

PAUSE FOR THOUGHT: SHOULD MENOPAUSE  
BE A PROTECTED CHARACTERISTIC

**GILLIAN CREW**

## **EXTENDING LIST OF PROTECTED CHARACTERISTICS UNDER THE EQA**

- Various candidates suggested – Caste, “Child in care/care leaver”, and Carer status including menopause.
- Good that the conversation is changing but does menopause need further protection

# 42

BEDFORD ROW  
BARRISTERS

# CHANGING THE CONVERSATION



# MENOPAUSE

- Menopause (and perimenopause) natural stage of life caused by lowered hormonal levels. On average, affects women between the ages of 45 – 55.
- can lead to severe and long lasting physical and mental symptoms : low mood, anxiety, depression, fatigue, poor concentration, heavy periods, anaemia, palpitations, difficulty sleeping, hot flushes, sweating, muscle/joint pain.

## WHY DOES IT MATTER?

- Brain drain: UK losing female talent: The House of Commons Women and Equalities Committee report, Menopause and the workplace - 28.7.2022 report
- women who suffered from menopausal symptoms are 43% more likely to have left their jobs by the age of 55 than those who did not, and that approximately 900,000 women have given up their jobs because of menopausal symptoms.
- Continuing ongoing social and cultural stigma, particularly for certain groups including LGBT+, young and ethnic minority

# Menopause is a workplace issue

*Menopause is a workplace issue. There is a legal, economic, and social imperative to address the needs of menopausal employees. We are not persuaded that a legal requirement for every workplace to have a menopause policy would embed meaningful change. But there is much that employers can and should do to help their employees. Many of the solutions involve practical adjustments and, in allowing additional flexibility and understanding, alongside fostering a greater respect and understanding of menopause. Employers who fail to support their menopausal employees, or act punitively towards them, leave themselves vulnerable to discrimination claims. They also risk their reputation, their ability to attract and retain female talent, and their profitability (Paragraph 63)*

# **MENOPAUSE IN THE WORKPLACE REPORT**

- Noted that current law not fit for purpose for menopause:
- EG direct sex discrimination – requirement for male comparator
- no current dual combined discrimination – age and sex – s 14 not in force
- chilling effect of describing natural stage of life as a disability

# RECOMMENDATIONS

- Government should produce model menopausal policies to include how to deal with sick leave, flexible working
- Recommendations menopause added to protected characteristics
- Duty to make reasonable adjustments to apply



## CAROLINE NOKES MP

- ““The omission of menopause as a protected characteristic under the Equality Act is no longer tenable, given that 51% of the population will experience menopause. Menopausal women have been mocked and maligned for too long. It is time that the government seizes the opportunity to enact change. It is time to support, and celebrate, these women.”

## **BUT IS IT NECESSARY?**

- Pro: simplify claims – not have to shoe horn claim onto another protected characteristic
- Reduce stigma of claims.
- Cons: Unnecessary - and covered by other protected characteristics: Age, sex and disability
- Few successful cases.

# ACAS GUIDANCE

- No EHRC or HSE guidance
- Acas guidance: Menopause at work

# SUCCESSFUL CLAIMS EAT

- menopause not a disability BUT symptoms may meet the statutory definition: Rooney v Leceister City Council [2022] IRLR 17 EAT held that an employment tribunal gave insufficient reasons and erred in striking out an employee's claim that her menopausal symptoms amounted to a disability.
- Unsuccessful: Gallacher v Abellio Scotrail UKEATS/0027/19 SS – February 2020. Unsuccessful claim. G brought claims of unfair dismissal, disability discrimination (s 15 and reasonable adjustments), indirect sex and age discrimination. Interesting case as one of the rare cases where dismissal found to be in band of reasonable responses despite no procedure. In terms of menopause, although it was accepted as a disability, tribunal found the employer no actual or constructive knowledge on.

## SUCCESSFUL CLAIMS CONT - ET

- In Merchant v BT Plc [2012] 1 WLUK 683<sup>a</sup> a capability dismissal for poor performance of an employee who said her performance was affected by her menopausal symptoms was found to be an unfair dismissal and direct sex discrimination because the employer did not properly investigate the impact of the claimant's symptoms on her performance

## SUCCESSFUL CLAIMS CONT ET

- In A v Bonmarche Ltd [2019] Case No: 4107766/2019 6<sup>th</sup> December 2019
- A had worked for the employer for 37 years, when she was subject to numerous comments about her being menopausal from her younger male line manager and was successful in her claims of sex and age discrimination.

## **SUCCESSFUL CLAIMS CONT ET**

- Davies v Scottish Courts and Tribunal Services [2018]

S/4104575/2017 Glasgow Employment Tribunal: C, a Court officer, was successful in unfair dismissal claim an section 15 claim. Order for reinstatement made.

- Donnachie v Telent Technology Services Limited [2020] 1300005/2020 Birmingham

Employment Tribunal, August 2020. Preliminary hearing to consider disability. C relying on menopausal symptoms, including anxiety and problems with concentration and Raynaud's syndrome.

## SUCCESSFUL CLAIMS - ET

- Kownacka v Textbook Teachers Limited Case Number: 2602697/2018  
March 2021– 42’s very own Max Gordon appearing for the Claimant.  
Direct disability discrimination and failure to make reasonable adjustments failed but harassment related to disability succeeded.  
The disability was breast cancer but one of the harassment comments concerned it being no big deal that C having a surgical menopause at 37.



## WAY FORWARD?

- Effective remedy?
- No change in protected characteristics
- Gmt will not act on report
- Report will continue to change the narrative
- Advise employers to draft menopause policies
- Training on ACAS guidance

