



MENOPAUSE RIGHTS AT WORK

Menopause Rights: The legal mechanisms for
tackling menopause discrimination at work

Dr Sue Westwood



UNIVERSITY
of York

Public Law

What is menopause?

- **Menopause** is when periods stop due to lower hormone levels. Can happen naturally, or for surgical/medical/genetic reasons.
- **Three phases:**
 - Perimenopause – symptomatic phase before periods stop
 - Menopause – when periods stop
 - Post-menopause – after periods have stopped
- **Common symptoms:**
 - hot flushes in the daytime
 - night sweats
 - vaginal dryness and discomfort during penetrative sex
 - reduced/loss of libido
 - disturbed sleep
 - anxiety/depression
 - mood changes
 - low self-esteem
 - problems with memory or concentration

- According to a **recent survey of over 2,000 menopausal women** in the UK (Bazeley et al 2022):
 - 77 % experienced one or more ‘very difficult’ symptoms,
 - 69 % experienced menopause-related difficulties with anxiety or depression,
 - 84 % experienced trouble sleeping
 - 73 % experienced ‘brain fog’
- **At work:**
 - 2019 survey conducted by BUPA and CIPD (BUPA 2019; CIPD 2020): **three in five menopausal women reported that they were negatively affected at work**
 - Almost **a million menopausal women** have been lost from the UK workforce (BUPA, 2022)

- **Key symptoms impacting work:** less able to concentrate, more stressed, less patient with others; loss of self-confidence, fatigue.
- **Workplace adjustments:**
 - **Changes to physical work environment**, e.g. room temperature, ventilation, providing rest areas and cooling systems, and relaxing uniform policies.
 - **Promoting flexibility**, such as allowing working from home, changing shift patterns, and varying start and finish times.
 - **Recording menopause-related absence separately from other absence**, ‘due to the potential discrimination risks of taking disciplinary action for such absence’
 - **‘Not using language that ridicules a worker’s menopause symptoms’** to avoid harassment claims.

- Many **managers fail to understand or appropriately support** menopausal employees
- In some cases, menopausal employees are **bullied, harassed** and/or subject them to **inappropriate performance management and disciplinary procedures**
- Some **quit their jobs** as a result
- Some **sue employers**. Many cases are **settled out of court**
- **UK employment tribunal cases growing in number:**
 - **2017:** 5 employment tribunals relating to the menopause plus 7 that mentioned it
 - **2021:** 23 employment tribunals relating to the menopause plus 207 that mentioned it
 - **First six months of 2023:** 14 employment tribunals relating to the menopause



UNIVERSITY
of York

York Law
School

**Who experiences
menopause?**

- ‘Anyone who has ovaries, including some transgender men and other gender-diverse people, will experience menopause’ (Beck and Brewis, 2024, 2)
- Most menopause discourse presume those who are menopausal to be white, heterosexual, cisgender women
- Menopause is an ‘intersectional experience’ affecting women of all ethnicities + sexualities
- Women in same-sex relationships are uniquely affected, especially if both are menopausal at same time
- Some gender non-binary persons (assigned female at birth) are affected, menopause unsettling gender identity
- Some trans men are affected although they are more likely to think about menopause as a 2nd puberty
- Research unclear re. trans women

Legal mechanisms for tackling menopause discrimination at work

Key legal pathways

- Health and Safety Regulations
- Employment Rights Act 1996
- Equality Act 2010:
 - Age discrimination
 - Disability discrimination
 - Sex discrimination

Health and Safety

- Under UK law, employers have a **common law duty of care** to their employees, and to **ensure their health and safety in the workplace.**
- This includes **providing a safe place of work, safe working systems, and appropriate plant and equipment** as well as **recruiting and training competent staff who are themselves responsible in relation to health and safety.**
- Failure to provide a safe place of work can result in **claims for constructive dismissal** and/or, where there is injury, **claims under the tort of negligence**

Health and Safety

- **Health and Safety at Work Act 1974 (HSWA):** requires employers to ensure health & safety of their employees and provide adequate information, instruction, training, and supervision to enable employees to carry out their work safely
- **Workplace (Health, Safety and Welfare) Regulations 1992:** general requirements for workplace environmental standards, including in relation to temperature, ventilation, sanitary conveniences, washing facilities, and water supply
- **Management of Health and Safety at Work Regulations 1999:** require employers to make appropriate workplace risk assessments in relation to employee health and safety, including identifying groups of workers who might be at particularly at risk (such as individuals going through the menopause).

Health and Safety

- **Health and Safety Executive (HSE):** national regulator for workplace health & safety. It can issue an improvement notice or a prohibition notice or bring a criminal prosecution against an employer for a breach of health and safety regulations.
- Health and safety legislation is important in that it **requires employers to take proactive steps that may provide menopausal women with appropriate support** and, as such, to offer preventative measures.
- However, **individual employees cannot bring direct claims under health and safety legislation**, which makes it **very limited in its usefulness for menopausal women seeking to make claims relating to their own personal circumstances.**

Employment Rights Act 1996

- Flexible working
- Unfair dismissal
- Constructive dismissal: where an employee terminates their contract without notice because of employer's conduct

Equality Act 2010

- **Prohibits direct and indirect discrimination, harassment and victimisation** on grounds of nine **protected characteristics**: *age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race, including colour, nationality, ethnic or national origin; religion or belief; sex; sexual orientation*
- **Direct discrimination**: when someone is treated less well because of a protected characteristic
- **Indirect discrimination**: where a provision, practice or criteria disadvantages someone with a protected characteristic

Case example (1)

A v Bonmarche Ltd ETS/4107766/19 (2019)

Case: the Claimant's manager attributed her poor performance was due to being menopausal. He "jokingly" referred to her as a dinosaur in front of customers. She claimed for both direct age and sex discrimination and harassment based on age and sex

Ruling: Employment Tribunal held she had experienced

- direct discrimination (finding her manager had 'had treated the claimant less favourably than he would treat someone who was not a female of menopausal age') and
- harassment (finding that her manager 'had created a hostile environment for her and that this was related to her status as a woman going through the menopause').

Awarded £28,000 (£10,000 for loss of earnings and £18,000 for the injury to her feelings).

Case example (2)

Davies v. Scottish Courts and Tribunals Service, ET 4104575 (2017)

Case: the claimant, a court officer, dissolved cystitis medication in water, went to the loo, came back, saw it had been moved, was concerned others had drunk it and alerted them to this. Although it turned out to be a false alarm, she was subjected to rigorous investigation, disciplinary action and dismissal on the grounds of gross misconduct.

Ruling: the claimant was unfairly dismissed and subjected to disability discrimination. Ordered reinstatement to her post.

Awarded £14,000 to compensate her for lost pay between the period of dismissal and reinstatement, plus £5,000 in respect of injury to feelings.

Disability

- **Whether/when** menopause constitutes a disability/ sufficiently severe disability is hotly debated and inconsistently applied by courts.
- In ***McMahon v. Rothwell & Evans 2410998 (2019)***, despite Employment Tribunal agreeing Claimant's menopausal symptoms constituted a disability, it did not accept this had significant impact on her workplace performance, ruling that it was no more than 'trivial' (falling below the Equality Act threshold).
- The Employment Tribunal observed '[i]n respect of fatigue, the claimant could not help us to distinguish between fatigue resulting from her busy lifestyle, being a single parent and working in a demanding job and studying, with fatigue resulting from the menopause'.

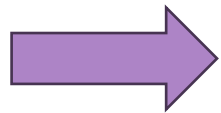
Need for a comparator

- **Key problem with direct sex discrimination claims is the issue of a comparator** (Section 23 of Equality Act 2010)
- **A woman needs to be able to show that she has been treated less well than a man experiencing a ‘similar’ condition.**
- The problem is, of course, **identifying a male health condition that is analogous to a woman’s menopause.**
- Arguably, there is **no similar complex, variable, frequently visible, ongoing health problem experienced by all middle-aged men**
- This means that **no comparator is available.**
- Women are then obliged to **shoehorn their claims into other headings** (e.g. age/disability discrimination that are **harder to prove**)

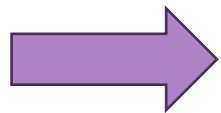
Need for legal change?

Equality Act – No intersectionality

- Can't claim for age *and* sex discrimination together, yet many women experience menopause discrimination as ageism and sexism combined
- Can't claim for age *and* sex *and* race discrimination, yet many black women and women from ethnic minority backgrounds experience menopause discrimination through lens of racism and sexism
- **Proposed changes:**



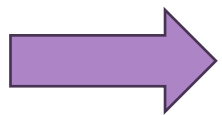
Implement s14 (dual discrimination)



Reform Act to allow protection from multiple discrimination

Equality Act – New protected characteristic?

- Calls for a new protected characteristic, ‘menopause’, including from the Bar Council, the Law Society of Scotland, various employment law firms and lawyers, the Discrimination Law Association, and the Women and Equalities Committee (2022)
- Previous Conservative government said not needed
- However, would give menopausal persons rights and protections similar to pregnancy and maternity, without need for comparator
- **Proposed change:**



New protected characteristic ‘menopause’



Thank
you!

- Bazeley, A. et al. (2022) *Menopause and the Workplace*
<<https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=9672cf45-5f13-4b69-8882-1e5e643ac8a6>>.
- Beck, V., & Brewis, J. (Eds.). (2024). *Menopause Transitions and the Workplace: Theorizing Transitions, Responsibilities and Interventions*. Policy Press.
- BUPA (2019) Supporting Employees through Menopause
(<<https://www.bupa.co.uk/~media/files/mms/bins-04797.pdf>>
- Cahn, N., Crawford, B. J., & Waldman, E. G. (2024). Menopause discrimination at work: Comparing the law in the United States and United Kingdom. In S. Westwood and N. Knauer (eds) *Research Handbook on Law, Society and Ageing* (pp. 281-297). Edward Elgar
- CIPD (2020) 'Majority of Working Women Experiencing the Menopause Say It Has a Negative Impact on Them at Work' <https://www.cipd.org/uk/about/press-releases/menopause-at-work>
- Glyde T (2022) LGBTQIA+ menopause: room for improvement. *The Lancet* 400(10363), 1578-9
- Prasad S (2023) Menopause in ethnic minority women. *Post Reproductive Health* 29(4): 236-9

Riach, K. and Jack, G. (2021) Women's health in/and work: menopause as an intersectional experience. *International Journal of Environmental Research and Public Health* 18(20), 10793.

Toze, M. and Westwood, S. (2024) Experiences of menopause among gender non-binary and trans people. *International Journal of Transgender Health*, <https://doi.org/10.1080/26895269.2024.2389924>

Westwood S. (2024a) Lesbian, gay, bisexual, transgender and queer (LGBTQ+) menopause: Literature review, knowledge gaps and research agenda. *Health*. <http://doi.org/10.1177/13634593241270923>

Westwood, S. (2024b) 'GP services are still heteronormative': Sexual minority cisgender women's experiences of UK menopause healthcare – health equity implications. *Post Reproductive Health* <https://doi.org/10.1177/205336912412798>

Westwood, S. (2024c) A bloody mess? UK regulation of menopause discrimination and the need for legal reform. *Journal of Law and Society*, 51, 104–129

Women and Equalities Committee (2022) Menopause and the workplace First Report of Session 2022–23 HC 91.