

## Written evidence from Adam Pavey [MEW0086]

### Introduction

1. I am Adam Pavey, a Solicitor and Director in the Employment Law department at Pannone Corporate LLP.
2. Throughout my career I have specialised in disability discrimination and awareness.
3. In recent years I have represented a number of Claimants in the Employment Tribunals in menopause discrimination cases. I have regularly been asked to provide legal commentary in the national press and radio.
4. Those that I have represented have predominantly been in senior roles within both large and small organisations. I have experience in acting for clients in a range of different sectors. It appears that menopause discrimination is not sector specific.
5. I am also a Non Executive Director of Menopause Experts who are an organisation that provides support to women who are suffering adverse effects from the menopause.
6. I hope that this document is a useful summary of the current legal position relating to the menopause in the workplace. In addition to the legal summary, I have spoken with a number of SME contacts to identify how the menopause is perceived and sought views upon possible changes to the law. The clients and contacts with whom I have spoken wish to remain anonymous.
7. I should say at the outset that I am in no way and expert within the medical remit of the menopause and can only speak about the position from an employment law perspective.
8. It may perhaps be useful for me to explain how I became interested in the menopause and its place within the workplace.
9. My first client, who openly referred to the menopause as being a crucial feature of her case, was a Social Worker in her 50s who had over 20 year's service. During our initial consultation she explained that she had been dismissed by reason of poor performance and believed this to have been unfair. She admitted that she had struggled with aspects of her job as a result of feeling very tired, experiencing headaches and difficulty with concentration. These symptoms were initially diagnosed as being due to stress but a later opinion had identified the menopause as being the cause.
10. My client explained to me that she had felt very uncomfortable discussing the menopause with her male line manager. The employer

did not understand the menopause and failed to connect it as being related to the performance issues.

11. When my client explained the facts of her case I was surprised that it wasn't immediately apparent which protected characteristic would apply. There was very little case law on the subject. My client's situation highlighted a confusing legal picture in which the alleged discrimination could be pled on the grounds of disability, sex or possibly age.
12. Describing the events as disability discrimination seemed discordant.

***Why are menopause discrimination cases mostly pled as disability discrimination?***

13. It is important to recognise that menopause is not a protected characteristic. The Equality Act 2010 does not currently contain any reference to "menopause discrimination". Instead discrimination is related to a protected characteristic such as disability, sex or age but for the purposes of this statement I will use the terminology.
14. Currently a Claimant cannot bring a claim in the Employment Tribunal for discrimination based upon the menopause. The case has to be pled on the basis of disability, sex or age.
15. It would seem more logical for menopause to be protected by the law pertaining to sex rather than disability. Menopause and consequently the adverse affects, experienced by a sizeable percentage of the female population are inherently related to sex, rather than any other protected characteristic. The menopause is a natural process and not an impairment.
16. To describe menopause as amounting to a disability means fitting it within Section 6 of the Equality Act as being a "*mental or physical impairment*" which has a "*substantial*" and "*long-term*" negative effect on your ability to perform daily activities. It is the notion of menopause being a mental or physical *impairment* which is seemingly problematic.
17. The reason why disability is a preferable legal route to sex discrimination is that it is the only way in which a Claimant can rely on the legal protection offered by requirements to make "*reasonable adjustments*". The duty to make reasonable adjustments under Section 20 of The Equality Act 2010, applies to disability. It is used therefore for convenience rather than design.
18. Very often it is the failure to make reasonable adjustments which is at the heart of menopause discrimination cases. Examples include, reasonable adjustments to capability proceedings (particularly relating

to sickness absence), installing equipment such as fans, and many others.

***What form does menopause discrimination take in the workplace?***

19. Examples of the way in which women experiencing the menopause are discriminated against include:-

20. Failure to promote.

I have pled many cases whereby there was a perceived perception that an employee on the menopause would not perform as well as a man and this belief often stems from the amount of sickness absence a woman experiencing the menopause may have accumulated.

Issues stemming from sickness absences.

Women experiencing the menopause are more likely to take more periods of absence from the workplace. This can lead to poor performance reviews and puts them at a disadvantage compared to their female and male colleagues.

Harassment

Reported cases of harassment have included derogatory terms being used about the menopause and a clear misunderstanding about the physical and mental effects. Women experiencing the menopause have felt alienated within the workplace and can be made to feel ostracised.

Disciplinary sanctions for poor performance

A number of cases I have pled have involved disciplinary proceedings brought against women who are experiencing the menopause and may have seen lapses in concentration or be experiencing forms of sleep deprivation. Employers in my experience are reluctant to view the menopause as a contributing factor to the poor performance of the employee in question and therefore poor performance sanctions are brought.

***The True Extent of Menopause Discrimination within the workplace***

21. Recent studies have confirmed that menopause discrimination is a feature in many workplaces. However, I believe there are a large amount of cases which go unreported for a variety of reasons.
22. There are, I believe, "hidden" menopause cases. That is to say cases which are related to the menopause but are referred to as something else, such as mental health discrimination.
23. A number of the symptoms of the menopause are similar to those experienced by people with mental health difficulties. In particular, tiredness, poor concentration, issues with motivation etc. It is not uncommon for women to be given a mental health diagnosis when in fact the menopause was more accurate.

Another factor is that many workplace issues involving menopause discrimination case are resolved via Settlement Agreements. Cases resolved by way of settle agreements are by their very nature non disclosable and therefore hidden and not reported.

24. Settlement Agreements are frequently used in capability proceedings prior to making a dismissal. Capability proceedings as discussed above include poor performance and also sickness absence. They are often used when an employee is too unwell to continue working and so rather than having to take the individual throughout each stage of the process, an off the record discussion is held in which sensible arrangements can be put in place.
25. It can therefore be assumed that a significant amount of settlement agreements arise as a consequence of menopause discrimination.
26. Furthermore, there is also a reluctance on the part of women to discuss a subject that is often perceived as personal. Women experiencing the menopause may not wish to notify their line managers or employers that they are experiencing or going through the menopause.

#### Difficulties experienced by claimants at the Employment tribunal

27. The fact that menopause is not a protected characteristic can cause Claimants difficulty in the Tribunal process. Often the Employer puts the Claimant to strict proof as to their symptoms amounting to a disability.
28. When you look at the symptoms which arise when certain women go through the menopause it is easy to see why there can be issues

relating to performance at work. However, it is also true to say that if the condition is properly understood and reasonable adjustments made that the employee can manage to perform well in their role.

29. The sad reality is that when employers failed to deal with Health related issues within the workplace, the way in which this makes employees feel often further exacerbates those symptoms. There are, A multitude of options open to employers when they become aware that an employee is having difficulties at work as a result of the menopause. Those options should be consulted over with the employee.

30. I can confidently say that most of the cases I have dealt with in the Employment Tribunals involved which, if handled differently, would have led to very different outcomes.

### **Proposals for change**

31. As referred to above there is no current reference to the menopause as a protected characteristic and therefore no direct protection to unlawful discrimination for a large a section of the female population.

32. Employers have taken significant steps to make provisions for those women experiencing the menopause by the implementation of workplace policies. However simply implementing a workplace policy will not automatically “cure” the problem. The reality is that employees do not regularly read policies until an issue has developed into a problem. A policy is only ever as good as the consultation and implementation which goes with it.

33. The policy is merely a starting point for action. The most immediate deficiency within the workplace is a lack of knowledge about the menopause in general. The perception that menopause is a pathology of hot flushes remains common. This is very easily achieved by workplace training.

34. What remains evident is that women experiencing the menopause should be able to bring a case under a more accurate definition and have the direct protection of the law. They should not have to rely on legislation which does not in effect recognise the menopause can have an impact on the working life of women.

35. The categorising of menopause as a protected characteristic would go some way to removing the stigma of talking about menopause.

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