

## Could fattism become a protected characteristic under discrimination legislation?

Huw Cooke, 25 October 2010

Perhaps it is a transport thing, but just as the Fat Controller and Thomas the Tank Engine go hand in hand, so it appears in some cases do overweight drivers and buses. In 2009, Stage Coach Cumbria said that drivers could not take charge of a bus if they weighed more than 20 stone. And in the past week, Blackpool Transport required two drivers, who weighed 20 stone each, to lose seven pounds in a month because their seats were not equipped to deal with their weight.

It appears that overweight bus drivers will have to embark on a fitness regime to avoid breaking their seats.

While being overweight is not protected under current discrimination legislation, if obesity is a result of a disability, the less favourable treatment of individuals as a result of their being overweight could give rise to a claim of discrimination. The new claim of 'discrimination arising from disability' under the Equality Act 2010 means if disabled employees are treated unfavourably as a result of a condition or symptom of their disability and that treatment cannot be justified, then it will amount to discrimination. So, if a bus driver is obese as a result of his disability and he is removed from his driving duties because he is overweight, then the bus company would have to justify its actions – most likely on grounds of health and safety – to avoid a discrimination claim.

While the bus companies may have had valid reasons to remove the drivers from their driving duties, it is likely to be much harder for an employer to justify such actions in an office environment where health and safety is less of an issue and where, at least in most offices, chairs are not bolted to the floor as part of the workplace's structural integrity.

It will be no surprise that some individuals may be bullied and subjected to abusive behaviour as a result of their weight and that such treatment can lead to individuals resigning and claiming constructive unfair dismissal. Employers should ensure their line managers make sure that workplace banter does not become workplace bullying.

The impact on individuals from weight-related abuse is usually mental and HR teams will often find themselves having to deal with individuals signed off work for work-related stress. Managing such absence is a time-consuming process and, if employers get it wrong, it can, in extreme circumstances, lead to psychiatric breakdown and claims for personal injury.

However, if an overweight individual is unable to do some or all of their role and if there are no disability issues, then an employer will wish to follow a capability procedure. If this eventually leads to the employee's dismissal, the employer should be able to rely on the reason of capability to defend a claim of unfair dismissal. Employers embarking on this route will want to follow a fair and reasonable process and will need to consider obtaining medical evidence to establish whether the individual is disabled before dismissing someone as a result of their weight.

While many internet forums talk about fattism becoming a protected characteristic under the Equality Act 2010 and cite developments in the US, where one in four individuals are clinically obese, such a step would present significant political and public policy issues to the UK Government given the enormous strain placed on the National Health Service as a result of obesity-linked conditions. If fattism becomes a protected characteristic, where would the line be drawn?