Flexible working requests and the dangers of overlooking menopausal symptoms

In *Johnson v Bronzeshield Lifting Ltd,* the Employment Tribunal held that an employer's failure to take into account an employee's menopausal symptoms when considering her flexible working request was an act of direct disability discrimination and a repudiatory breach of trust and confidence which resulted in her constructive unfair dismissal

What happened in this case?

The employer, Bronzeshield Lifting Ltd, is a small crane hire business with a predominantly male workforce. Ms Johnson was employed as an Administrator. She was a long-serving employee, having worked for the employer for over 25 years. In 2018, Ms Johnson began experiencing a wide range of menopausal symptoms including:

- low mood and volatile emotions;
- anxiety and low self-esteem;
- feelings of anxiety or panic when performing tasks that she had previously found easy;

- sleep problems causing tiredness and fatigue the following day; and

- “brain fog” which manifested as feelings of disorientation and made it difficult to concentrate.

These symptoms affected her general resilience and ability to cope with the stresses and strains of day-to-day work. This was exacerbated by the fact that she needed to help care for her elderly parents and uncle.

Ms Johnson’s worked 32.5 hours per week between the hours of 9am to 4pm, Monday to Friday (she had a 30-minute unpaid lunch break each day). In August 2021 she asked to changing her working hours to 9am to 5pm, four days per week, with Wednesdays off (totalling 30 hours per week). She said she would be happy to check and reply to emails from home on Wednesdays if required. The request was approved for a fixed period until 1 July 2022, after which the arrangement would be reviewed and either made permanent, or she would be expected to revert to her original working pattern.

The review did not take place in July 2022. However, around this time, Ms Johnson asked to if she could reduce her working hours further. She asked to work 9am – 4.30pm on Monday to Wednesday with no lunch break, 9am – 1pm on Thursday and to have Fridays off (totalling 26.5 hours per week). She suggested that another colleague could cover on Thursdays and Fridays. When making the request, she explained she needed the change to accommodate her caring responsibilities and her menopause issues. A meeting was held to discuss the request,

during which Ms Johnson made mention of her menopause and caring responsibilities again.

The employer refused the request on the basis that it would be unfair to ask a colleague to cover and it was not feasible to recruit someone. In addition, the proposal would put the employer in breach of the rules on daily rest breaks and they would be left without cover on Fridays, which was considered to be their busiest day. No alternative proposal was put forward and the implication was that she would have to return to her original five-day week working pattern.

Ms Johnson resigned on notice, expressing her disappointment that her reasons for wanting to change her working patterns had not been taken into consideration, nor a compromise suggested. The employer wrote back offering a one-week "cooling off" period and reminded her that she could appeal the decision. Although she then submitted a letter challenging the decision, the employer failed to treat this as an appeal as she had not labelled it as an appeal letter. Therefore, Ms Johnson's employment terminated at the end of her notice period.

Ms Johnson argued that the employer had directly discriminated against her because of her disability and/or sex by:

- failing to take into account her menopause when determining the flexible working request; and
- refusing to grant the flexible working request.

She also claimed that both matters amounted to serious breaches of trust and confidence, meaning she had been constructively unfairly dismissed.

What was decided?

Shortly before the Employment Tribunal hearing, the employer conceded that Ms Johnson was disabled for the purposes of the Equality Act 2010, meaning this question did not have to be determined by the Tribunal.

In relation to the first discrimination complaint, the Employment Tribunal found that the employer had failed to take into account the fact that Ms Johnson was going through the menopause when determining her flexible working request. Given that she had explicitly referred to it in her written flexible working request, and in the meeting, it was not something that should have been missed. The Tribunal found that the employer would have treated an employee with a different but serious medical condition (e.g. cancer) in a different way. It would have made efforts to find out whether such a person would have needed treatment and what the link was between the condition and the working pattern. More generally, it would have taken the condition into account when determining the application. Therefore, the Tribunal concluded that Ms Johnson had suffered less favourable treatment because of the particular disability of menopause. However, it rejected the claim that she had been treated less favourably because of her sex.

In relation to the second discrimination complaint, the

Employment Tribunal found that the employer had refused the flexible working request, but this was not because of her menopause (indeed, her menopause had not been taken into account when considering the request). Nor would the employer have treated an employee with a different but serious medical condition in a different way – their request would also have been refused. The Tribunal accepted the employers reasons for refusing the request were that it would mean they would be in breach of rules on daily rest breaks, and that it was not practicable for the business for Ms Johnson to have Fridays off. Accordingly, this disability discrimination complaint failed. The sex discrimination complaint failed for the same reasons as the first complaint.

Finally, the Tribunal held that the employer had committed a breach of contract by failing to take into account her menopause when determining her flexible working request. The Tribunal notes that *"All that was really required was to ask the Claimant a few questions, listen to her answers and factor it all into the reasoning when coming to a decision upon the application."* The Tribunal considered this amounted to be a repudiatory breach of trust and confidence for the following reasons:

- the hours an employee works has a major impact on their life – all the more so where they have health problems and other commitments as was the case here;
- it matters how a flexible working application is dealt with – the outcome is not the only thing of importance;
- here, the employee had put her menopause "front and

centre" of her request;

- the menopause was affecting the employee in a profound way but there was an absence of effort to try and understand how menopause was affecting her and its relevance to her application – there was no good reason for leaving this important factor out.

The refusal of the flexible working request itself was not a breach of trust and confidence – there was reasonable and proper cause for the refusal.

The Tribunal found that Ms Johnson had resigned in response to the repudiatory breach of contract, meaning her constructive unfair dismissal claim succeeded.

What does this mean for employers?

The employer in this case appeared to have sound reasons for refusing the flexible working request on the facts. Where they went wrong was in the process leading up to that decision.

If an employee signposts their motivations for making a flexible working request, an employer should explore this with them when discussing the proposal. This is all the more important where the employee has highlighted a health reason, including those that the employer may not immediately understand as being relevant to the request. Here, it was

found that the employer would have taken other serious health conditions into account when considering the request. But because the employer did not properly understand the potential impact of the menopause, it failed to make the necessary connection and explore the issue further. This underlines the need for appropriate disability training, which includes menopause, to be given to appropriate staff.

As the Tribunal made clear, taking the underlying reason into consideration is not an especially onerous task. It could have required as little from the employer as discussing the matter with the employee and factoring this into their decision in a fair way. In cases where symptoms are unclear, it may mean medical advice is needed before a fair decision can be made.

In this case, the failure to get the process right amounted to direct disability discrimination and was also a repudiatory breach of contract. The latter finding should be of concern to employers when dealing with *all* flexible working requests – not just those motivated by health reasons. The Tribunal's comments about the major impact of working patterns in employees' lives, and the importance of how flexible working applications are dealt with, suggests that shortcomings in such processes could open the door to constructive dismissal claims. Not only would this be costly to deal with, it risks the loss of a valuable employee.

Although not argued in this case, employers should also remember that a rejection of a flexible working request by a disabled employee could attract other types of disability discrimination claim including failure to make reasonable adjustments, indirect disability discrimination and disability arising from discrimination.

Johnson v Bronzeshield Lifting Ltd

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.