The menopause taboo: employers who ignore their responsibilities risk claims

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Employment Law News

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The menopause taboo: employers who ignore their responsibilities risk claims

Recent UK media headlines have focused on pioneering private medical treatment being offered to women to postpone the menopause by removing a piece of their ovary by keyhole

surgery, freezing it and then regrafting it when a woman's natural menopause arises. The procedure could cost between £7-£11,000 and is being offered to women under the age of 40. What about those women that cannot afford this cost, or those over the age of 40?

Kate* an analyst in the City, sometimes felt she was losing her mind. She had always been smart and tenacious, earning a first-class honours degree in economics, after which she went to work in the specialist area of complex international investment funds. However, now in her early 50s, she worried that her intelligence, reason, and her body were working against her almost every day.

Like many women, Kate battles with peri-menopause. She suffers from insomnia, muscle aches, night sweats, hot flushes, and mood swings. But it is the brain fog that gets her most, wreaking havoc on her professional confidence. She has gone from being at the top of her game, to struggling to get through each day, and sometimes feeling completely incompetent in her role.

But she tells no one. Because she knows that in her male-dominated profession, menopause is often at best misunderstood, and at worst, seen as a sign of a woman being "well past her prime".

There are around 4.3 million women aged 50 and over in employment in the UK (ONS 2015) and the biggest increase in employment rates over the last 30 years has been for women aged 55-59 (from 49% to 69%). According to figures quoted during a World Menopause day Debate in the UK House of Commons in 2018 about 50% of working women say menopausal symptoms make it difficult to do their jobs, and 10% give up work altogether as a result.

So why is menopause still seen as a taboo topic?

In the recent House of Commons debate, the Minister for Women,

Victoria Atkins, stated that it is in employers' interests to ensure that they have policies that adapt to the growing number of women who are experiencing peri-menopausal and menopausal symptoms at work. Her comments echo a July 2017 report by the Government Equalities Office, titled 'The effects of menopause transition on women's economic participation in the UK' which calls for the introduction of new measures to better accommodate working women dealing with the condition.

However, in order to support menopausal women, we first need to understand what perimenopause and menopause actually is.

What is menopause?

The menopause occurs when a woman stops having periods and is no longer able to become pregnant naturally. The average age of natural menopause is 51, and the symptoms of menopause can begin several years earlier (referred to as 'perimenopause'); as such, many female workers experience menopause 'transition' during their working lives.

Menopause transition involves a wide range of physical and psychological transition symptoms; there is no uniform experience, but symptoms (which usually last around four years though can be longer) can include hot flushes, night sweats, insomnia, depression, anxiety, and decreased memory and concentration. While some women have very few symptoms, many may benefit from workplace support to help lessen the impact on their professional life.

Not only can transition symptoms impact a woman's ability to carry out her role effectively, but they can have detrimental effects on her career, including needing to work reduced hours, leaving work altogether (whether resignation or dismissal), and/or an ongoing fear of being targeted for redundancy. The Government's July 2017 report confirmed there is an emerging pattern in society whereby those experiencing

menopause transition feel those around them (within the workplace) are unsympathetic or treat them badly because of "gendered-ageism".

With the array of potential career-damaging possibilities, as well as the stigma often attached to menopausal women, it is little wonder that many of those women going through the transition period report feeling embarrassed and/or unwilling to discuss their symptoms with their employers, and feel that they have no option but to cope alone. This is often exacerbated by employers who either don't understand the symptoms of menopause, or how best to support menopausal women (often feeling reluctant to broach the subject), or do not want to take responsibility for supporting menopausal women in their workforce.

The legal position on menopause

Employers have a duty to protect the health and wellbeing of their workforces and not to act in a way which seriously undermines the implied duty of trust and confidence. Further, discrimination on the grounds of age, sex, or disability (which are protected characteristics) is prohibited under the Equality Act 2010. Claims for discrimination have potentially unlimited compensation.

Direct discrimination is deemed to have occurred when a worker is subject to less favourable treatment (including dismissal) because of a protected characteristic. Indirect discrimination, on the other hand, can occur if a policy is applied to everyone but has the effect of putting those with a protected characteristic at a specific disadvantage.

Discrimination can also take the form of harassment and/or victimisation and, in the case of disability discrimination, can arise if the worker is treated less favourably because of something arising as a consequence of their disability, or a failure to make reasonable adjustments to accommodate it.

There is limited case law surrounding menopause transition in the UK, but those non-binding cases which do consider the issue have provided useful insights into the types of potential claims which can be successfully pursued at a tribunal.

Unfair dismissal and direct sex discrimination

The first case is*Merchant vs British Telecoms Plc* in which the tribunal agreed that Ms Merchant had been unfairly dismissed and direct sex discrimination had occurred when she was dismissed for poor performance.

In this case, Ms Merchant had been subject to underperformance procedures for a few years, culminating in a final warning. The performance issues persisted so a further performance process was commenced. During a meeting to discuss the performance issues, Ms Merchant provided her manager with a letter from her doctor explaining that she was going through the menopause and that this was affecting her ability to concentrate. She also referred to her menopause on several occasions during the meeting.

The manager, however, chose not to carry out any further investigation of her medical condition, in breach of the company's performance management policy. Instead, he made a judgment on Ms Merchant's health and the impact on her ability to carry out her role by comparing it to what he knew of the menopause experiences of his wife and HR adviser, despite all women experiencing the menopause differently.

The tribunal held that the manager would never have adopted this "*bizarre and irrational approach with other non-female-related conditions*". A man with ill-health experiencing similar under-performance concerns would not have been treated in the same way and, consequently, the failure to refer Ms Merchant for medical investigation before making the decision to dismiss was directly discriminatory on the grounds of sex.

Disability related discrimination

The second case, *Davies v Scottish Courts and Tribunals Service*, found that Ms Davies had been unfairly dismissed and that her dismissal was because of something arising in consequence of her disability.

Under the Equality Act 2010, in order for menopause to be considered a disability, it must have a substantial and long-term adverse effect on the individual's ability to carry out day-to-day activities. It, therefore, should not be assumed that all women going through the menopause will be protected; each case must be determined on its own facts.

In this case, however, Ms Davies suffered from heavy bleeding (requiring her to be near a bathroom to change her sanitary towel every 30 minutes), severe anaemia, memory loss and a "fuzzy" feeling. Her employer recognised her disability and made reasonable adjustments for her.

In February 2017, Ms Davies began taking a medication which needed to be dissolved in water. On the day in question, she was working in court and, upon returning from the lavatory, was concerned to note that her jug of water was being drunk by two members of the public. She could not remember whether she had dissolved her medication in the water and so informed the two men that her medication had been dissolved in it.

Despite her condition making her flustered and forgetful, and her 20 years of unblemished service, Ms Davies was subsequently dismissed for gross misconduct on the grounds that she had knowingly misled the two men and management (she should have known the water would turn pink once the medication was in it), and that she had brought the court into disrepute.

In addition to being unfairly dismissed, the tribunal held that there was a clear link between Ms Davies' dismissal and her conduct and that her conduct was affected by her

disability. Whilst the tribunal accepted that the justification of having an honest and trustworthy staff member could be a legitimate aim, they could not accept that dismissal of Ms Davies was a proportionate means of achieving it.

Although not yet tested at tribunal, it is possible that claims for age discrimination may also be successful, on the basis that the menopause usually affects women of a certain age.

How to support female employees with peri-menopause and menopause

Failure to support women suffering from menopause can lead to Employment Tribunal claims. These types of cases may increase as women become more confident about speaking out about their symptoms and subsequent negative treatment

The British Menopause Society (BMS) has issued guidance on how employers can support female staff through menopause. Steps include:

- Raise awareness of menopause and its symptoms, especially in relation to line managers who are responsible for the health and wellbeing of their team.
- Set out guidance for line managers on how to conduct conversations around menopause with employees. It is especially important to realise that what works for one person may not be the right approach for another, as this is a highly sensitive matter for many suffers.
- Health and safety handbooks and policies should be updated to include information regarding menopause.
- Implement support mechanisms within the workplace. This could be a named person in HR or just the occupational health team; each organisation will be different. You may even have a named ‘menopause champion’. The contact details for the support available should be made clear

within the guidance.

In summary

The issue of menopause needs to come out of the shadows. Given women's increased life expectancy and the fact of working longer, it is imperative that workplaces change and adapt to support women during what may be a challenging time in their lives. Not doing so raises the risk of claims and reputational damage to employers.

*Names have been changed.

If you have any questions regarding employment law matters, please do not hesitate to call us on 020 3828 0350.

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