] 1 SCR 665; and the Australian High Court in *Purvis* v *New South Wales* (2003) 202 ALR 133. See also the definition of disability in the New Zealand Disability Strategy of 2009. Some have claimed that the Netherlands *Wet gelijke behandeling op grond van handicap of chronische zeikte* 2003 (Act on Equal Treatment on the grounds of disability or chronic illness) adopts a social model, see C. Heißl and G. Boot, 'The application of the EU Framework for Disability Discrimination in 18 European countries' (2013) 4 *European Labour Law Journal* 119. For a US perspective on the competing models, see M. A. Stein, 'Disability Human Rights' (2007) 95(1) *California Law Review* 75. Note that many US states and localities have adopted provisions on weight discrimination, see Hamermesh above n 9, 152-153.

[24] Although the s 6 definition is classically medical, it is modified by Sched 1, in particular the severe disfigurement provision in Art 3 and the deeming provisions in Arts 6 (cancer, HIV and Multiple Sclerosis) and 8

or physical, which has a substantial, long term, adverse effect on the ability to carry out day-to-day activities. The similarity to the 1980 ICIHT and the ADA definitions will be immediately apparent. The DDA focuses on a functional deficit caused by impairment. It does not consider the social context. During the passage of the Bill, the Minister of State responsible, William Hague, explained that the definition had been settled on as one which was easily understood. He described it as covering people who are disabled 'in commonsense terms' and referred to the need to ensure that the Bill's aim be met by 'carrying with us' employers, business and the general public.[25] Nonetheless, the definition was the subject of contemporary criticism[26] on the ground that it did not conform with the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted in 1993, which encompass a social model definition of disability. [27]

B Characteristics protected under the Act

Under the Equality Act, all three elements - impairment, long term and substantial adverse effect - must be proved before the right to complain of discriminatory treatment is established. To fall short of proving any of the components of that definition is to fall outside the protection of the Act. An

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(progressive conditions). To the extent that each of these allow for conditions to be treated as disabling even though they may not (yet) have any substantial adverse effect they introduce a social model element to the definition. For further discussion of the DDA's approach, in context, see B. Hepple *Equality: The Legal Framework* (Oxford: Hart, 2014); S Fredman, *Discrimination Law* (Oxford: Clarendon, 2011) 95-101; B. Doyle, *Disability Discrimination Law and Practice* (Bristol: Jordans, 2008) 15-36; N. Bamforth, M. Malik, C. O'Cinneide *Discrimination Law: Theory and Context* (London: Sweet and Maxwell, 2008); A. McColgan, *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 2005) 566-589.

[25] HC Deb Standing Committee E vol 566 col 73 28 March 1995.

[26] B. Doyle, 'Disabled Workers' Rights, the Disability Discrimination Act and the UN Standard Rules' (1996) 25 *Industrial Law Journal* 1, 11.

[27] UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, paras 17 and 18.

extreme, but theoretically possible example, would be a person with a physical impairment which had had a substantial adverse effect on their ability to carry out day-to-day activities for 11 months and 29 days. Since 'long term' is defined in the Act as a year, that person could not complain of discrimination arising from a disability contrary to section 15 of the Act if they were dismissed because of their absence from work which itself was wholly caused by the impairment. Our question is to what extent people with non-ideal weight can rely upon the disability discrimination provisions in the Equality Act to seek protection from discrimination. Excess weight or emaciation is not *of itself* a disability but may give rise to impairments which, if they have the necessary effects of sufficient duration, might result in definition of disability in the Act being satisfied. We examine each of the elements of the definition of disability in turn.

C *'Impairment'*

Section 6(1) of the Act provides that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out day-to-day activities. Any tendency to equate 'impairment' with 'illness' was dealt with firmly by the Court of Session, Inner House in *Miller* v *Inland Revenue Commissioners* (a case brought under the DDA but of continuing authority).[28] The leading opinion of Lord Penrose, at paragraph 22[29] makes it clear that 'physical impairment can be established without reference to causation and in particular, without any reference to any form of illness'. Thus to fall within the protection of the Act, it is not necessary that non-ideal weight constitute an 'illness'.

In *J* v *DLA Piper*,[30] the Employment Appeal Tribunal made the point that there may be difficult medical questions in deciding the nature of an impairment. Where there might be a dispute as to the

[28] [2006] IRLR 112.

[29] p 116.

[30] [2010] IRLR 936.

existence of an impairment, it would be sensible to identify whether the claimant's ability to carry out day-to-day activities was adversely affected and to draw 'commonsense' inferences about the existence of impairment from the results of that enquiry. With this background, there is no obvious reason why the mere fact of a particular body mass might not give rise to impairment. The courts' pragmatic approach, which dispenses with the complications of causation and even precise identification, focuses on the question of function. Does some aspect of the claimant's condition, physical or mental, impair their functioning? In relation to obesity, the point was made clearly by Langstaff P, in the unreported decision of the EAT in *Walker* v *SITA Information Networking Computing Ltd*:

> 'Third, though I do not accept that obesity renders a person disabled of itself, it may make it more likely that someone is disabled. Therefore on an evidential basis it may permit a Tribunal more readily to conclude that the individual before them does indeed suffer from an impairment or, for that matter, a condition such as diabetes, if that diabetes is such as to have a substantial effect upon normal day-to-day activities.' [31]

If non-ideal weight can be shown to have a substantial effect on normal day-to-day activities, or if a Tribunal may infer that from its understanding of non-ideal weight, it may constitute an impairment under the Act.

C *'Substantial adverse effect'*

The Act requires that an impairment must have a substantial adverse effect on a person's ability to carry out day-to-day activities.[32] The phrase 'day-to-day activities' is not defined. The DDA did define

[31] UKEAT/0097/12, para 18. For an extended discussion of the *Walker* ruling, reaching a different overall conclusion to ours, see S. W. Flint and J. Snook, 'Obesity and discrimination: The next "big issue"' (2014) 14 *International Journal of Discrimination and the Law* 183.

[32] s 6(1)(b).

the phrase and limited it to a consideration of a closed list of 'activities' which included, for example mobility, physical dexterity and the ability to lift and carry 'everyday' objects.[33] It cannot be the case that the Equality Act intends that activities are confined to those necessitated by the person's employment, because the definition must hold good in non-employment cases also.[34]

The approach of the UK courts to the issue has been to focus the enquiry on things that a person cannot do or can only do with difficulty.[35] It is a 'functional deficit test'. This approach is supported by the Guidance issued by the Secretary of State under the Act.[36] The Guidance[37] gives, as an example of an impairment likely to meet the necessary conditions: 'a woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk'.[38] Since the Act no longer limits the definition of day-to-day activities, there is an even wider scope than under the DDA for considering the potential functional consequences of excessive weight or indeed its opposite. For example, severely underweight people are more prone to exhaustion and do not deal well with cold. The consequences of their weight on their ability to carry out the day-to-day activities of remaining awake for sustained periods of time, and of maintaining a body temperature that allows normal functioning in a cold place may mean that their non-ideal-weight constitutes a disability under the Act. Again the focus is on functional deficit.

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[33] DDA Sched 1, Art 4.

[34] Contained in Parts 2 (goods and services), 4 (premises) 6 (education) and 7 (associations).

[35] *Goodwin* v *The Patent Office* [1999] IRLR 2 (EAT), *Aderemi* v *London & South Eastern Railway Ltd* [2013] ICR 591.

[36] The Act (as did the DDA) empowers the Secretary of State to issue guidance on the definition of disability, (s 6(5)).

[37] Guidance On Matters To Be Taken In To Account In Determining Questions Relating to The Definition Of Disability 2011 (Official for Disability Issues, HM Government, 2011).

[38] Para A.7.

C *'Long term'*

The adverse effect must be long term, which means that it has either already lasted for 12 months, is likely to last for a total of 12 months, or is likely to last for the rest of the person's life.[39] The focus is not on how long the impairment has existed but for how long it has, or is likely to have, the relevant adverse effect. Langstaff P's judgment in *Walker* points out:

> 'It may also be relevant evidentially to ask whether the obesity might affect the length of time for which any impairment was to be suffered. Thus in the case of someone determined to lose weight, in respect of whom it could confidently be predicted that they would reduce their weight to normal levels well within a year, with the consequent result that they no longer suffered from impairments which could confidently be ascribed to the weight itself, this could have the result that there was no disability, for those impairments would not last for over 12 months.'[40]

There is nothing about non-ideal-weight which causes any particular *conceptual* difficulties when considering the definition of disability from the point of view of functional deficit. But, as the discussion in this section has shown, there may of course be *evidential* difficulties in proving the various elements of the definition. For example, an obese person who is imminently to undergo bariatric surgery may have difficulty in satisfying the requirement for long term effect. A person with a high BMI but not yet morbidly obese may have some limitation, say to their walking, but it might be insufficient to be regarded as substantial.[41]

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[39] Sched 1, Art 2.

[40] above n 31, para 18.

[41] For example the Guidance on the Definition of Disability 2006 suggested that tiredness or discomfort on walking 1.5 kilometers would not amount to substantial adverse effect.

But the real problem, noted in the introduction, is that the evidence shows that people with non-ideal-weight suffer discriminatory treatment *even though their weight does not result in any impairment or at least any impairment having the requisite long-term substantial adverse effect*. The definition of disability in the Act, focused as it is on the 'functional deficit', inspired by a medical model of impairment, suggests that such adverse treatment does not fall under the scope of the Act.

C. Severe disfigurement

In a few significant instances,[42] the definition of disability in the Act departs from a purely medical model. Schedule 1, Article 3 provides that 'an impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities'.[43] The Act deems an impairment (severe disfigurement) which does not in fact have a substantial adverse effect (a 'functional deficit') as nevertheless having that effect for the purposes of determining whether there is a disability in the sense of the Act. The Court of Appeal in Northern Ireland, in *Cosgrove* v *Northern Ireland Ambulance Service*,[44] observed

> 'The reason that disfigurement is given access to the protected category by the device of the deeming provision is that those who are at risk of being refused employment or disadvantaged in relation to employment arrangements because of their appearance form a group that require equivalent protection to those who cannot carry out normal day-to-day activities. It appears to us that this special status reflects the increased consideration that it is felt should be accorded this group *on account of their disfigurement*.'[45]

[42] See Sched 1, Art 3; and the deeming provisions of Sched 1, Art 6.

[43] The other instance of departure lies in the deeming provisions of Sch 1 Art 6.

[44] [2006] NICA 44.

[45] Para 15.

A further guide to the nature of this exception can be gleaned from the Guidance. Paragraph B25 states that assessing severity will be a matter of degree of disfigurement, but that it may be necessary to take into account nature, size and prominence.

The very nature of this exception to the general rule points to a social model of disability. That model of disability holds that the disability arises from some aspect of society, for example the way the built environment is arranged or the way in which social attitudes are constructed, in this case the latter. The suggestion that 'prominence' might be a factor in determining severity reinforces the idea that this is a social model approach to disability. In cases of a physical impairment with a substantial adverse effect, the question of prominence, that is, to what extent is the disability visible, goes directly to the question of the cause of the adverse treatment. In the case of severe disfigurement, prominence or visibility of the impairment is a factor in determining whether the gateway test of 'functional deficit' is met. The relevance of prominence or size can only go to the question of the reaction it provokes. The Act recognises that, because of construction of social attitudes, people are more likely to discriminate against people whose disfigurement is prominent and visible, and therefore a prominent, sizeable and visible disfigurement is more likely to meet the test of severity. By way of illustration, the unreported decision of HHJ Eady QC in the EAT in *Hutchinson 3G UK Ltd* v *Edwards*[46] deals with a claimant with Poland Syndrome. The Employment Tribunal at paragraph 6.2 of its judgment had found that: 'The claimant has a substantial disfigurement to his chest. He is missing the major chest muscle and the sternal head on the left side of his chest. He is also missing two ribs. That amounts to a substantial disfigurement to his chest. It is clearly prominent as the claimant goes to substantial length to hide it.'[47] In dealing with the question of severity, HHJ Eady observed that the Tribunal was entitled to consider the psychological

[46] [2014] EqLR 525.

[47] above n 46, 526.

effect of the disfigurement upon the claimant, in that case said to be significant. Such an effect was not a necessary requirement to establish severity, but it was certainly a relevant consideration.[48]

As to severity therefore, people with non-ideal-weight may well be able to meet the definition. The prominence and ready visibility of their weight, provoking as it might the sort of stereotypical responses we have already discussed, or the effect on their psyche of non-ideal-weight – low self-esteem, social anxiety – would be factors which could be relied upon to prove disability. But the real difficulty with meeting the definition of disability via the deeming provision of severe disfigurement lies in the idea of 'disfigurement'.

The Act does not define the term 'disfigurement' and the authorities[49] proceed on the basis that the word needs no definition. It follows that the normal canons of statutory interpretation apply. In the absence of a definition, the legislator must be taken to intend that the ordinary English meaning of the word in common usage applies.[50] In ascertaining the ordinary meaning of a word, it is permissible to turn to the dictionary.[51] The Oxford English Dictionary defines the verb 'disfigure' as 'to mar the figure or appearance of; to deform, to deface' and the noun 'disfigurement' as 'something that disfigures; a deformity, defacement'. The connotation of the word therefore is of something considerably stronger than a 'departure from the norm'. It means something a great deal more than a factor which renders the person merely unattractive, although aesthetics are certainly engaged. Some clue as to the meaning of the word 'disfigurement' may be gleaned from subordinate legislation, made under a power in Schedule 1, Article 3 (a) and (b) of the Act,[52] which provides that a severe disfigurement consisting of a tattoo or a piercing is *not* to be treated as having

[48] above n 46, 528.

[49] *3G* above n 46 and *Cosgrove* above n 44.

[50] See, *inter alia, Stock* v *Frank Jones (Tipton) Ltd* [1978] 1 AllER 948.

[51] For example *Goodhew* v *Morton* [1962] 1 AllER 771.

[52] Equality Act (Disability) Regulations 2010, Reg 5.

a substantial adverse effect. Furthermore, the Guidance gives, as examples of disfigurement, scars, birthmarks, limb or postural deformation (including restricted bodily development) and diseases of the skin. These examples reinforce the idea that a disfigurement is that which mars or deforms. Nor is there anything inherently absurd or contradictory about such an interpretation, which might require a court or tribunal to depart from the literal approach to statutory interpretation.

Although not a natural reading of the word 'disfigurement', being of non-ideal-weight might be capable of being described as being marred or deformed, within the literal approach. However, Court of Appeal authority suggests that a purposive approach to interpretation of 'disfigurement' is appropriate. *Cosgrove*[53] describes the purpose of the provision. It can either been seen as an exception to the general requirement to show functional effect (and that is the rationale given in *Cosgrove*) or, in the alternative, can be viewed as asserting the existence of a particular type of functional deficit. In either case, it is designed to ensure that people with severe disfigurements are brought within the scope of the definition because of the disadvantage to which they are put *because of* their appearance. The reason for the disadvantage must be the disfigurement itself.

What then is the reason for the disadvantage which people of non-ideal-weight experience? It may, in part, arise from a feeling that such people are unattractive, but the literature suggests that that appearance gives rise to stereotypical assumptions about the value or worth of those individuals.[54] It is not their appearance per se, provoking revulsion or fear, but because their weight triggers conscious or unconscious bias centred on their personality, which gives rise to discriminatory treatment. Whilst the well-evidenced existence of weight based discrimination may be a ground for offering protection under the legislation, it is not a reason to suppose that the purpose of the drafters of the Act was to include non-ideal-weight within the definition of disfigurement.

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[53] above n 44.

[54] See above n 1, 4, 5, 6 and 9.

The extremes of weight occupied by morbid obesity or severe emaciation might be said to lead to disfigurement, although that is not natural language even then. In any event, those individuals would meet the functional impairment test, and so an argument based on disfigurement would be unnecessary. Mere departure from ideal weight is unlikely to meet anybody's idea of a disfigurement adopting the normal UK approach to statutory interpretation.

B Conduct prohibited under the Act

The Act explicitly outlaws certain 'prohibited conduct'.[55] As applied to the protected characteristic of disability, prohibited conduct is as follows: direct discrimination,[56] harassment,[57] indirect discrimination,[58] adverse treatment for a reason arising from disability,[59] and, crucially, breach of the duty to make reasonable adjustments.[60] Of these, only the wording in the sections on direct discrimination and harassment leaves scope for claims to be brought by someone who does not actually possess the protected characteristic, in this context, someone who does not have a disability.[61] Where the person's weight falls short of creating a disability that constitutes an impairment within the functional test of the medical model, the disadvantage suffered by those subject to non-ideal-weight discrimination might be based on a *perception* that they meet the statutory definition of disability. Therefore, we focus here on direct discrimination and harassment,

[55] Chapter 2, part 1.

[56] s 13.

[57] s 26.

[58] s 19.

[59] s 15.

[60] s 21.

[61] In the case of the duty to make reasonable adjustments, the CJEU in *Coleman* affirmed that the duty (reasonable accommodation in Art 5 of the Framework Directive) applies only to people who have a disability.

and do not consider other types of conduct which are not prohibited in perception-based claims. In so doing, we recognise that, whilst the concept of perceived disability might extend protection against discrimination to some people with non-ideal-weight who do not meet the functional deficit test, the limitations of this approach are significant.

C Direct discrimination

Here the conduct is treating a person less favourably *because of a protected characteristic* (our emphasis) than the way in which another person would be treated. The words in italics represent a significant departure from the predecessor legislation which limited direct discrimination to treatment '*of a disabled person*'. In order to attract the protection of the DDA from direct discrimination, a claimant him or herself had to be disabled. But such a limitation did not conform with the EU's Framework Directive 2000/78,[62] in the light of the wording of Article 2 (2) of the Directive which does not require that the person bringing the complaint themselves possess the protected characteristic. In *Coleman*,[63] the CJEU confirmed that Mrs Coleman could pursue a complaint of direct discrimination because of her *association* with someone (her child) who was disabled. The new definition also opens the way to an argument that a person who is merely *perceived* as having a disability is protected from direct discrimination. We discuss that possibility in more detail below.

C Harassment

[62] above n 12.

[63] Case C-303/06 *Coleman* v *Attridge Law and others* ECLI:EU:C:2008:415 [2008] ECR I-5603.

The Act also outlaws harassment. Section 26 defines what treatment amounts to harassment and provides that a person harasses another person if she or he subjects that person to unwanted conduct, *related to* a protected characteristic, which meets the definition. Here too there is no requirement that the complainant actually possess the required characteristic and that was confirmed by *Coleman*[64] in the context of harassment by association. On the face of it, the same reasoning ought to apply to perception-based claims. Harassing treatment because the putative harasser perceives a person to have a disability is, ipso facto, treatment related to disability.[65]

C Discrimination based on a perception of disability

The implication of the above is that the Act provides protection from direct discrimination and harassment based on a *perception* of disability. This is not made explicit in the wording of the Act,[66] but may be supported by the following argument. The Equality and Human Rights Commission Code of Practice on Employment (2011) provides an explanation of the Act, and whilst not an authoritative statement of the law, must be referred to by courts and tribunals where relevant.[67] At paragraphs 3.21 and 7.10, the Code explicitly recognises the possibility of the prohibited conduct being on the basis of a *perception* that the protected characteristic is present. Thus a wrongly held perception that a person is a person with a disability could found a complaint of harassment or direct discrimination. So, for example, an employer who (wrongly) believed that an overweight employee was disabled, and treated that person less favourably because of that perception, would be directly discriminating because of the protected characteristic of disability.

[64] above n 63.

[65] The Equality and Human Rights Commission Code of Practice on Employment (2011), Paragraph 7.10.

[66] Interestingly, the ADA in 1990 explicitly included 'being regarded as having' a physical or mental impairment within its definition of disability.

[67] Equality Act 2006, s 15(4).

What must the alleged discriminator be shown to *actually* perceive in order for a person who has been adversely treated because of that perception to claim that there has been a perception of disability? It must be doubtful that many claimants will be able to show the existence of the perception without, in fact, satisfying the functional deficit requirement. A recent first instance decision in the Employment Tribunal, *Estlin* v *Central Manchester University Hospitals NHS Foundation Trust*,[68] concluded that, in a case of perceived disability discrimination, the employer would have to have had in mind all of the factors entailed in the definition of disability. This approach is consistent with the jurisprudence on the question of knowledge of disability. It is well established that, in order to succeed in a claim for, say, direct discrimination because of disability, a claimant must show that the alleged discriminator knew of the existence of the disability.[69] 'Knowledge' here means knowledge of all the factors which comprise the definition of disability as they apply to the claimant.[70] In other words, the employer must have considered the questions of impairment and long term adverse effect. It seems improbable that a level of consideration less detailed than that would suffice to fix an alleged discriminator with a perception of the existence of the disability. If it is indeed this level of consideration that must be shown, it is unlikely that a claimant could successfully show that an alleged discriminator had developed the perception that a claimant met the definition without a certain amount of evidence that that was in fact the case, even if that evidence was observation or impression. We would suggest that there will be relatively few claimants who could show 'perception' without also being able to show that they actually meet the functional deficit test.

B Conclusion

[68] 2412374/2011, 20 November 2014.

[69] *Gallop* v *Newport City Council* [2013] EWCA Civ 1583.

[70] Rimer LJ in *Gallop*, above n 69, para 36.

There are three possible ways in which people with non-ideal-weight may meet the definition of disability in the Act and thus attract protection from discrimination. They may be *deemed* to be disabled if their weight is such as to result in 'severe disfigurement'. We consider that to be unlikely for all but perhaps the most extreme ends of the weight spectrum. They may be *perceived* to be disabled although establishing the existence of such a perception would be the ground only for claims of direct discrimination or harassment. Finally they may meet the basic 'medical model' definition in section 6, that is, if their weight is such that it creates substantial functional deficit. There will be people whose weight is such that their ability, say, to mobilise is so compromised that they meet the section 6 definition.[71] However, the types of non-ideal-weight discrimination of most interest here are not those where an impairment with actual long term effect is present. As we have already pointed out, most non-ideal-weight discrimination arises from stereotypical assumptions which attach to people whose bodies do not fit an ideal, although in most cases their weight will not give rise to any significant functional deficit. Although we have described possible routes to protection available in the Act, we consider them to be problematic and fragile as long as domestic law retains its adherence to the medical model of disability.

A European Union law: Directive 2000/78/EC (The Framework Directive)

If protection for people of non-ideal-weight from discrimination is only a tenuous possibility under UK law, might EU law offer some hope? Disability discrimination is prohibited under Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (The Framework Directive).[72] The Directive is expressly designed, inter alia, to 'foster a labour market

[71] Indeed Mr Kaltoft, (below n 92) whose BMI reached 54 (where over 40 is regarded as severely or morbidly obese) would probably meet the current UK definition of disability.

[72] OJ 2000 L 303/16.

favourable to social integration' by 'combating discrimination against groups such as persons with disability'.[73] The Directive applies only to equal treatment in employment and occupation.[74]

B 'Disability' under the Directive

The Directive does not define the term 'disability'. Earlier provisions of EU anti-discrimination law[75] did not cover disability. The Directive refers to the 1989 Community Charter of the Fundamental Rights of Workers,[76] but, although the Charter recognises the need to take action for the social and economic integration of disabled people, it does not define disability. Nor does the Council's Recommendation 86/379/EEC on the employment of disabled people in the Community.[77] The Recommendation merely says that the term includes people with 'serious disabilities which result

[73] Recital 8.

[74] Art 1.

[75] Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ 1975 L 45/19; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ 1976 L 39/40; Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1979 L 6/24; Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes OJ 1986 L 225/40; Commission Recommendation 92/131/EEC on the protection of dignity of men and women at work OJ 1992 L 49/1; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ 2000 L 180/22.

[76] Recital 6.

[77] OJ 1986 L 225/43.

from physical, mental or psychological impairments'. The text of the Directive thus leaves open the question of whether EU law understands disability through a medical or a social model.[78]

C The *Chacón Navas* approach

It was not until the 2006 decision of the CJEU in *Chacón Navas* v *Eurest Colectividades SA*[79] that the matter was addressed authoritatively. The CJEU observed that there was no definition of disability in the Directive and that the Directive made no reference to the law of the Member States for the purpose of determining its meaning. The term was, therefore, to be given an autonomous and uniform interpretation, having regard to the objective pursued by the legislation. That objective was to combat certain types of discrimination, including disability, as regards occupation and employment. 'In that context, the concept of "disability" must be understood as referring to a limitation which results in particular from physical mental or psychological impairments which hinders the participation of a person in professional life.'[80]

It is not at all clear why this particular, narrow approach followed so obviously from the purpose of the Directive. The Advocate General's Opinion refers to the 'rapid evolution' of the concept of disability. He expressly mentions that disability has both a medico-scientific and a social sense.[81] However, he goes on to say 'Nonetheless, in developing a uniform interpretation of the term 'disability', account should be taken of the aforementioned dynamic aspect of society's perception of the phenomenon of disability as a functional limitation resulting from a mental or physical defect, the evolution of medical and biomedical understanding and the major contextual differences in the assessment of a wide variety of disabilities.'

[78] For an early take on this question, see K. Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' (2003) 32 *Industrial Law Journal* 253.

[79] Case C-13/05 ECLI:EU:C:2006:456 [2006] ECR I-6467.

[80] Para 43.

[81] Opinion of A-G Geelhoed, ECLI:EU:C:2006:184, para 58.

Certainly the UK courts understood the decision in *Chacón Navas* to create no particular difficulties with the functional deficit approach to the definition of disability in the Disability Discrimination Act 1995, the relevant provision then in force.[82] Nor is it difficult to see why. An espousal of a social model of disability would have entailed a reference in the CJEU's ruling to systemic barriers and negative attitudes which result in impairments becoming disabling. Instead, the idea of 'professional life' remains uninterrogated, and the focus is upon functional limitations to the ability to participate fully in it.[83] Nonetheless, the medical model is not inconsistent with the text of the Directive, or the obligations of the CJEU to interpret the Directive at the time of the *Chacón Navas* ruling.

C The post-2010 position

These obligations changed in December 2010, when the European Council approved the United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCRD).[84] From the date of its approval, the UNCRD became an 'integral part of the European Union legal order'.[85] EU legislation

[82] See, for instance, *Chief Constable of Dumfries and Galloway Constabulary* v *Adams* [2009] IRLR 612 and *Paterson* v *Commissioner of Police of the Metropolis* [2007] IRLR 763.

[83] L. Waddington, 'A New Era in Human Rights Protection in the European Community: The Implications of the United Nations' Convention On the Rights of Persons with Disabilities for the European Community', Maasticht working papers 2007-4, available at http://www.maastrichtuniversity.nl/web/Faculties/FL2007_maastricht_working_papers (last accessed 15 July 2015); L. Waddington, 'Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006', (2007) 44 *Common Market Law Review* 487; D. Hosking, 'A High Bar for EU Disability Rights', (2007) 36 *Industrial Law Journal* 223.

[84] Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ 2010 L 23/35.

[85] See *Haegeman* v *Belgium* Case 181/73 ECLI:EU:C:1974:41 [1974] ECR 449, para 5.

(including the Directive) must be interpreted, as far as possible, consistently with the UNCRD.[86] Article 1 of the UNCRD defines disability thus:

> '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.'

Paragraph e) of the preamble reads as follows

> 'recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'

It will be immediately apparent that the UNCRD adopts a strong variant of the social model of disability.[87]

That the UNCRD adopts the social model was acknowledged by the CJEU in 2013 in *Ring*.[88] Advocate General Kokott expressly recognised that, since the UNCRD defines disability as arising from the

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[86] For criticism of the *Chacón Navas* judgment, making the argument that it is not in line with the UNCRD see, L. Waddington, above n 83.

[87] A. Lawson, *Disability and Equality Law in Britain* (Oxford: Hart 2008) 30; C. O'Cinneide, 'Extracting Protection of the Rights of Persons with Disabilities From Human Rights Frameworks: Establishing Limits and New Possibilities' in O. M. Annandóttir and G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandanavian Perspectives,* (The Hague: Marinus Nijhoff 2009); T. Collingbourne, *Realising Disability Rights*, *Implementation the UN Convention on the Rights of Persons with Disabilities in England* http://etheses.whiterose.ac.uk/3904/ (last accessed 15 July 2015), 84, 87-88. For a description of the groundbreaking process by which the UNCRD came to be drafted, including the involvement of people with disability and NGOs, see Collingbourne, 59-70.

'interaction with various barriers', the approach to the definition of disability in *Chacón Navas* might fall short of the protection extended by the UNCRD in certain circumstances.[89] The CJEU's judgment on the question of the definition of disability adopts the A-G's Opinion. Paragraph 38 reads: '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* (our emphasis) may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.' A social model approach to defining disability under the Directive in *Ring* was followed in 2014 by *Z* v *A Government Department*,[90] and *Glatzel* v *Freistaat Bayern*.[91]

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[88] *HK Danmark, acting on behalf of Ring* v *Dansk Almennyttigt Boligselskab; HK Damark, acting on behalf of Werege* v *Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* Cases C-335/11 and 337/11 ECLI:EU:C:2013:222. See also Waddington, above n 17; L. Waddington, 'Fine-tuning non-discrimination law' (2015) 15 *International Journal of Discrimination and the Law* 11; N. Betsch, 'The *Ring* and *Skouboe Werge* Case: A Reluctant Acceptance of the Social Approach to Disability', (2013) 4 *European Labour Law Journal* 135; C. Hiessl and G. Boot, 'The Application of The EU Framework for Disability Discrimination in 18 European Countries' (2013) 4 *European Labour Law Journal* 119; and E. Kajtár, 'Life outside the bubble: International and European legal framework of disability discrimination in employment' (June 2013) *Pécsi Munkajogi Közlemények* 5, describing the rulings as a 'paradigm shift'.

[89] Para 27.

[90] Case C-363/12 ECLI:EU:C:2014:159. The CJEU found, following *Ring*, that the UNCRD was capable of being relied upon in determining the concept of disability (see paras 70-76). However, the Framework Directive presupposed that disability arises from the interaction between an impairment and the relevant barriers such as to hinder that person's full and effective participation in professional life' (para 80). The UNCRD is essentially programmatic and is not capable of being relied on directly to challenge the validity of the Framework Directive. Since the Framework Directive is limited in its scope, a wider definition of disability, establishing the existence of disability even where the impairment in question has no impact on the ability to participate in work, was not required. This may be seen as something of a check to the idea that there has

C Kaltoft

At that point it might be thought that the social model had taken a full hold of the jurisprudence of the CJEU, save that, although the phrase 'various barriers' had been used repeatedly, what those barriers might amount to was yet to be clarified. The CJEU was given an opportunity to deal with the matter further in the reference from the District Court of Kolding, Denmark, in the case of *Kaltoft*.[92] As this is the most recent CJEU ruling on the subject, it deserves some elaboration.

Kaltoft was employed by the Municipality of Billund as a childminder. He was obese in the clinical sense, having a BMI of over 40. In 2013, he was dismissed and complained that the decision to dismiss him was on the ground of his obesity. The Danish Court referred four questions to the CJEU,

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been a wholesale embracing of the social model in its broadest sense in *Z,* (see Waddington, above n 86), although within the limited scope of the Framework Directive, we maintain that at least a variant of the social model is now the CJEU's dominant model for defining the meaning of disability.

[91] Case C-356/12 ECLI:EU:C:2014:350. C. O'Brien in 'Driving Down Disability Equality', 21 (4) *Maastricht Journal of European and Comparative Law* (2014) 723, argues that *Glatzel*, despite its apparently unequivocal endorsement of the CJEU's approach to the definition of disability in *Ring* (paras 45 and 46) in fact falls short of a genuine embracing of the social model. As noted above, our view is that, while this may be the case in the sense of some variants of the social model, the CJEU has adopted a variant of the social model. Indeed, as O'Brien herself acknowledges (also in O'Brien, above n 11), the EU is constrained by its limited competences (the Framework Directive covers only equal treatment in employment and occupation). Moreover, whether or not the CJEU, or EU law more generally, has adopted a strong version of the social model of disability, it is certainly a stronger version than that found in UK domestic law. For the purposes of our discussion here, therefore, EU law represents a more likely route than domestic law by which a version of the social model could become integrated within UK law.

[92] *Fag Og Arbejde acting on behalf of Karsten Kaltoft* v *Kommunersness Landsforening acting on behalf of the Municipality of Billund*, Case C-354/2013 ECLI:EU:C:2014:2463.

two of which were answered. The first was whether EU law laid down a general principle of non-discrimination on the ground of obesity as such. This was answered in the negative.

The second question was whether EU law is to be understood as meaning that the obesity of a worker constitutes disability. From *Ring*, disability refers to a limitation resulting from 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 others. Kaltoft argued that the barriers he faced were both physical (for example, reduced mobility) *and* prejudice because of his physical appearance[93].

Advocate General Jääskinen acknowledged that barriers in such a case might include attitudinal and environmental barriers as referred to in the preamble to the UNCRD, and in the judgment of the CJEU in *Ring*.[94] The Advocate General continued with the Opinion that, 'in cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UNCRD,[95] plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.'[96]

Surprisingly however, and for no discernible reason outlined in the Opinion up to that point, the Advocate General then opined that the definition ought only to be satisfied by persons with 'severe' obesity (defined as Body Mass Index of 40 or more).[97]

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[93] See for example the Daily Telegraph of 14 November 2014.

[94] Para 37.

[95] See *Ring*, above n 88.

[96] Para 55.

[97] For alternative views of the AG Opinion see M. Butler, 'Obesity As a Disability: The Implications Or Non-Implications of *Kaltoft*', (2014) 20 WebJCLI http://webjcli.org/article/view/358/466 (last accessed 15 July

In dealing with the second question, the CJEU referred to its earlier rulings.[98] The CJEU repeated the formulation of the concept of disability in *Ring*[99] and continued:

> '58 It should be noted that obesity does not in itself constitute a 'disability' within the meaning of Directive 2000/78, on the ground that, by its nature, it does not necessarily entail the existence of a limitation as referred to in paragraph 53 of this judgment.
>
> 59 However, in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78 … [100]
>
> 60 Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers *on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity* (our emphasis).'

2015); K. Ferris and J. Marson, 'Does Disability Begin at 40? *Karsten Kaltoft* v *Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund* (Advocate General's Opinion)' [2014] 20 WebJCLI http://webjcli.org/article/view/373/476 (last accessed 15 July 2015).

[98] *Ring* above n 88, para 76; *Glatzel* above n 91, para 45.

[99] Para 53.

[100] The CJEU here refers to *Ring* above n 88, para 14.

On the face of it, the judgment appears to be looking in two directions at the same time. Having paid the appropriate homage to the primacy of the social model in paragraph 59, the judgment appears to home in on a purely medical model in paragraph 60.

It would, however, be a mistake to take paragraph 60 as limiting obese workers to having to show functional impairments, say to mobility, in order to prove their disability. The words 'in particular' ought to be read as addressing the particular facts of the instant case. If the Danish court were to find that Mr Kaltoft had 'reduced mobility' or 'discomfort when carrying out his professional activity', it need look no further. Given that Kaltoft *was* severely obese, such a finding would be unsurprising. Paragraph 60 would not look out of place in the EAT's 'medical model' judgment in *Walker*.[101] But it need not be taken as the CJEU reverting to a *purely* medical model, and it certainly need not be taken as shutting the door on the idea that an impairment can result in disability through its interaction with attitudinal or environmental barriers. *Kaltoft* is the fourth in the series of disability cases decided after the EU's approval of the UNCRD. All of the rulings on the point since the approval of the UNCRD have taken care to repeat the social model formulation. *Kaltoft*, as we have seen, does that too. To treat paragraph 60 of *Kaltoft* as an abandonment of that general line of jurisprudence would be to place unwarranted weight on a part of a judgment that is probably only intended as a steer to the national court. It is in any case unlikely that the CJEU would reverse a clear direction of travel without explicitly signalling its intention so to do[102] and in *Kaltoft*, on the contrary, the CJEU expressly referred back to *Ring* when setting out the definition of disability.[103] Whilst there may be some frustration that the CJEU chose not to highlight the significance of the attitudinal barriers that Mr Kaltoft in part relied upon, that should not be taken as evidence that in some future reference, where they are of more central significance to the fact patterns of the claim, they will not

[101] above n 31.

[102] As the CJEU did in, for instance *Keck* Cases C267 & 268/91 ECLI:EU:C:1993:905 [1993] ECR I-6097.

[103] above n 92, para 59.

be acknowledged by the CJEU as just the sort of barrier that might turn an impairment into a disability.[104]

B Conclusion

Our view is that the social model – or at least a variant of the social model – has become central to the CJEU's jurisprudence on the definition of disability and is likely to remain so, the continued flirtation with the medical model apparent in paragraph 60 of *Kaltoft* notwithstanding. EU law thus provides a possible route for protection of people with non-ideal-weight from discrimination arising from attitudinal barriers based on perceptions of the inherent qualities of members of that group, at least as to their capacities in the context of the world of work. This conclusion ought to have consequences for national courts' interpretation of the Directive, and of their national implementing legislation. The following section explores those consequences.

A Obligations of UK courts in EU law

The Equality Act is the UK's legislation implementing the Framework Directive. Since the import of the cases since *Chacón Navas* is that we must understand the Framework Directive's prohibition of discrimination on the grounds of disability in the light of the UNCRD definition of disability, what consequence does that now have for UK law? The definition of 'disability' in section 6 of the Act, as it currently stands, is incompatible with the UNCRD's definition to the extent described by A-G Kokott in her Opinion in *Ring*.

There are a variety of responses to that incompatibility of UK law with EU law open to the UK. Legislative reform would be the most obvious. That was how Parliament responded to the CJEU's

[104] For a different view see D Hosking , 'Fat Rights Claim Rebuffed: *Kaltoft v Municipality of Billund*' 2015 September *Industrial Law Journal* 460.

decision in *Coleman*.[105] Absent such reform, there are obligations which rest upon the UK courts and tribunals to attempt to give effect to the obligations of Member States to comply with EU law, understood as 'supreme' in the EU's legal order.[106] These obligations rest on the concepts of 'direct effect' of EU law;[107] 'indirect effect'[108] or consistent interpretation; and 'horizontal effect of general principles of EU law'.[109] From the point of view of a claimant, these obligations offer decreasing levels of protection, given their relative certainty in securing the remedy sought, that is, in practice,

[105] Equality Act 2010, s 13, replacing the DDA, defines direct discrimination so as to remove the requirement that the claimant him or herself be a person with a disability.

[106] See, from the point of view of the CJEU, *Costa* v *ENEL*, Case 6/64 ECLI:EU:C:1964:66 [1964] ECR 585, p 593-594. The 'supremacy' of EU law is contested by some national constitutional courts, for instance *Internationale Handelsgesellschaft* [1974] 2 CMLR 540; *Brunner* v *The European Union Treaty* [1994] 1 CMLR 57; *Honeywell* 2BvR 2661/06, 6 July 2010 ECLI:DE:BVerfG:2010:rs20100706.2bvr266106; *Gauweiler* 2 BvR 2728/13, 14 January 2014 ECLI:DE:BVerfG:2014:rs20140114.2bvr272813. For discussion, see eg F. C. Mayer, 'Rebels Without a Cause? a Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 *German Law Journal* 111; M. Payandeh, 'Constitutional Review of EU Law after Honeywell' (2011) 48 *Common Market Law Review* 9; R. Mehdi, 'French Supreme Courts and European Union Law: Between Historical Compromise and Accepted Loyalty' (2011) 48 *Common Market Law Review* 439; A. Lazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland' (2011) 48 *Common Market Law Review* 503. The UK House of Lords accepted the supremacy of EU law in *Factortame* v *Secretary of State for Transport (No 2)* [1991] 1 AC 603. But see per Laws LJ (obiter) in *Thoburn* v *Sunderland City Council* [2003] QB 151, and European Union Act 2011, section 18. See eg P. Craig, 'Britain in the European Union', in J. Jowell, D. Oliver, C O'Cinneide (eds), *The Changing Constitution* (Oxford: OUP 2015).

[107] *Van Gend en Loos* Case 26/62 ECLI:EU:C:1963:1 [1963] ECR 1.

[108] *Von Colson* Case 14/83 ECLI:EU:C:1984:153 [1984] ECR 1891

[109] Case C-144/04 *Mangold* v *Helm* ECLI:EU:C:2005:709 [2005] ECR 1-9981; Case C-555/07 *Kücüdeveci* v *Swedex* ECLI:EU:C:2010:21 [2010] ECR 1-365.

the ability of the claimant to enforce an obligation in a measure of EU law, in this case, the Framework Directive. We therefore discuss them in that order.

B Direct effect

A provision of EU law (including a provision of a Directive)[110] which forms a 'complete legal obligation'[111] confers upon individuals rights that are enforceable before national courts.[112] While Treaty provisions may be enforced against private individuals,[113] provisions of Directives are enforceable only against an 'emanation of the state'.[114] There is no real doubt that Article 2 of the Framework Directive, which prohibits discrimination on any of the grounds (including disability) set out in Article 1, is a complete legal obligation. The CJEU's ruling in *Marshall* v *Southampton and South-West Hampshire Area Health Authority (Teaching)*[115] established that a similar provision, Article 5(1) of Directive 76/207 providing for equal treatment as between men and women in the workplace,[116] was of direct effect. Although there is no decision of the CJEU on the direct effect of

[110] Case 148/78 *Ratti* ECLI:EU:C:1979:110 [1979] ECR 1629.

[111] In the sense of a clear, precise and unconditional provision, not qualified by reservations that make implementation conditional on a positive national legislative measure (Case 26/62 *Van Gend en Loos*), not leaving discretionary powers to Member States (*Van Duyn* v *Home Office* Case 41/74 ECLI:EU:C:1974:133 [1974] ECR 1337).

[112] Case 26/62 *Van Gend en Loos*.

[113] *Defrenne* v *SABENA* Case 43/75 ECLI:EU:C:1976:56 [1976] ECR 455.

[114] *Marshall* Case 152/84 ECLI:EU:C:1986:84 [1986] ECR 723; Case C-91/92 *Faccini Dori* ECLI:EU:C:1994:292 [1994] ECR I-3325.

[115] *Marshall* Case 152/84 ECLI:EU:C:1986:84 [1986] ECR 723.

[116] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ 1976 L 39/40.

Article 2 of the Framework Directive, that is almost certainly because it seems obvious that it meets the tests of unconditionality and sufficient precision. If, therefore, it appears to a court or tribunal that the implementing legislation (in this case the Equality Act 2010) does not fully implement the Framework Directive, a claimant may rely upon the Directive without any recourse to the Act itself, provided the respondent is the state or an emanation of the state.[117]

Insofar as the definition of disability adopted by the Act now differs and is, we would argue, more narrow than the definition applicable under the Directive, the Act does not fully implement the Directive. Thus, in a case where a claimant might meet the social model definition of disability but not the medical model, the claimant might seek to rely upon his or her rights under EU law as against the state. EU law is given legal effect within the UK's constitution through the European Communities Act 1972. Section 2 (1) of the European Communities Act provides that 'all rights, powers, liabilities, obligations and restrictions' created or arising in EU law, which are to be given immediate legal effect in national law, 'shall be recognised and available in law, and be enforced, allowed and followed accordingly'. A directly effective provision of EU law (an 'enforceable Community right' in the words of the European Communities Act) is thus deemed to be part of the UK legal system, and is to be treated accordingly by UK courts and tribunals. The European Communities Act imposes a duty on UK courts 'to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.[118] Despite its potential disruption to the ordinary relationships between courts and the legislature, as expressed in the doctrine of Parliamentary sovereignty, this duty applies to all courts and tribunals, including at first instance. Thus, 'an industrial tribunal is bound to apply and enforce relevant Community law, and disapply an

[117] *Foster and others* v *British Gas* Case I88/89 ECLI:EU:C:1990:313 [1990] ECR I-3313.

[118] *Factortame* [1990] 1 AC 603, 151.

offending provision of UK domestic legislation to the extent that it is incompatible with Community law, in order to give effect to its obligation to safeguard enforceable Community rights'.[119]

It follows that a claimant seeking redress for non-ideal-weight discrimination, who met only the social model of disability, could invite a court or tribunal to 'disapply' the Act, at least as to the question of whether or not she or he possessed the protected characteristic of disability.[120] For people with non-ideal-weight who do not meet the medical model definition and who are proceeding against a state respondent, the direct effect of the Framework Directive, as interpreted by the CJEU, offers a route to claim protection from discrimination. Its key limitation is, however, that it gives no redress as against a private respondent. For that, a claimant would need to rely on another route.

B Consistent interpretation/'indirect effect'

Under Article 4 (3) TEU, national courts owe a 'duty of sincere cooperation' to the EU, requiring that they 'take any appropriate measure … to ensure fulfilment of the obligations' in the Treaty or in EU legislation. According to the CJEU, this means that 'national courts are required to interpret their national law in the light of the wording and purpose of [a] Directive, in order to achieve the result [intended]'.[121] The obligation of consistent or conform interpretation, or 'indirect effect', as it is

[119] *Biggs* v *Somerset County Council* [1995] IRLR 811, 827, relying upon the House of Lords in *Factortame* [1990] 1 AC 603; and in *R* v *Secretary of State for Employment ex parte EOC* [1992] 1 All ER 545.

[120] In case of a complaint of disability discrimination, the question of whether a Tribunal has power to apply European Union Law directly in the absence of a domestic legal framework does not arise, see *Barry* v *Midland Bank Ltd* [1997] ICR 192 and, per contra *Unison and anor* v *Brennan and ors* [2008] ICR 955 (EAT). That framework is supplied by the Equality Act 2010.

[121] *Von Colson* para 26.

known, applies irrespective of whether the defendant is an emanation of the state.[122] It requires national courts and tribunals to interpret national law 'as far as possible' so as to give effect to EU law.[123]

The Act must therefore be interpreted as far as possible to conform with the Framework Directive. The question of whether a non-ideal-weight claimant, who meets the social (but not the medical) model of disability, suffering from discrimination at the hands of a private employer, is protected by EU law turns on what is 'possible'. In this context, 'possible' means consistent with the obligations of statutory interpretation, as understood by the national court or tribunal seized of the claim. In UK law, the ordinary 'canons of construction' embody judicial deference to Parliament's will.[124] The literature[125] terms these the literal, golden, purposive[126] and mischief rules.[127] The starting point, in

[122] *Marleasing*, para 8.

[123] *Marleasing*; *Océano* Case C-240-244/98 ECLI:EU:C:2000:346; *Centrosteel* v *Adipol* Case C-456/98 ECLI:EU:C:2000:402 [2000] ECR I-6007; *Coote* Case C-185/97 ECLI:EU:C:1998:424 [1998] ECR I-5199; *Inter-Environment Wallonie* Case C-129/96 ECLI:EU:C:1997:628 [1997] ECR I-7411.

[124] This principle of UK constitutional law is often discussed more in terms of exceptions to the rule, but nonetheless remains an important guiding principle for the separation of powers between legislature and judiciary in the UK. Exceptions, in addition to EU law, include the Human Rights Act 1998, which is said to have limited parliamentary sovereignty in numerous ways; the Statute of Westminster 1931, which states that an outgoing Parliament does not possess the power to bind a successive Parliament; and the Act of Union of 1707. Many of these exceptions have been subject to significant pressure in recent years.

[125] UK judges rarely, if ever themselves explicitly volunteer the information that they are now applying a certain rule of interpretation, S. Hanson, *Legal Method* (London: Cavendish, 1999), 99. However, the patterns of their judicial reasoning can be discerned through academic literature, see C. K. Allen, *Law in the Making* (Oxford: Clarendon Press 1964).

[126] *Pepper* v *Hart* [1993] AC 593.

general, is the literal rule.[128] However, the literal rule has been subject to significant scrutiny. The margin of uncertainty at the edges of the core meaning of a word or phrase gives judicial flexibility, even if notionally the literal rule is being applied.[129] Judges may say that the meaning of words in a statute is 'plain', but then disagree on their interpretation.[130] In the latter part of the twentieth century, the literature points to a move away from the literal and towards the purposive approach.[131] This move is partly attributed to the effect of EU law on UK law.[132] At least some UK judges have taken the view that the different methods adopted by the CJEU to the interpretation of EU law require different methods of interpretation from UK courts when interpreting or applying EU

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[127] The term 'rules' of interpretation has been criticised by Zander, who points out that they are not rules in the ordinary sense, in that they point to different solutions to the same problem, M. Zander, *The Law-Making Process* (Cambridge: CUP 2004).

[128] See Laws LJ in *Oliver Ashworth (Holdings) Ltd* v *Ballard (Kent) Ltd* [1999] 2 AllER 791, 805 '… the conventional English approach has been to give at least very great and often decisive weight to the literal meaning of the enacted words'. Key authorities are *Re Rowland* [1963] Ch 1; *Whiteley* v *Chappell* (1868-9) 4 LR (QB). Zander, above n 127, points out that in 1969 Maxwell's *Interpretation of Statutes* (12th ed) described the literal rule as the 'primary' rule, and others as 'other principles of interpretation'.

[129] H. L. A. Hart, 'Positivism and the separation of law and morals' 71 *Harvard Law Review* (1958) 593, 607.

[130] above n 127, citing the examples of *London and NE Railway Company* v *Berriman* [1946] AC 278 and *Ellerman Lines* v *Murray* [1931] AC 126. See also J. A. Corry, 'Administrative Law: Interpretation of Statutes' (1936) *University of Toronto Law Journal* 286; J. M. Kernochan, 'Statutory Interpretation: An Outline of Method' (1976-7), 3 *Dalhousie Law Journal* 331.

[131] See J. Holland and J. Webb *Learning Legal Rules* (Oxford: OUP 2006 6th ed) 234; M. Partington, *Introduction to the English Legal System* (Oxford: OUP 2008 4th ed); S. Lee and M. Fox, *Learning Legal Skills* (London: Blackstone 1994).

[132] See, eg, T. Hervey and N. Sheldon, 'Judicial Method of English Courts and Tribunals in EU Law Cases: A Case Study in Employment Law' in U. Neergaard, R. Nielsen and L. Roseberry (eds), *European Legal Method: Paradoxes and Revitalisation* (Copenhagen: DJØF Publishing 2011).

law to those applied to English law.[133] In *Coleman*[134] for example, the tribunal was prepared to add words to the Act expressly extending protection from direct discrimination to those people *associated* with a person with a disability, where the treatment complained of was because of that association.

Since the Employment Tribunal and the higher courts are required to interpret UK law consistently with directives where possible, this route may indirectly pave the way for an accommodation of the CJEU's understanding of disability in national law. Were that to be the case, claims which could only succeed relying on a social model definition could be pursued against any respondent. There are, however, two potential problems with this route.

The first is that for disability claims, the obligation is simply to interpret consistently with the Framework Directive, which itself is confined to discrimination in the workplace. Commission proposals for an extension of the non-discrimination principle for the protected characteristics covered by the Framework Directive to the sphere of goods and services have failed to secure the necessary support of the other EU legislative institutions.[135] The Equality Act 2010 definition of disability in Section 6 applies to all the spheres covered by that Act. Conceivably, any route in for the

[133] See, eg Lord Denning, in *Bulmer* v *Bollinger* [1974] Ch 401, at 425 ' … What are the English courts to do when faced with a problem of interpretation? They must follow the European pattern. … They must look to the purpose and intent …'; and Lord Diplock in *Henn and Darby* v *DPP* [1981] AC 850, at 905, ' …the European Court, in contrast to English courts applies teleological rather than historical methods to [interpretation] … it seeks to give effect to … the spirit rather than the letter [of the law] …'.

[134] See the description of the Tribunal's decision in *EBR Attridge LLP (formerly Attridge Law) and another* v *Coleman* [2010] ICR 242, 256; and in *Attridge Law and another* v *Coleman* [2007] ICR 654, 659-660.

[135] Proposal for Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final. This was last discussed in Council in December 2014. Unanimous agreement of Council is necessary for the adoption of the proposal.

social model would have to be confined to employment cases, creating a significant departure from the entire scheme of the Act, which is to establish concepts of general application (the protected characteristics and the prohibited conducts) and then to apply them to the different areas of coverage.

The second is the limitation placed upon national courts when exercising their obligations to interpret consistently, expressed in the 'so far as possible' aspect of the concept of indirect effect. The latitude extended to the courts is considerable. From as early as the House of Lords case *Litster* v *Forth Dry Dock*,[136] it has been understood that the courts may imply words in to a statute necessary to comply with EU law obligations and that this may entail departure from the strict and literal application of the words which the legislature has chosen.[137] In the context of disability discrimination, the obligation was given effect in the case of *Coleman*.[138] On a reference from a UK Employment Tribunal, the CJEU extended the scope of protection from direct discrimination on grounds of disability by holding that it includes associative discrimination. Once the matter was referred back to the national court, the EAT held that although giving effect to the CJEU's interpretation was an extension of the scope of the legislation as enacted, it was 'in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted'.[139] The definition of direct discrimination in Section 3A of the Disability Discrimination Act 1995 confined protection to persons with a disability. In order to deal with the incompatibility of that restriction with the Directive as now understood, the EAT proposed the addition of an entire

[136] [1990] 1 AC 546.

[137] For a comprehensive survey of the obligations and limitations upon UK courts in exercising their EU obligations in this manner, see Sir Andrew Morritt's summary in *Vodafone 2* v *Revenue and Customs Commissioners* [2009] EWCA Civ 446, paras 37 and 38, cited with approval in *Jessemey* v *Rowstock Ltd* [2014] EWCA Civ 185.

[138] *EBR Attridge LLP (formerly Attridge Law) and another* v *Coleman* [2010] ICR 242.

[139] Para 14.

new subsection (5A) to section 3A to the effect that 'a person also discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person'. The matter was later codified by Parliament in the broader definition of direct discrimination in the Equality Act.

Nevertheless, there are limitations upon what the courts may, and indeed are obliged to, do. The meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'.[140] An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation, since this would cross the boundary between interpretation and amendment. The exercise of the interpretative obligation cannot require the courts to make a decision for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.[141]

One approach to the duty, at least in cases involving non-ideal-weight claimants, would be to turn again to the concept of severe disfigurement with a willingness, informed by the CJEU jurisprudence, to read that provision as including people who are suffering discrimination because of their weight. As we have observed, that would be, in many cases, to strain the natural meaning of the words, particularly the term 'disfigurement'. Nevertheless, it would provide a route for the social model definition which did not entail the addition of words into the Act. However this would require claimants to identify as disfigured. Many people with non-ideal-weight do not consider themselves disabled[142] and this further step may prove too difficult for some.[143]

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[140] *Coleman* above n 138.

[141] *Coleman* above n 138.

[142] N. K. Chan and A. C. Gillick, 'Fatness as a disability: Questions of personal and group identity' (2009) 24 *Disability and Society* 231.

[143] Another obvious weakness of the idea is that it would not have the effect of defining 'disability' in the Act through the social model, for example, for people suffering stigmatizing conditions which do not give rise to

A more satisfactory approach would be to add to the definition in section 6 of the Act by drafting a new subsection (2)(A)

> 'A person also has a disability if he possesses a long-term impairment which in interaction with any barriers placed by society hinders his full and effective participation in society.'

That would of course be to create an additional rather than a replacement definition. We see no particular difficulty with that. The reasoning in *Kaltoft* seems to suggest that satisfaction of a medical model definition of disability will suffice to also meet a social model definition. Furthermore, the CJEU in *Ring* specifically referred to its judgment in *Chacón Navas* in support of part of its reasoning[144] suggesting that it did not intend the new approach to entail a total abandonment of the definition adopted in that case. Indeed, we have been unable to come up with a hypothetical instance where satisfaction of a medical model would not result in satisfaction of a social model. In our view, the worst that could be said of this approach to including the social model definition is that it would render the first part of the definition in section 6 otiose. In fact, for practical reasons that is unlikely to be the case.

The real difficulty with the social model is that it lacks the legal certainty of the medical model, particularly when it comes to evidentiary matters. Indeed, the social model blurs the boundaries between the existence or possession of the protected characteristic and the discriminatory

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the requisite functional deficit. An obvious example is the status of being HIV positive. That, in fact, is a deemed disability (along with cancer and Multiple Sclerosis) see Equality Act 2010, Sched1, Art 6. Nevertheless, other conditions can give rise to stigmatisation but do not benefit from an equivalent deeming provision and might not meet the conventional definition of disability, for example hyperhidrosis (or excessive sweating), particularly for women, polycystic ovaries leading to excessive facial hair, mild depression or anxiety, and irritable bowel syndrome. http://www.livescience.com/14424-top-10-stigmatised-health-disorders.html (last accessed 15 July 2015). On stigma, see above n 16.

[144] Para 42.

consequences. An obvious example is the question of attitudinal barriers. They are a significant issue in the case of non-ideal-weight discrimination. In fact, for those people whose non-ideal-weight is not sufficient to meet the functional deficit test posed by the medical model, they are *the* problem. The Act's approach is to first consider whether the claimant can establish the existence of the protected characteristic of disability and then to consider whether the discriminatory prohibited conduct has taken place. A social model, relying upon attitudinal barriers, posits the existence of a protected characteristic established only if and when it can be shown that attitudes, in the form, say, of stereotypical thinking, have erected a barrier to full participation, for example a decision not to recruit.[145]

How would that then play out, for instance, in a complaint of direct discrimination because of disability? Under the medical model it would be for the claimant to prove the existence of the disability. The claimant would, as a next step, be required to show facts upon which the tribunal or court could decide, in the absence of a non- discriminatory explanation, that the Act had been contravened. Only if that burden were discharged, would it be for the respondent to provide an explanation in no sense connected to the protected characteristic.[146] The respondent would be entitled to insist that the claimant prove his or her disability before ever adducing any evidence as to its actions. Having done so, the claimant would have to adduce a prima facie case that she or he had suffered a detriment and that there was a causal connection between the detriment and the fact of the protected characteristic.

Under the social model approach, presumably the claimant would need only to show the existence of an impairment and that it was long-term to trigger an examination of the factual matrix of the

[145] As we have seen, this is already the case for severe disfigurement which is, nevertheless, treated as an exceptional case, presumably because a more general use of a social model did not fit the stated aim of simplicity and ease of understanding.

[146] Equality Act 2010, s 136, derived from Framework Directive, Art 10.

complaint of discrimination. The burden would rest upon the claimant to show facts which would allow the tribunal to decide that discrimination had taken place. Those facts would have to be the treatment complained of and the existence of attitudes arising from the impairment which caused the treatment *and* which are the final factor in proving disability. This has, to the UK legal eye at any rate, the smack of circularity. A person is disabled if she or he has been discriminated against because they are disabled.

There is, however, a possible way out of this. If a claimant with non-ideal-weight could show the existence of attitudes generally held in society, which have a negative impact upon the ability of people of non-ideal-weight to participate in society, perhaps even have had that effect on her or him in the past, then that might be thought enough to establish the protected characteristic without having to show, at that stage, that *the respondent itself* harboured those attitudes or acted upon them. That might be left to a second stage of analysis to which the burden of proof provisions could apply in a more conventional way.

B Horizontal effect of a general principle of non-discrimination

There remains a third potential route for a social model definition of disability to establish itself in UK law. Over time the CJEU has developed in its jurisprudence the idea that there are certain 'general principles' underpinning all EU law.[147] Amongst those is the existence of certain fundamental rights as integral to the EU legal order.[148] In addition to national constitutional

[147] For example, the general principles of proportionality (see eg *Internationale Handelsgesellschaft* Case 11/70 ECLI:EU:C:1970:114 [1970] ECR 1125) and legitimate expectations (see eg *Di Lenardo and Dilexport* Cases C-37&38/02 ECLI:EU:C:2004:443 [2004] ECR 1-6911).

[148] See *Internationale Handelsgesellschaft* above n 147.

traditions, the CJEU has looked to international human rights treaties, including the UNCRD,[149] as a source for those fundamental rights.[150] A further source is the EU's own Charter of Fundamental Rights 2000, which has 'the same legal value as the Treaties'.[151]

The question of the practical effects of fundamental rights as general principles of EU law in litigation involving the enforcement of directives against private parties emerged in the CJEU's judgment in *Mangold*.[152] The complaint was one of direct age discrimination. The conflict between the national law, which permitted directly discriminatory treatment of workers on the grounds of age in the awarding of fixed term contracts, and the Framework Directive which does not, was incapable of being reconciled by indirect effect. The case was between two private individuals and thus direct effect in the traditional sense was of no assistance to Mangold. Moreover, the time allowed to Member States for the implementation of the Framework Directive had not expired and Mangold had therefore no remedy against the (German) state for its failure to transpose the Directive into law.[153]

The CJEU in *Mangold* confirmed that non-discrimination is a general principle of EU law.[154] However, it went significantly further by appearing to create a new approach to the application of EU law in

[149] See *Ring*, above n 88.

[150] See for example *Nold* v *Commission* Case 4/73 ECLI:EU:C:1974:51 [1974] ECR 491 and *Rutili* v *Ministre de l'Interieur* Case 36/75 ECLI:EU:C:1975:137 [1975] ECR 1219 where the CJEU referred to the European Convention on Human Rights and Fundamental Freedoms.

[151] Article 6 (1) TEU. See K. Lenaerts and J. A. Gutiėrrez-Fons, 'The Charter in the EU Constitutional Edifice' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights* (Oxford: Hart, 2014) 1559-1593.

[152] *Mangold* v *Helm* Case C-144/04 ECLI:EU:C:2005:709 [2005] ECR 1-9981.

[153] Cases C-6&9/90 *Francovich and Bonifaci* v *Italy* ECLI:EU:C:1991:428 [1991] ECR I-5357.

[154] Para 75. Long before the Framework Directive was adopted, the CJEU had recognised a general principle of equality, see, eg, Cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160 [1977] ECR 1753.

private disputes. At paragraph 76 of its judgment the CJEU, referring to the fact that the time period for the implementation of the Framework Directive had yet to expire, said that nevertheless the 'observing of the general principle of equal treatment … cannot be conditional upon the expiry of the period allowed … in particular so far as the organisation of appropriate legal remedies … to implement such a directive are concerned'. In the following paragraph, the CJEU asserted that, in such cases, it was for the national court to ensure full effectiveness by setting aside conflicting national rules. In other words, this seemed to be an extension of the principle of direct effect to cases where the state was not a party. Chalmers[155] describes the CJEU's judgment as 'mired in obscurity' and certainly it attracted considerable critical comment.[156] Nevertheless, it was followed, and to some extent clarified, in another age discrimination case from Germany, *Kücüdeveci* v *Swedex*.[157] Once again, the case concerned a discriminatory national law in conflict with the Framework Directive. At paragraphs 50 and 51, the CJEU restated the obligation upon the national courts to give effect to the general principle of non-discrimination by disapplying provisions of national law which are contrary to that general principle. In so doing, the CJEU stressed the binding nature of the EU Charter of Fundamental Rights, which includes, at Article 20, the right to equality

[155] D. Chalmers, G. Davies, G. Monti, *EU Law: Text and Materials* (Cambridge: CUP 2014), 322.

[156] See eg A. Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?'(2006-7) 9 CYELS 81, M. Schmidt, 'The Principle of Non-Discrimination In Respect of Age: Dimensions of the ECJ's *Mangold* Judgment' (2005) 7 *German Law Journal* 505; D. Schiek, 'Constitutional Principles and Horizontal Effect; *Kücüdeveci* Revisited' (2010) 1 *European Labour Law Journal* 368 and the Opinions of Advocates General Mazak in *Palacios de la Villa* v *Cortfeld Servicios* Case C-411/05 ECLI:EU:C:2007:106 [2007] ECR I-8531, and Ruiz-Jarabo Colomer in *Michaeler and ors* v *Amt für sozialen Arbeitsschutz* and *Autonome Provinz Bozen* Cases C-55&56/07 ECLI:EU:C:2008:42 [2008] ECR I-3135.

[157] *Kücüdeveci* v *Swedex* Case C-555/07 ECLI:EU:C:2010:21 [2010] ECR 1-365.

before the law and, at Article 21, a prohibition of discrimination, inter alia on the grounds of age and disability.[158]

Where does this leave our putative claimant in a non-ideal-weight case brought against a private respondent? If that claimant needs to rely upon the social model definition of disability, and the court or tribunal considers that the interpretative barriers to 'indirect effect' are insuperable, might recourse be had to the general principle of non-discrimination, in order to give horizontal direct effect to the provisions of the Framework Directive? The reasoning in both *Mangold*, and with greater clarity, in *Kücüdeveci* is based upon the idea that the Framework Directive is not itself the source of the general principle of non-discrimination but is an expression of it. This reasoning permits the CJEU to give the Directive what Schiek describes as a 'heightened degree of effectiveness', which is achieved by a requirement on the national court to exclude national legislation which would otherwise be in conflict.[159] However, the jurisprudence has not advanced since the judgment in *Kücüdeveci*, despite the opportunity for the CJEU to apply it in an annual leave case, *Dominguez*.[160] This missed opportunity leaves doubt as to the full scope of the obligation on the national courts apparently required by *Mangold* and *Kücüdeveci*.

One possibility is that it only requires the *exclusion* of conflicting national legislation, leaving another pre-existing and non-discriminatory national rule which can be applied. In *Kücüdeveci* the national

[158] For a consideration of to what extent Article 21 has added anything to the pre-existing general principle of non-discrimination and to the Framework Directive see C. Kilpatrick 'Article 21' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds) *The EU Charter of Fundamental Rights* (Oxford: Hart, 2014).

[159] Schiek above n 156, 372.

[160] *Dominguez* v *Centre Informatique du Centre Ouest Atlantique* Case C-282/10 ECLI:EU:C:2012:33. Although A-G Trstenjak's Opinion ECLI:EU:C:2011:559 deals at length with the *Mangold*/*Kücüdeveci* jurisprudence (paras 144-169), it is not referred to at all in the judgment and the CJEU at paras 42 and 43 simply asserts that where direct and indirect effect are of no assistance to a claimant she or he must rely upon a claim against the state for its failure to transpose the relevant Directive (see above n 153).

court was able to exclude a national rule limiting the accrual of rights to notice of termination to years of service in employment after the worker's 25th birthday and instead apply the accrual rule applicable to workers aged 25 and over. This interpretation is to be contrasted with the *substitutory* requirements of vertical direct effect[161] where the national rule is replaced by the relevant Directive as the legislation governing the case. If this is the correct reading of *Mangold* and *Kücüdeveci*, the fundamental rights jurisprudence of the CJEU offers no help to our putative claimant. Excluding the section 6 definition of disability leaves a void. There is no alternative definition for our claimant to fall back on.

A further possibility is that the CJEU's refusal in *Dominguez* to use the *Mangold* and *Kücüdeveci* line of reasoning signals an abandonment of it altogether. This prospect has receded somewhat since the decision of the CJEU in *Association de Mediation Sociale* v *Union Locale des Syndicats CGT*.[162] There the CJEU refused to give horizontal direct effect to EU Charter of Fundamental Rights, Article 27, guaranteeing worker information and consultation, and Directive 2002/14/EC establishing a general framework for informing and consulting employees,[163] Article 3, but did so whilst distinguishing *Kücüdeveci*.[164]

For greater clarity of the extent of the general principles approach to direct effect, we must await further decisions of the CJEU. At present however, it remains at least a possibility that, where a general principle such as non-discrimination is at stake, and national law has failed to give full effect

[161] Schiek above n 156, 372

[162] Case C-176/12, ECLI:EU:C:2014:2.

[163] OJ 2002 L 80/29.

[164] The *Association de Mediation Sociale* judgment does not give a clearly discernible reason for the distinction between the Article and Directive at issue in that case and those at play in *Kücüdeveci*, but nothing in the judgment can be taken as a clear signal that the reasoning in that case and *Mangold* is no longer to be followed in the appropriate cases. On the contrary, para 47 can be read as an endorsement of it.

to that principle, even as between private individuals, recourse can be had to the relevant EU provisions guaranteeing the principle. Our putative claimant could therefore seek to rely upon the general principle of non-discrimination, articulated in the EU Charter of Fundamental Rights and as instrumentalised in the Framework Directive, but understood in the light of the UNCRD, as the source of their legal rights. He or she could thus insist upon the social model definition of disability in a case against a private individual and evade the restrictive nature of the definition in section 6 of the UK Act. Indeed, such a case, if referred, might well prove the material upon which the CJEU could further refine its jurisprudence in this area.

A Conclusions

As the pop song from which we take our title reminds us, people of non-ideal-weight suffer from discrimination – in the workplace, and elsewhere. Meghan Trainor might sing 'don't worry about your size', but people *do* worry about size – and draw negative inferences from those worries. Does UK law offer any protection from the effects of that discrimination? The relevant domestic legislation, the Equality Act 2010, is limited in its scope as it embodies a medical model to define disability. For that reason, the Act is able to extend protection only to the limited number of people whose weight is such that it causes them functional deficit. The existence of protection against discrimination because of perceived disability does not, in our view, add any significant extension to the coverage by the Act, because it requires that a person be perceived as disabled *as defined by the Act*. Although we have considered the possibility of persons with non-ideal-weight bringing themselves within the definition by relying on the concept of 'severe disfigurement', we have, on balance, concluded that it is unlikely that UK courts and tribunals would construe the term 'severe disfigurement' as extending to persons of non-ideal-weight, except perhaps in the cases of extreme emaciation or obesity, which would in any case meet the medical model's definition.

The Act offers very limited protection. What about the application of EU law? The standard understanding of the relationship between EU and UK law is that UK courts and tribunals are obliged to give effect to 'supreme' EU law. The UNCRD has influenced EU law's understanding of what is meant by disability. The UNCRD's social model of disability offers broader protection than the medical model. In theory, therefore, EU law provides a route for people of non-ideal-weight to challenge discrimination based on their weight, relying upon a social model. Nonetheless, we conclude that, on balance, save for claims against a state employer, the possibility of introducing a social model definition of disability into UK law remains highly problematic. The constraints upon UK courts in their interpretative duties and the uncertain state of the jurisprudence on the horizontal direct effect of the general principle of non-discrimination preclude an effective remedy in practical terms. Our conclusion overall therefore is that it is difficult to discern a clear and robust legal protection in the UK from discrimination for most people of non-ideal-weight.

Our analysis suggests that the paradigm example of non-ideal-weight discrimination offers an ideal opportunity for the CJEU to develop and clarify its perhaps tantalising jurisprudence on horizontal direct effect of general principles of EU law. Because a medical model has been relied upon as a basis for the definition of disability, the UK's Equality Act 2010 stands in conflict with the general principle of non-discrimination on the ground of disability. Faced with a preliminary reference where, on the facts, a person with non-ideal-weight could only hope to be regarded as disabled by relying upon a social model definition, and where the respondent was a private body, the CJEU would be obliged to choose whether to continue along the path begun by the judgments in *Mangold* and *Kücüdeveci* or to retreat and reassert the pre-*Mangold* orthodoxy. Were the CJEU to pursue the idea of a horizontal direct effect in cases where a general principle of EU law was at stake, it might clarify whether that effect was of an exclusory or substitutory nature, a matter which is critical to the success of claims under this mechanism for rendering effective obligations and entitlements enshrined in EU law.

More broadly, our research agenda offers insight into the practical barriers to enforcing entitlements to non-discrimination before UK courts. We have described the potential disruption caused by a definition of disability confined to workplace discrimination when the Equality Act 2010 seeks to extend a single definition to discrimination cases arising in several spheres. Of even greater importance, we have identified a very significant difficulty, should a social model definition gain traction in UK law, whether by the application of EU law or because of marginal legislative reform. The entire structure and rationale of UK legislative protection against discrimination is based upon a separation of the concept of 'protected characteristic' from the concept of 'prohibited conduct'. Certain 'key concepts'[165] apply throughout the Act. These include 'protected characteristics'[166] and 'prohibited conduct'.[167] In some cases, the protection of the Act is extended only to those in possession of a protected characteristic; in others conduct is prohibited on the basis of association with a person with the characteristic, or on the basis of perception that a person may have the characteristic. In all cases, however, the prohibited conduct only becomes prohibited if it is, in some sense, connected to a protected characteristic. The court must investigate whether the threshold test of protected characteristic is satisfied, before it turns its attention to the question of whether prohibited conduct has taken place. Courts and tribunals must consider whether the one has caused the other.

The structure seeks to balance the interests of claimants and those of respondents, and to promote legal certainty, transparency and fairness. The separation of concepts is so intrinsic to the statutory approach that, for instance, case law insists that direct discrimination cannot be found where it is shown that the alleged discriminator was ignorant of the existence of the protected characteristic,

[165] Equality Act, Part 2, Heading.

[166] Equality Act, Chapter 1, Heading.

[167] Equality Act, Chapter 2, Heading.

which is particularly relevant in the instance of disability.[168] A social model definition would force courts and tribunals to investigate the existence of an attitudinal barrier *as part of their consideration of whether the claimant met the threshold test of disability*. A person relying upon the social model is likely to wish to establish that they meet the definition of disability by virtue of attitudinal barriers prevalent in society. Indeed, the social model definition derives much of its power from that idea. A claimant seeking to establish the existence of those barriers will wish a court or tribunal to take into account, as evidence of their existence, any adverse conduct towards the claimant on the part of the discriminator. This approach would create unfairness for the respondent, who would be obliged to engage in a forensic exercise, potentially involving a great deal of evidence and considerable expense, in seeking to disprove the existence of the claimed attitudinal barriers. Not to do so would be to run the risk of the claimant adducing unchallenged evidence which would not only point towards the existence of the disability, but also go a very long way towards proving the discriminatory conduct linked to it.

We describe this elision of two separate stages in the evidentiary process as creating a circularity that is highly unlikely to have been intended by Parliament. A person is disabled if they have been adversely treated because they are disabled. The only way of breaking out of that circularity is for the court or tribunal to locate the attitudinal barriers not with that particular respondent, but more generally in society. A claimant would have to prove not just the existence of the impairment of non-ideal-weight but also the existence of attitudinal barriers in society by reference to which that impairment was disabling. Such an approach would be fairer to the respondent, as the onus of proving both elements would remain on the claimant, which is what the Act intends. Courts and tribunals might accept as such evidence the literature on bias against people of non-ideal-weight, cited in our introduction. The alternative would be for legislation to add non-ideal-weight to the

[168] *Gallop* above n 69.

category of deemed disabilities, recognising the existence and effect of those barriers, in the same way as severe disfigurement has been treated.

The theoretical but nonetheless plausible scenario of a person of non-ideal-weight seeking to enforce an entitlement not to be discriminated against a private employer, which we have investigated in this article, illustrates deficiencies in the 'standard accounts' of how EU law is supposed to apply in national contexts. Such accounts imagine a 'supreme' EU law, perhaps inspired by 'general principles', or 'fundamental human rights', including those enshrined in international conventions and in the EU Charter of Fundamental Rights. The 'new legal order'[169] of EU law is supposed to grant rights to individuals within Member States, and impose obligations upon both the state and private individuals. But as the example discussed in this article shows, to reach a position of offering protection of such rights to individual claimants, national judges are required to go through a complex series of legal evolutions, which take them beyond standard understandings of their constitutional position. They must interpret the obligations that are found in the European Communities Act 1972 which require consistent interpretation of UK statutory language with EU law. That EU law is expressed in the CJEU's sometimes surprising declaratory interpretations of EU statutory texts, which themselves have been found by the CJEU to express international obligations articulated in extremely general terms. National courts must do so alongside obligations of deference to Parliament, embodied in the ordinary canons of statutory interpretation. Even though they may of course make a preliminary reference to the CJEU,[170] national constitutional courts may experience some discomfort in navigating these potentially competing claims of judicial fidelity to the language of national and EU legislation. But in the case of disability discrimination in the UK, first instance tribunals are expected to do so.

[169] *Van Gen den Loos* Case 26/62, EU:C:1963:1

[170] Article 267 TFEU.

It seems to us that the UK cannot avoid at least a version of the social model for much longer. The Framework Directive must be read as requiring Member States to define disability not only through a medical model, but also through a social model. To that extent, the Equality Act 2010 stands in conflict with the Directive. However, the difficulties for courts and tribunals in finding an appropriate route for the introduction of the Directive into the national legislative framework and the consequences for the litigation of cases should they do so are such that, in our view, compliance with EU law cannot be achieved without further legislation.[171]

[171] Such further legislation might also be the opportunity to specifically address the position of people of non-ideal-weight if it was thought that it was appropriate to extend to the protected categories. We have not sought to consider whether that would be appropriate but we have noted the problematic nature of a requirement that people of non-ideal-weight identify themselves as disabled, see above n 142.