Employment law dispatches

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Legislation update

with Matthew Clayton

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New guidance from ACAS on menopause

ACAS has published new guidelines for employers on how to manage the impact of the menopause on workers.

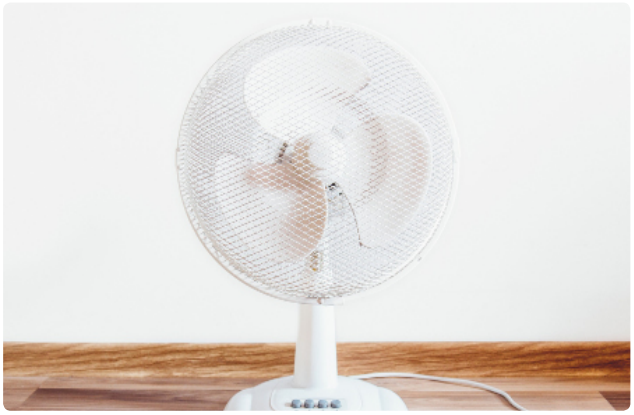
The menopause is a natural stage of life for women, usually in their late forties/early fifties. For many women symptoms last about four years, but in some cases can last longer - up to 12 years. Part of the process is the 'perimenopause' when a woman's body is starting to change in the build up to the menopause – this is not the same as an early menopause.

A trans man – someone who proposes to go through, is going through or has gone through a process, or part of a process to change their gender from female to male – may go through perimenopausal and menopausal symptoms.

Those symptoms can vary from person to person and range from very mild to severe. As well as the oft-mocked 'hot flushes', they can include sleep difficulties, fatigue, mood swings, anxiety, difficulties with memory and concentration, and taking longer to recover from illness, amongst others.

Without proper support, the effects of menopause can lead to workers feeling ill, losing confidence, suffering mental health conditions, and even leaving their jobs. The ACAS guidance reminds us that menopausal issues, if not handled correctly, can lead to complaints of discrimination or harassment on grounds of gender, disability or age, and could also have health and safety implications.

"...risk assessments should take into account factors such as heating and ventilation, uniform fabrics, availability of drinking water, rest areas and toilets."



Many workers will feel reticent about sharing the issue with their employer. Ways of countering this understandable reluctance could include having a menopause or wellbeing champion in your workplace, training managers on how to handle such issues with dignity and sensitivity, and developing a written policy for the organisation.

What does ACAS recommend?

Once you are aware of an issue, ACAS recommends that health and safety risk assessments should take into account menopause factors such as heating and ventilation, uniform fabrics, availability of drinking water, rest areas and toilets. Sickness absence also needs to be carefully managed in order to avoid allegations of discrimination. If a constructive and sensitive conversation can take place (whether with the line manager or someone else in the organisation), then steps can be taken towards agreeing changes at work to help the worker manage their symptoms when doing their job. These changes could be as simple as providing a fan, allowing breaks when needed, or moving a desk nearer to an opening window.

It is worth reading the detailed guidance in full. If you need help with developing a policy, training managers or managing a difficult workplace situation, please get in touch.

Jenny Hawrot
Associate, solicitor

Case law watch

with Jenny Hawrot

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Investigation outcomes

In *Dronsfield v The University of Reading*, the Employment Appeal Tribunal (EAT) found it was not unfair for an investigation report to be altered following advice from a solicitor, prior to a disciplinary hearing taking place.

The investigator had included their 'evaluative conclusions' about whether the employee was guilty of misconduct as defined in the employer's rules. However, the employer's solicitor advised the investigator to remove these findings as the investigation should be limited to factual findings as to whether there was a case to answer. The final 'evaluation' of the conduct should be undertaken at the disciplinary hearing only. The comments - which, incidentally, were helpful to the employee's case - were removed from the investigation report prior to the disciplinary hearing. The employee was dismissed, following that hearing.

The employee claimed that removing the comments from the investigation report rendered her dismissal unfair, but the Employment Tribunal and the EAT disagreed. They found the whole disciplinary process had been fair and it was appropriate for the solicitor to advise that the investigation should be restricted to factual findings only, leaving the hearing chair to make an evaluative judgment. ■

What should I do?

Remember, a disciplinary investigation should be a neutral, fact finding exercise, designed to establish whether or not there is a case to answer. It should not make any recommendations as to the outcome of the disciplinary process but rather should indicate if a hearing is needed.

Clear disciplinary procedures, written guidance and training for managers on such processes will help to avoid any problems. We can assist with this.

Harassment and the burden of proof

In *Raj v Capita Business Services*, Mr Raj's female boss massaged his shoulders in an open office. He claimed that this amounted to harassment as it was unwanted conduct that created an offensive environment on the basis of his gender.

Mr Raj presented evidence that an offensive environment was created, but did not present any evidence that the reason for the conduct was a protected characteristic (namely, his gender). These are both elements of the Equality Act test for harassment, and the EAT found that both elements must be satisfied to establish a prima facie case. Unless this is done, the burden of proof will not shift to the employer and they will not have to prove the reason for the conduct. Mr Raj did not satisfy both elements, so his claim failed.

Although the tribunal agreed that his boss' conduct did create an offensive environment, it found the conduct was not a result of his gender, but rather because of 'misguided encouragement'. ■

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What should I do?

Although this decision ostensibly reduces the burden on employers to explain alleged harassment situations, you should always be prepared to provide reasons for any such alleged treatment.

Again, robust investigation procedures and training for managers on handling and investigating grievances are the key to this. Contact us if you would value help with this.

Philosophising on what amounts to a religion or belief

It's well known that some vegetarians are passionate about their decision not to eat meat, but is this passionate decision enough to amount to a 'philosophical belief' and therefore a protected characteristic?

This was considered in *Conisbee v Crossley Farms Ltd*, where the claimant tried to bring a claim for discrimination because of his vegetarian belief. The tribunal had to consider whether vegetarianism fell into the definition of 'religion or belief' for the purposes of the Equality Act.

The tribunal concluded that whilst it accepted that the claimant had a genuine belief in vegetarianism and animal welfare vegetarianism, it was not capable of amounting to a philosophical belief under the Equality Act 2010. This is because it is not enough merely to have an opinion based on logic. They commented that *"the belief must have a similar status or cogency to religious beliefs… having a belief relating to an important aspect of human life or behaviour is not enough in itself for it to have a similar status or cogency to a religious belief."*

Whilst this may be an unsurprising result for many, it's worth keeping an eye on a similar case which, will rule whether 'ethical veganism' is capable of being a philosophical belief.

Elsewhere, another employment tribunal has ruled that an employee's deeply held belief in Scottish independence did amount to a philosophical belief under the Equality Act 2010.

What should I do?

These two decisions are plainly at odds with each other and therefore we will need to await further guidance from the EAT on what is sufficient to amount to a philosophical belief. Although they are not binding decisions, they serve as a useful reminder that employers should be mindful when dealing with employees who have strong beliefs that fall outside of the 'usual' religious and philosophical spheres. If in doubt, take advice.

In *McEleny v Ministry of Defence*, the tribunal found that Mr McEleny's belief in Scottish independence was not just an 'opinion' that he held based on the present state of information available, but rather it was a fundamental belief in the right of Scotland to national sovereignty. His belief concerned fundamental questions about how people living in Scotland are governed, and the right to self-determination of the people of Scotland. As such, his belief concerned a substantial aspect of human life and behaviour generally and had a sufficient level of seriousness, cohesion and importance to be a philosophical belief. ■

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Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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