

Strategic HR Forum 5 April 2016 – Discussion paper
Obesity as a disability
and potential changes in disability laws

Introduction

The rise in obesity levels – in both adults and children - is often in the news headlines. There are concerns regarding the costs to the NHS associated with obesity-related diseases, as well as the impact on the health and well-being of those individuals considered to be obese.

Obesity is estimated to be the fourth largest risk factor contributing to deaths in England (after hypertension, smoking, and high cholesterol)*. Many chronic diseases are linked to obesity including type 2 diabetes, heart disease, stroke and some types of cancer.

Definition of obesity

The most widely used method to define obesity is body mass index (BMI). BMI is a measure of whether you're a healthy weight for your height.

For most adults, a BMI of:

- 18.5 to 24.9 = healthy weight
- 25 to 29.9 = overweight
- 30 to 39.9 = obese
- 40 or above = severely obese

The UK's growing obesity crisis means that by 2030:

74% of men in UK will be overweight

64% of women in UK will be overweight

36% of men and 33% of women are predicted to be obese**

Does an overweight employee fall into the category of a disabled person?

There is no general principle in UK or EU law which includes discrimination on grounds of obesity as unlawful discrimination on its own. However an individual case of an obese employee may fall within the Equality Act 2010 protections for disability.

Definition of disability

The Equality Act 2010 defines disability as *a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on the ability to do normal daily activities.*

'Substantial' meaning more than minor, eg taking longer to get dressed each day

'Long-term' meaning lasting for 12 months or more.

Under the Act, individuals with cancer, multiple sclerosis or HIV/AIDS are covered from the date of diagnosis regardless of the impact that the illness is having on their life at the time of diagnosis. Other examples of conditions covered include: chronic fatigue syndrome, rheumatoid arthritis, diabetes, epilepsy, dyslexia, depression and some cases of obesity. These are simply examples and many more categories may be included.

As an employer do we need to consider obesity as a disability?

The CIPD*** states that *mere obesity on its own with no consequences is insufficient* to be considered a disability. An overweight or obese employee may fall into the category of a disabled person if their mobility, physical co-ordination, or ability to lift, carry or move everyday objects, is affected. The official government guidance uses an example of a woman with obesity *which gives rise to* impairments such as mobility restrictions and breathing difficulties and who is unable to walk more than 50 yards without a rest. Such an employee will definitely fall within the definition of disabled.

Recent employment law cases

Kaltoft v Billund Kommune – 2014: A well-publicised case in Denmark illustrates the way the law operates in the EU.

- Child-minder who weighed over 25 stone claimed he was dismissed (on grounds of redundancy) by his local authority employer due to his obesity.
- A person with a BMI in excess of 40 is ranked as morbidly obese; the child minder's BMI was 54.
- The employer said that the child minder was unable to perform his day to day duties, for example being unable to tie a child's shoe-laces without a colleague's help.
- The European Court of Justice (ECJ) stated that there is no general principle under EU law which outlaws discrimination on the grounds of obesity, but that obesity could fall within the concept of 'disability'.
- This is especially the case when the obese person was hindered by their condition from taking full and effective participation in their professional life on an equal basis with others.
- The ECJ therefore confirmed that obesity can fall within the concept of 'disability' although the case was referred back to the Danish Courts for final ruling
- The ECJ ruling has been seen as controversial in some quarters because obesity is regarded by some as a life choice rather than an illness. However the Advocate General has been keen to point out that it does not matter whether the obesity is caused by an underlying medical condition or simply the over consumption of food. The crucial issue is whether or not the employee is in fact suffering from a long-term impairment.

European Law comments: As such, the Kaltoft ruling does not really change or extend the prior concept of disability discrimination. Nevertheless, it is a remarkable judgment because it reduces legal uncertainty in this area by making explicit that, under some circumstances, obesity discrimination in employment can be a breach of EU law.

Bickerstaff v Butcher – 2015: A case in Northern Ireland where the ET upheld a claim for harassment by an obese employee.

- The claimant was morbidly obese with a BMI of 48.5.
- He was harassed by a number of colleagues, particularly one who harassed him because of his weight on an almost daily basis with numerous offensive comments

- The main perpetrator admitted to using foul language against the claimant, but said that he thought that this was banter.
- The claim for harassment relating to his disability against the main perpetrator proceeded to a tribunal hearing.
- The tribunal found that the claimant was disabled by his obesity and that he had been harassed for a reason relating to that disability.
- Following the Kaltoft decision, the tribunal was satisfied that the claimant was disabled by a combination of his morbid obesity and gout conditions. He had knee, joint and back pains, sleep apnoea, frequent tiredness and loss of concentration, all of which were directly linked to his weight.

There are no expected changes in 2017 to employment laws relating to obesity as a disability however the above cases give us some information to consider.

- As employers, we should remember is that an obese person is not necessarily disabled
- However, if there is an underlying medical condition contributing to the employee's weight, it will be easier for the employee concerned to show that they are disabled. Whether a condition related to obesity is likely to amount to a disability will depend on the circumstances of the individual case.
- If obesity causes an employee to suffer from diabetes, mobility problems, joint pains and so on, then they are likely to be regarded as disabled and will be protected in law
- We have an obligation to all employees to treat everyone – colleagues and members of the public – with dignity and respect. This is covered in our Dignity at Work workshop, which is part of our essential learning programme.
- As managers, we need to ensure obese employees are not subjected to offensive comments or behaviour because of their weight and that obese job applicants are not discriminated against because of their weight.
- If an employee's severe weight is a cause of problems at work then we may need to look at making reasonable adjustments in the same way that we would for any other disabled employee.
- Suitable adjustments could include providing a parking space nearer to the office, adjusting work stations, providing adapted chairs to meet DSE obligations or reviewing the location of their desk.

References

- * NHS Atlas of Risk
- ** Public Health England
- *** CIPD Chartered Institute of Personnel & Development