



DISCRIMINATION LAW ASSOCIATION

Briefings

Developments in US on unlawful discrimination on grounds of height and weight and the Equality Act 2010

Laura Redman, dual-qualified US and English barrister, Cloisters Chambers, and former Director of the Health Justice Program at New York Lawyers for the Public Interest, looks at the introduction of protection against height and weight discrimination in the United States. She highlights the extent of such discrimination in the UK and considers how the Equality Act 2010 could be used to address this widespread form of discrimination.

Testimony of New York City residents before New York City Council, February 8, 2023

‘As a large breasted Black woman, I was told early in my legal career that I shouldn’t wear my actual clothes size: “It wouldn’t be a problem if you’re a skinny size 2 or 4, but if you have large breasts or butt or any kind of curves, you’re going to look unprofessional.”’

‘I am a person with dwarfism. I have experienced discrimination based on unalterable physical characteristics. People have immediately judged my abilities, competence, and intelligence based on my appearance.’

‘The sizeism I’ve experienced on the job has taken many forms, ranging from an employer refusing to purchase an office chair that would fit and support my body to a supervisor who let me know she wouldn’t support my application for a more public-facing role in the organisation because seeing me as the face of the organisation would “give the wrong impression.”’

‘John was a skilled blue-collar worker. He was happily married and had grown children with whom he was close. He was so good at his job that his boss gave him raises, praise, and a new Cadillac to reward him for how well he had worked over many years. He was also a fat man. His company was eventually taken over by a new owner, who told John that he had to lose either 100 pounds or his job. John tried everything he could to lose the weight, but couldn’t lose 100 pounds. A middle-aged man, he eventually lost his job.’

‘When my first wife Joyce and I were seeking an apartment, we had a difficult time, as several landlords did not want to rent to a couple in which the wife was very large. We were openly sneered at by several; at the apartment building in which we finally ended up, we had to listen to the superintendent, who was showing us the place, share his concerns that someone the size of my wife might easily damage the property (things like the built-in ironing board, for example which he feared she might lean on.) Other landlords seemed to doubt that a couple like us could afford to pay the rent, and we should seek an apartment in a poorer part of town.’

‘I am fat. I use the term “fat” and I encourage you to, as well. It’s a morally neutral descriptor.’

New York City anti-discrimination law

On November 22, 2023, New York City (NYC) will join a few smaller municipalities in the United States and the State of Michigan in outlawing discrimination based on height and weight.¹ The sponsors of NYC Council's bill presented evidence which showed '*pervasive bias against people of size in the United States, as well as detailed evidence of weight-based discrimination*'. Data demonstrated that gaining weight predicted a decrease in salary; weight-based bullying in schools, often ignored, led to high rates of depression. Personal responses to a survey in NYC found that 90% of respondents had personally experienced weight-based discrimination and 55% within the workplace.²

In response, and after extensive advocacy from campaigning groups, mostly concerning weight-based discrimination, in May 2023 NYC added the words 'height' and 'weight' to the list of characteristics protected under its anti-discrimination law.³ An individual will now be able to bring a claim based on the stand-alone category of weight or height in employment, housing or the provision of goods and services.

The state of Michigan has had a stand-alone protected characteristic for weight for several years, although note that in 2018 weight discrimination complaints made up only 1.5% of complaints to the Michigan Department of Civil Rights.⁴ One weight discrimination case which made it through summary judgment in federal court in Michigan, concerned a FedEx employee whose weight made him unable to use certain delivery trucks leading to his request for a seatbelt extender, which was denied. His claim under disability discrimination law failed, but he was able to continue his claim under Michigan's weight discrimination law as the court found that there was a factual dispute concerning the employer's alleged reason for not providing a seatbelt extender.⁵ The case settled in February 2023.

Weight and height discrimination in the UK

The same data which inspired the NYC Council to act paints a similar picture here in the UK. With regard to weight, a detailed academic study in 2016 confirmed that people who are fat are discriminated against when applying for employment. The study went even further and found that weight had an impact on whether a candidate was perceived as suitable with stereotypes, such as people with more weight are physically less capable, often being applied. Female candidates who were considered 'obese' were viewed as even less suitable and assessed less favourably.⁶

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1 It may be helpful to first understand that there are multiple jurisdiction levels in US discrimination law. First, there are federal prohibitions against discrimination in employment, housing and provision of goods and services (called public accommodations) which come from Congressionally enacted legislation such as the Civil Rights Act 1964 or Disability Discrimination Act 1992. These pieces of legislation cover the basic protected characteristics and can be enforced in federal or state court after exhausting certain administrative requirements. There is also the New York State Human Rights Law which covers the same characteristics plus several others, including sexual orientation and gender identity. Claims under this law can be brought alongside a federal claim in federal court if they come from the same '*nucleus of facts*', otherwise known as pendant jurisdiction, but if not, only in state court. Then there is the New York City Human Rights Law which is the most expansive and includes additions such as caregiver status, credit or previous salary history, sexual or reproductive decisions or in housing, source of income. Claims under this law can be enforced either by making a complaint with the Human Rights Commission Law Enforcement Bureau, filing a claim in NY state court or if pendant jurisdiction exists and is accepted, in federal court. This tiered system operates in cities all over the US. It is common for city anti-discrimination law to be more expansive and inclusive than the other jurisdictions.

2 Office of City Council Member Brad Lander, Issue Brief, August 2021, available at council.nyc.gov/brad-lander/wp-content/uploads/sites/40/2021/08/Policy-Brief-on-Weight-Based-Discrimination.pdf

3 Section 8-101, New York City Human Rights Law

4 Harvard Strategic Training Initiative for the Prevention of Eating Disorders, *Body Size Anti-Discrimination Law* available at www.hsph.harvard.edu/wp-content/uploads/sites/1267/2022/02/MI-Weight-Discrimination-Claims-4.pdf

5 *Trapp v Federal Express Corp.*, US District Court for the Eastern District of Michigan, Case No. 1:21-cv-11271 (December 1, 2022)

6 Flint, Stuart W. and others *Obesity Discrimination in the Recruitment Process: 'You're Not Hired'*, May 3, 2016, *Frontiers in Psychology*, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC4853419/

The World Obesity Foundation carried out an extensive survey in 2018 and found that four out of five people in the UK believe people who are ‘obese’ are viewed negatively because of their weight - higher than other forms of discrimination. Twenty five per cent of the adults surveyed admitted that out of two equally qualified candidates, they would appoint the one they considered having ‘healthy weight’ over a candidate they considered ‘obese’. And nearly half of adults who consider themselves ‘obese’ have felt judged because of their weight when shopping or accessing healthcare.⁷

A 2023 report by a UK employment research group found that 70% of respondents believe weight discrimination occurs in their workplace. Thirty two per cent of respondents say they have witnessed weight discrimination at work, yet only 11% of witnessed incidents are reported to human resources.⁸

With regard to height, a 1992 UK study determined that the rate of promotion amongst civil service managers in Britain was correlated to height.⁹ Further, a study into genetics at the University of Exeter in 2016 found that shorter height in men could lead to lower income.¹⁰ In other parts of the world, studies have considered why these correlations exist finding that men (and sometimes women) who are taller are viewed as more ‘leader-like’, charismatic and having more ‘perceived intelligence’. However, taller women are often viewed as too dominant, which can lead to lower outcomes.

At the outset, it is not likely that the government is going to create a stand-alone protected characteristic for weight or height and this article does not seek to necessarily push for such but to alert readers to this area of discrimination and how current protections can, or cannot, be used to address this widespread problem.

Intersection with disability

The most obvious area where size discrimination could be considered unlawful is within the scope of disability discrimination. As the NYC resident with dwarfism confirmed, she would very likely be covered under relevant disability discrimination law as having a disability, and so enjoy the protections which apply.

In Europe, the intersection of weight and disability was initially addressed in *Fag og Arbejde v Kommunernes Landsforening* (also known as *Karsten Kalfolf v the Municipality of Billund*) [2015] ICR 322, EU; Briefing 734 [2015]. In a preliminary ruling, the CJEU found that while there was no EU law which prohibited discrimination on the grounds of ‘obesity’, obesity could be afforded protection if the claimant’s experience met the test for disability in that jurisdiction. Responding to the question addressed to it, the court found that the concept of disability within Framework Directive 2000/78 did not depend on the extent to which the person may or may not have contributed to the onset of their disability - a commonly held weight-based stereotype.

Shortly after the CJEU decision, in the UK in *Bickerstaff v Butcher* [2014] WL 10246872 the Northern Ireland Industrial Tribunal, being mindful of this ruling, found that the claimant’s condition met the test of a disability under s1 of the Disability Discrimination Act 1995 (the equivalent of s6 of the Equality Act 2010 (EA)). It determined that his mobility was substantially affected by his morbid obesity and he was disabled by a

⁷ World Obesity Federation *Weight Revealed as the UK’s Most Common Form of Discrimination* October 11, 2018; based on survey of 1,115 UK adults in September 2018.

⁸ Pearn Kandola *Weight Discrimination at Work Report 2023* August, 21 2023, available at <https://pearnkandola.com/research/weight-discrimination-at-work-report-2023>

⁹ Melamed, Tuvia and Nicholas Bozionelos, *Managerial Promotion and Height*, Sage Journals, Vol. 71, Issue 2, October 1992, abstract available at <https://journals.sagepub.com/doi/abs/10.2466/pr0.1992.71.2.587>.

¹⁰ Frayling Tim and Dr Jessica Tyrell *Shorter stature and higher BMI lower socioeconomic status: a Mendelian randomisation study in the UK Biobank* 12 January 2016, available at www.bmj.com/content/352/bmj.i582

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combination of his morbid obesity and gout conditions, and by each condition separately. [paras 4(iv) and (viii)] The tribunal found that he had experienced harassment for a reason related to his disability. [para 9(2)]

Several of the people testifying before the NYC Council, and in UK studies, explained the challenges they face in terms of physical structures within society. Such an example is the size of theatre seats; even where entities had fulfilled their obligations by removing seats to accommodate customers using wheelchairs, customers of larger size were not accommodated for and thus excluded.

Once alerted to these challenges across our physical world, it becomes apparent that navigating the world in a larger sized body not only means encountering stereotypes and assumptions but also direct limitations in the ability to enjoy and experience entertainment and services. If a person's weight was determined to be a disability, as in *Bickerstaff*, a court should be able to apply the general principles of reasonable adjustments in the provision of services under s29 EA.

Intersections with sex, race and age

But as the data and testimony reveals, the NYC law did not just seek to cover those who might meet the s6 EA definition of disability. Others may experience height and weight discrimination intersected with sex, race or age stereotypes. The same issues are present here in the UK and are appearing in the courts.

In 2018 in *Esoterikon v Kalliri*, [2018] IRLR 77, EU, the CJEU issued a preliminary ruling that Greece's minimum height for police officers could constitute indirect sex discrimination because many more women than men would not make the height limit. Further, although Greece had established the legitimate aim of operational capacity and proper functioning of the police services, that particular height limitation was not appropriate or necessary to achieve that end. The discrimination at issue in this case was based on sex, but the factual matrix concerned height.

Back in the UK, in the recent decision in *Ola v King's College Hospital NHS Foundation Trust* London South Employment Tribunal, Case No. 2305835/2021 and 2301696/2022, August 9, 2023, addressing issues of height and sex, EJ Macey noted that:

We have found on the evidence that Ms Quainoo informed the claimant on 31 March 2021 that when Ms Quainoo had seen the claimant before she 'felt unable to concentrate at her tasks' and that the reason why other staff members were complaining was because, in [her] opinion, the claimant is taller and her style ... We do conclude that these comments were related to the claimant's sex (being female). It is more likely for a woman to be subjected to comments about her body shape, whether that be a reference to her height or weight. [paras 353 & 357]

In this case an employee in a hospital pharmacy department, who was considered tall, received comments about her dress and had been asked to go home and change because of her dress. On that particular day, she had been told that what she was wearing was inappropriate for work; the EJ determined that her dress was 'not tight' and '*the hemline was higher than 2 inches above the knee*'. [para 66] She alleged this was 'body shaming' and discriminatory. The tribunal found that the specific comments cited by EJ Macey above constituted harassment based on sex but did not find either direct or indirect sex discrimination. EJ Macey stated that the evidence demonstrated that men were treated the same regarding the dress code. The claimant presented a series of images where men who did not abide by the dress code were not penalised; however, the tribunal agreed with the respondent that each situation could be distinguished in terms of whether the same dress code applied, and thus were not appropriate comparators.

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In 2005, under previous sex discrimination legislation, a 6ft 10in man brought a claim for indirect discrimination after his training offer was withdrawn because the respondent had said it was too dangerous for him to sit at the desks provided. The employment tribunal in *Sargeant-Thomson v National Air Traffic Control Centre* [2005]¹¹ held that the respondent's actions were justified because of safety concerns in terms of the claimant being able to sit comfortably at the Centre's work stations and no alternative options were practical. The BBC News report of the case notes that the claimant later found employment where there were adjustable desks.

Discrimination based on stereotypes

In many instances, height and weight discrimination is based on stereotypes - see the NYC testimonial examples above of the couple trying to rent a flat or the employer's 'public-facing role' comment. Discrimination can be made out where it is based on a stereotype associated with a group, but *'there must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment'*. *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278, CA, paras 48-49 (a case challenging stereotypes about mental health disability).

In other words, there *'must still in any given case be sufficient reason to find that the putative discriminator has been motivated by such a stereotype'*. *B v A* [2010] IRLR 400, EAT, para 23 (stereotypes regarding men).

The intersection of sex and weight and stereotypes around women and weight were grappled with in *Galvani v Mr A Walters trading as The Crown Inn* [2021] WL 11457388, ET. In this case the claimant brought a claim of direct sex, or in the alternative age discrimination, alleging that she had not been allocated shifts because she was 'too fat'. When she asked her employer if it was because she was 'too fat' he responded 'yes'. His defence to the comment was that he had lost patience and wanted the conversation to end.

The tribunal did not uphold the claimant's direct sex or age discrimination complaints because there were both younger larger weight men and younger larger weight women who were offered shifts, creating a challenge to finding an appropriate comparator. Further, business needs dictated the allocation of shifts. With regard to harassment, EJ Midgley stated that:

It does not require any great explanation that to say to any individual that they will not be offered shifts because they are too fat would be unwanted conduct, and that such a comment would undermine the dignity or create a hostile, degrading, humiliating or offensive atmosphere for the person to whom it was directed ... [and] we accept in general that in the hospitality industry there might be a bias for younger, thinner female staff at busier times such as evening shifts, and that that might go some way to establishing the necessary connection. [para 52]

However, the tribunal did not find there was evidence of this connection in Ms Galvani's case and dismissed her discrimination and harassment claims.

The stereotypes expressed in the NYC Council testimony quotes above are similar to claims where claimants argue they experienced less favourable treatment based on stereotypes such as the *'angry black woman'* or *'aggressive black male'*. Employment tribunals are willing to consider that such stereotypes exist and the argument has been successful in a number of cases. In *Shaikh v Moorfields Eye Hospital NHS Foundation*

¹¹ See [news.bbc.co.uk/1/hi/england/4227752.stm](https://www.bbc.com/news/health-4227752)

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Trust, Central London Employment Tribunal, May 11, 2023 a black woman had been described on several occasions as showing ‘*very aggressive behaviour*’ and was told that she would be moved to allow for ‘*a cooling off period*’. EJ Keogh stated the evidence ‘*generally points strongly towards [the respondent] stereotyping the claimant as a “loud ethnic female”*’ and found for the claimant on her claims of direct discrimination, harassment and victimisation.

Similarly, in *Morgan v Arriva Rail London Ltd*, London Central Employment Tribunal, October 26, 2022, Case No. 2207398/21 where a black male was repeatedly called ‘angry’ and ‘intimidating’ EJ Lewis stated: ‘*we believe that [the respondent] had a conscious or unconscious stereotyped perception of [the claimant] as intimidating and aggressive because he is a black man*’. [para 148]

In both cases the employment judges carried out a detailed analysis of the alleged discriminator’s evidence and motivations.

However, where evidence is limited to the claimant having been called ‘aggressive’ or ‘difficult’ after exhibiting certain behaviour, the claims have not succeeded. In these cases, the tribunal found that the employer would have responded to the same behaviour (for example shouting) with the same action (calling someone aggressive), if it had been a white person and/or man who exhibited the same behaviour.¹² As with Ms Galvani, the claims failed in establishing the appropriate comparator and causal link.

Conclusion

How can weight and height discrimination be so pervasive today? Might it be that people don’t think there are protections against discriminatory treatment or don’t see it as harmful? Stereotypes are attached to both weight and height and how the person may carry out their job or what they may need in goods and services. There are also stereotypical assumptions with a person’s weight that the individual is at fault as they could control their weight and, thus, do not deserve the same respect as the immutable, or even non-immutable, protected characteristics under the EA. Whatever the reasons, the evidence from the UK, similar to the evidence in the US, demonstrates that many people are experiencing discrimination because of their weight and height characteristics, particularly in employment.

The recent judgments in *Ola* and *Galvani* demonstrate that employment tribunals understand and are willing to consider the intersection of sex and weight, or sex and height or dress, and the stereotypes which apply; however, the facts of each individual case need to line up in terms of the causation requirements under the law. Although the EAT has said that as ‘*most courts have regularly recognised, direct evidence of discrimination is rare*’,¹³ unfortunately in these circumstances, as noted in responses to research and testimony above, people appear comfortable stating out loud the connection between their action or decision and an individual’s weight or height. Research demonstrates that the bias experienced with regard to weight is often conscious and overt. Unsurprisingly, where such statements are made there would be no need for the court to draw inferences of discrimination and it is those claims which are most likely to be successful.

It is incumbent upon discrimination law practitioners to think about these intersections. It will be of value to claimants for their representatives to consider their experiences, not just narrowly within the established protected characteristics, but how they may be

¹² Examples include: *Lewis v North Huddersfield Trust and Fell*, Leeds Employment Tribunal, July 28, 2023, Case nos. 1805209/21 and 1801640/22, paras 393-99; *Okoh v North East London NHS Foundation Trust*, East London Employment Tribunal, May 1, 2020, Case No. 3201955/18, paras 171-83.

¹³ *London Borough of Islington v Ladele (Liberty intervening)* [2009] ICR 387 para 40(3); Briefing 523 [2009]

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grounded in the defendant's/respondent's view or impression of their height or weight and how these features intersect with an EA protected characteristic.

The description of a comparator will be essential - see *Galvani*. Lessons can be learned from the 'angry black women/man' comment; while it is understood that the stereotype exists, the evidence must show that the stereotype was part of the motivation for the treatment using a comparator who had behaved in a similar way but did not have the same protected characteristic (race or sex). For example, with a larger sized woman, practitioners should think, as with a sex discrimination claim, not just how a male would be treated but particularly how a larger size male would be treated. Similarly, with a shorter sized man, comparison would be made with how a shorter sized woman was treated.

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Without a stand-alone protected characteristic of height and weight similar to what is now enshrined in NYC law, although the stereotype is how the larger woman and shorter man are treated because they are larger or shorter, the comparator must be of the different sex and a person who materially shares their situation. This is the limitation that sunk the case in *Galvani* - even where such stereotypes around weight and waitressing were accepted as existing in that sector. Where disability can be established based on the impact of height or weight on day-to-day activities, stereotypes also come into play and can be found to motivate discrimination as in *Stockton*.

The new law has not yet come into effect in NYC and regulations and guidance are currently being drafted; there is no doubt however, that based on the extensive evidence of often blatant discrimination, litigation will follow. Discrimination practitioners in the UK will follow that litigation with interest.

