Employment Tribunal wrong to say that a woman suffering from menopausal symptoms was not disabled

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In only the second appellate decision on menopause in the workplace, the EAT held that an Employment Tribunal had erred in deciding that a woman suffering from a wide range of menopausal symptoms which affected her day to day life was not disabled for employment law purposes.

What happened in this case?

Ms Rooney worked as a social worker for Leicester City Council. In August 2017 she began to suffer from a wide range of menopausal symptoms including hot flushes, palpitations, night sweats, insomnia, fatigue, light-headedness, confusion, difficulty concentrating, memory loss, depression, anxiety, loss of confidence, urinary problems and headaches. Ms Rooney felt unsupported and resigned on 29 October 2018. A few months later her solicitors lodged an Employment Tribunal claim alleging constructive dismissal. On the claim form her solicitors conceded that she was not disabled by virtue of her menopausal symptoms.

However, Ms Rooney said that her solicitors had made this concession without her permission. She fired them and the next day lodged a second Employment Tribunal claim, alleging discrimination, harassment and victimisation on the grounds of disability and/or sex. These claims centred around alleged mistreatment of her by the Council in connection with her menopausal symptoms including that:

- the Council had failed to meet her request to be seen by a female occupational health specialist, which caused her embarrassment;

- the Council failed to take her condition into account when deciding to issue a written warning in respect of her sickness absence;
- she was forced to discuss her situation in front of four male colleagues at an internal appeal hearing, again, causing her embarrassment;
- a male manager minimised the fact that she suffered from hot flushes by comparing it to the fact that he also got hot in the office; and
- the Council failed to make reasonable adjustments for her.

Ms Rooney applied to amend the first claim to remove the statement that she was not disabled. However, at a Preliminary Hearing, an Employment Judge decided that Ms Rooney was not disabled by virtue of her menopausal symptoms. As a result, her claims of disability discrimination, harassment and victimisation were all dismissed. The Judge also struck out the sex discrimination, harassment and victimisation claims for having no reasonable prospect of success. Ms Rooney appealed to the Employment Appeal Tribunal.

What was decided?

The EAT decided that the Tribunal had been wrong to say that Ms Rooney was not disabled. The Judge had erred in considering what Ms Rooney could do, instead of focusing, as it should have done, on what she could not do. It was also wrong to have concluded that her menopausal symptoms only had a minor or trivial effect on her day-to-day activities. The Tribunal had accepted evidence that she suffered from a wide range of symptoms which had led her to:

- forget to attend appointments and events;
- lose personal possessions;
- forget to take safety measures when driving (such as putting the handbrake on);

- forget to turn off appliances such as the oven and the iron;
- forget to lock the door when leaving the house; and
- spend long periods of time in bed due to fatigue.

She also experienced dizziness, incontinence and joint pain. The Tribunal had accepted this evidence but gave no explanation for why it had considered that these effects were merely minor and trivial. The Tribunal's decision appeared to be based, in part, on the fact that in her first claim it had been stated that she was not disabled yet this neglected the fact that she had applied to amend the first claim to remove that statement.

The EAT said the Tribunal had also been wrong to strike out the sex discrimination, harassment and victimisation claims. The Judge had failed to consider the extent of Ms Rooney's complaints in this respect and wrongly stated that her complaint was confined to feelings of embarrassment at having to discuss her symptoms with men. There was also a failure to explain why the claims had been struck out.

The EAT allowed Ms Rooney's appeal and ordered that a new Employment Tribunal should consider the claims.

What does this mean for employers?

There is growing momentum around the impact of the menopause in the workplace. In the last few months alone, two Parliamentary inquiries have been launched and the Wellbeing of Women charity has urged employers to take the menopause pledge to increase understanding, support and training around the issue. Could greater awareness lead to a surge in related Employment Tribunal claims, including discrimination claims? Media reports suggest this is already happening. However, further scrutiny reveals that since Employment Tribunal decisions were first published online in February 2017, only 44 out of 79,000 decisions have included the word "menopause".

And, in fact, menopause was a material issue in only 27 of those 44 decisions.

More interestingly, ten of those 27 decisions concerned the preliminary issue of whether menopausal claimants, like Ms Rooney, qualified as disabled under the Equality Act 2010. In Donnachie v Telent Technology Services Ltd it was decided that there is no reason in principle that typical menopausal symptoms cannot have a relevant disabling effect on an individual (discounting the remedial effect of hormone replacement therapy where used). Despite this statement, closer analysis reveals that only three claimants were found to be disabled by reason of their menopausal symptoms (Ms Rooney may turn out to the be the fourth).

To date, therefore, menopausal women have faced an uphill struggle in showing that they are entitled to bring disability discrimination claims. However, growing awareness around the impact of menopausal symptoms may lead to a turning of the tide. Where possible, employers should ensure they seek occupational health advice on whether an affected employee is disabled, asking questions which probe the various elements of the disability test.

The other important take away for employers is that insensitive behaviour from managers can cause problems. This includes things like minimising or belittling symptoms, refusing to speak to staff about menopause issues or, conversely, forcing such conversations to take place. Analysis of the 27 Employment Tribunal decisions suggests that this type of behaviour is not uncommon. Employers can avoid liability for such mistakes by training managers on how to manage menopausal employees. Information to support such training is now freely available. For example, in May 2021, the Chartered Institute for Personnel Development published A Guide to Managing Menopause at Work: Guidance for Line Managers, which includes guidance on how to conduct sensitive discussions.

Rooney v Leicester City Council

If you would like to discuss how your organisation can support staff though the menopause, please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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