West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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What is a disability?

This proverbial difficult and diverse question continues to exercise Employment Tribunals and nearly became even more clouded in the case of *Metroline Travel Ltd v Stoute*, EAT. Here we find that the Employment Tribunal initially ruled that a person with type 2 diabetes, being controlled by diet, could be perceived as disabled. The EAT however disagreed with the decision, citing abstaining from sugary drinks as insufficient to warrant a control measure in relation to the definitions contained within the Equality Act.

The Facts in Brief

Stoute was a bus driver for Metroline Travel Ltd who, after over 20 years service, was dismissed for gross misconduct. He wasn't the most reliable of employees judging by one particular reference in the case report where he diverted his bus to pick up some chicken kebabs! On the day in question Stoute had been late due to a bout of diarrhoea and was subsequently dismissed. The evidence suggests this was not a sole reason for such, but was a clear stimulant for the final decision. Following his dismissal, Stoute claimed disability discrimination due to the fact that he had type 2 diabetes and his case was therefore heard at the Employment Tribunal.

The Employment Tribunal

The tribunal were shown a medical report which explained that there were two occasions when Stoute was not on medication for reducing blood sugar levels and at these times he was advised to follow a diet reducing sugary foods and drinks (we are not sure if the kebab incident preceded this by the way!).

We all know the qualification for a disability under the Equality Act 2010, requires that an individual must have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The tribunal concluded that if someone was not regimented in their diet and suffered type 2 diabetes, there was the potential they could have a hypoglycaemic episode. It made specific reference to the Equality Act 2010 with particular reference to the words:

"[in the case of an] impairment the subject of treatment or correction was to be treated as having a substantial adverse effect if but for the treatment or correction the impairment was likely to have that effect. "Likely" is interpreted as meaning "could well happen" rather than "more likely than not to happen"

The tribunal felt that abstaining from items such as sugary foods and drinks could be deemed to be a form of correction and if this control was not applied there would be a substantial effect on Stoute's health. It is interesting that Stoute had not been part of any incident where it could be concluded that his work was adversely affected, but the disability area of the Equality Act does not require there to be a pattern.

The link, however that was made, was in relation to the particular tablets that Stoute was taking and in this scenario there was evidence that it did disrupt work and his punctuality at times, due to its side effects of somewhat impromptu diarrhoea.

As the issue of the tablets however not being mentioned for the rest of the tribunal proceedings we are assuming that on the occasion of the dismissal, Stoute was being treated through diet only.

The EAT

Metroline appealed, and the counsel of Metroline (Solomon) argued:

"Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities."

The Employment Judge at the EAT, who felt obliged to declare that he also suffered from Type 2 diabetes, was not convinced that avoidance of certain foods constituted a control measure for disability purposes and was inclined to agree with Solomon's assessment. He felt the decision of the tribunal was perverse and to allow it would mean that everyone whose type 2 diabetes was controlled by diet would be classed as disabled. He also questioned the impact of agreeing such an approach, i.e. opening the floodgates to all those who take preventative strategies to support their health, such as those with nut allergies or those who are lactose intolerant.

The Employment Judge did not accept that abstaining from sugary drinks for example was akin to adopting a particular diet and therefore did not amount to treatment or correction as defined by law as disability measures of control. The tribunal's decision was therefore overturned and it was decided the claimant should pay costs up to a limited amount.

Whilst only a subtle reference, we suspect that the employee had been unreliable before this incident and therefore that may have contributed to the decision taken to dismiss. It shows however how close employment tribunal interpretation is coming to ruling discrimination in cases involving the treatment of more ordinary controlled conditions. This would have material impact on employers and how we deal with this difficult area of employment law. Having a clear and consistent stance, as is possible, on the definition of disability related conditions can only help in an area of law that can sometimes become very unclear.

HR HOWLERS

A survey conducted by Protecting.co.uk outlined the ultimate workplace sins revealed by staff earlier this year. Worryingly for us the results were anonymous so you could be sitting next to one of these culprits! Apparently the research company received a deluge of people wanting to confess. Here are 3 of the best ones:

1. Trying to burn the Office Down

A narrow escape. An employee put the wrong thing down the wrong hole in the photocopier which set fire to it (and three years of sales paperwork)

2. Using Talents inappropriately

An adventurous error- obviously bored, an employee made an air powered gun from the compressed air feed they had in the workshop. It blew a steel bolt through two brick walls. The company ruled their employee was too much of a risk to work in the defence industry!

3. A lapse in Judgment:

Finally a gem from an employee who showed what may be the ultimate lapse in judgement or too much booze: “This is really stupid when I think back. I used to sleep in the office, under my desk about three times a week. It got to the point that one night I thought nothing of inviting a chap from the pub who said he had nowhere else to go to do the same. Of course, he robbed a load of laptops and some cash. I still don't know how I never took the blame."

The researchers rather than being alarmed by the answers added "Keep doing the funny stuff, British workers, heaven knows we'd be miserable without you."

And on that note have a wonderful Easter!