

Menopause in the Workplace – the Law

Case Law

Analysis of court records by Menopause Experts Group found that the number of ET cases which cite menopause increased by 44% in 2021.

The aspect of employment law that has really evolved on the subject of menopause is discrimination law.

Employers clearly need to be aware of the risk of potential discrimination claims that may arise because of their treatment of those experiencing the menopause.

Discrimination

9 protected characteristics – need to rely on one or more of them to bring a claim.

Menopause is not a protected characteristic and is not going to be.

Depending on the facts, those experiencing M may be able to bring separate discrimination claims based on the Protected Characteristics of age, sex, disability, and potentially gender reassignment.

Age Discrimination

Menopause related Age Discrimination claims tend to be brought by menopausal or post-menopausal women alleging they've experienced less favourable treatment or disadvantages. However, employers should bear in mind that employees in younger or older groups could bring AD claims if they feel they've been treated less favourably compared to those of Menopausal age.

Mc Cabe v Selazar Ltd ET/2200501/2021

ET held that Selazar had subjected Mrs McCabe to direct age discrimination when it dismissed her at age 55 – the CEO's comment of "calm down...don't let the hormones get out of control" was evidence that he viewed Mrs M as a menopausal woman, that is an older woman. He also asked a recruiter to look for a younger person to replace Mrs McCabe and considered older people not to be familiar with IT businesses. The ET concluded that at least part of the reason for her dismissal was age.

Sex Discrimination

While Menopause symptoms may affect some people who don't identify as women, it's mostly women who will experience the Menopause. Therefore where a woman is treated less favourably or suffers a disadvantage related to Menopause, this could give rise to claims for sex discrimination.

Newbould v Commissioner of Police of the Metropolis ET/2205178/2018

Claim of sex related harassment – Ms N alleged her male manager belittled her by saying that she was probably getting upset about things because of her hormonal state, and also alleged that a female officer ordered her to try HRT when she was experiencing mental health issues connected to the Menopause because it was the duty of a police officer to be "robust".

Claims did not succeed – Claimant had herself told the male manager that she was getting upset over minor issues because of the M, and he had been exploring this with her and trying to show empathy. The ET felt his behaviour may have come across as patronising, but was not harassment. They also found that the Claimant and her female colleague had previously shared menopause experiences and

that the colleague had not ordered but recommended the Claimant try HRT because it had worked for her.

Sokolova v Humdinger Ltd ET 2021

Sokolova was employed in a nut factory and complained that the employer's requirement of keeping overalls buttoned up to the neck worsened her Menopause-related hot flushes. Her employer said could not relax the rule but that it could provide fans for staff, which were available on a first come first served basis, so were usually taken before Sokolova arrived at work. She brought a claim for indirect sex discrimination.

ET accepted hot flushes were a symptom of the Menopause and that the Menopause only applies to women (no evidence before the ET that there are conditions which generate heat that only apply to men). Therefore the requirement of having overalls buttoned up to the neck put women at a substantial disadvantage and put Ms Sokolova to that disadvantage.

But, you can objectively justify discriminatory practices/requirements ("PCPs") - the justification was that the PCP was to avoid the contamination of food and the wearing of overalls was proportionate to achieve that aim. Therefore there was no Indirect Discrimination on the basis of sex.

Disability

This is the one that you're likely to experience most often.

In order to bring a Disability discrimination claim, the employee has to show that they have the protected characteristic of a disability.

Section 6 of the Equality Act 2010 defines a disability as a mental or physical impairment which has a substantial, long term adverse effect on someone's ability to carry out day-to-day activities.

It's going to depend on the severity of the symptoms, impact on quality of life and ability to work.

Most people who experience Menopause have some symptoms that are mild to moderate – may not satisfy the definition, meaning they wouldn't qualify for protection from discrimination based on their menopause.

When Menopause is a disability under the EqA 2010

Chan v Stanstead Airport Ltd Et/3205543/2022

Ms Chan's main symptom – stress and anxiety – she'd never experienced difficulties with her mental health before. Symptoms continued for over 4 years, and caused her to be signed off for 4 weeks at a time in different years.

Other symptoms – lack of concentration, memory loss and fatigue.

ET concluded symptoms had a substantial adverse effect on her ability to carry out normal day to day activities due to her not being able to work for several weeks at a time, having to set up systems to remember everyday info, and not being able to read a whole book having previously done so regularly.

ET noted her condition wasn't consistent. And it was hard to pinpoint when some of the symptoms manifested in a way that the adverse impact was substantial, in particular lack of concentration and memory loss.

In deciding the effects were long term the ET concluded that her condition was recurrent due to the three documented periods of absence from work due to M symptoms of stress and anxiety

Rooney v Leicester City Council EA 2020

M symptoms – hot flushes, Sweating, palpitations, anxiety, night sweats, sleep disturbance, fatigue, poor concentration, urinary problems, headaches, dizziness, joint pain....

Led her to forget to attend events, meetings, losing personal possessions, forgetting to put the handbrake on her car and to lock it, leaving the cooker and iron on, leaving the house without locking the doors and windows and spending prolonged periods in bed due to fatigue.

ET did not accept these symptoms had a substantial adverse effect on her ability to carry out day to day activities – taking into account she was a carer for her mother and husband and some matters were trivial considering the things she did for her family.

EAT disagreed and overturned the decision. Said ET had been wrong to weigh up what she could do against what she couldn't do, and had failed to consider the "long term" effect. Symptoms had more than a minor or trivial effect. Went back to a differently constituted ET who found that she was disabled.

Charles v London Underground Ltd ET/32003332/2021

Ms Charles had menorrhagia in 2006 and symptoms worsened with the Menopause – heavy and prolonged menstrual bleeding and spontaneous escape of clear fluid. Sanitary products were often inadequate and she avoided shopping and walking anywhere without toilet facilities. Interrupted her sleep, TV, reading and conversing. Discomfort and fatigue impacted her quality of life. Found to be disabled.

McMahon v Rothwell and Evans LLP ET/2410998/2019

Early onset Menopause – symptoms of brain fog, lack of concentration, joint pain, fatigue, night sweats. ET accepted long term element of definition, but evidence of the frequency of her symptoms and their effect was not always reliable. Symptoms individually were not substantial, however when the scattered symptoms were considered together, bearing in mind how different symptoms were combined at different times (eg night sweats and fatigue) the ET concluded that their effects was substantial and that the nature of the M was that effects are unpredictable. Therefore disabled.

When Menopause is not a disability under the EqA 2010

Kelly v DWP ET/2500881/2021

Dismissed for misconduct – she argued that the reason for her misconduct was because her course of HRT had finished and as a result she was suffering from a lack of concentration and fatigue. ET held her symptoms did not amount to a disability – not convinced they had a substantial adverse effect, and there was a complete absence of medical evidence that she suffered debilitating symptoms and no evidence of symptoms affecting her domestically and socially, or impacting her capability at work or resulting in any sick leave

Rose v Commissioner of Police of the Metropolis ET/3203055/2019

No disabled – no evidence of adverse effect and not clear to what extent the impact on her ability to work at night was caused by the Menopause and not her other conditions.

Duty to make reasonable adjustments

Duty to make reasonable adjustments where a disabled person is placed at a substantial disadvantage by an employer's PCP, a physical feature of the employer's premises or failure to provide an auxiliary aid.

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October 2024