

Menopause, neurodiversity and the law

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Menopause and the duty of care

- The employer has a duty of care both under the criminal law: Health and Safety at Work Act 1974 and Management Regulations 1999, and also under the civil law of negligence, but unlike pregnancy there are no specific legislative provisions.
- The employer should undertake a risk assessment and have a policy.
- Training is important, especially of line managers in conducting sensitive conversations.
- Occupational health has an important role.

Menopause and the Equality Act

- Menopause in itself is not a protected characteristic, but discrimination against menopausal women may be sex, age or disability discrimination (or all three).
- Rooney v Leicester City Council (2021) Social worker in her late 40s. Mentioned menopausal symptoms to GP and OH but not in detail. OH reported: “ The Equality Act unlikely to apply”. Disciplined for poor attendance. She said she was too embarrassed to discuss symptoms with male managers. Referred to OH a second time. She asked to see a female doctor but was told that none available. She then resigned. Claimed constructive dismissal and sex/disability discrimination.

Rooney v Leicester City Council (2021) EAT

- The employment tribunal held that the claims of sex and disability discrimination should be dismissed.
- There was insufficient evidence that the employer would have treated a man with similar health problems (poor concentration, forgetfulness, fatigue, headaches, stress) differently and insufficient evidence of substantial impairment of normal day to day activities for a year or more.
- The Employment Appeal Tribunal held that the tribunal judge had not properly considered the medical evidence; menopause was capable of being a disability, depending on the evidence

Merchant v BT (2011) ET

- Woman at last stage of incapability procedure. Letter from GP stated that concentration affected by menopause. Procedure said that manager should investigate whether poor performance due to ill health. Male manager did not refer to OH because he said he knew about the menopause from his experience of family members. Woman dismissed.
- Held sex discrimination. The manager would have referred a male employee in similar circumstances to OH, not relied on his own judgment.

Should menopause be made an automatic disability?

- The only automatic disabilities at present are cancer, MS and HIV infection
- Is it advisable to create more automatic disabilities?
- Since only women can be menopausal is it justified to make a sex-based condition an automatic disability?
- Given that the severity of the symptoms of menopause vary considerably between middle aged women is it not enough to treat each case on its facts?

Neurodiversity and disability

- People on the autistic spectrum (including Asperger, ADHD, dyslexia, dyspraxia, Tourette's syndrome) may be disabled under the Equality Act 2010. **Note that a formal diagnosis is not needed for a disability to be established. It is a question of functional capacity.**
- The definition of disability is a physical/mental impairment, which is long-term, and has a substantial adverse effect on ability to carry out normal day-to-day activities(including work activities)
- The autistic spectrum runs from birth to death and is therefore long-term
- It is a mental impairment
- It may substantially adversely affect normal day-to-day activities

Elliott v Dorset County Council (2021) EAT

- E, IT systems manager, had difficulty in communicating with others, found it difficult to work in an office, needed clear written instructions, set routines, but satisfactorily completed his tasks. Employed 1984-2018. Previous manager allowed him to work at home part of the time, but records said that he worked in the office. New manager accused him of falsely recording working time. Activated disciplinary procedure.
- E accepted voluntary redundancy to avoid procedure.
- TU representative suggested that he obtain autism assessment.
- Nurse Specialist in the Community Adult Asperger Service diagnosed Autistic Spectrum Disorder and Asperger's.

Elliott v Dorset County Council

- ET judge held E not disabled. Referred to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) and EHRC Statutory Code of Practice on Employment.
- Guidance, B1: The requirement that an adverse effect should be substantial reflects the general understanding of disability as a **limitation going beyond the normal differences in ability which may exist among people.**

Held that E was not substantially affected compared with people who are not ASD but not good at communicating with others etc

Elliott v Dorset County Council

- EAT held that decision wrong. Judge should apply the words of the statute. If they conflicted with the Guidance or Code the latter must be disregarded. They are guidance only. The statute is the law.
- The Equality Act does not compare a person claiming to be disabled with people in general.
- The ET must concentrate on what the person cannot do, or only do with difficulty, not what they can do. Disabled people develop coping mechanisms and avoid tasks they find difficult.
- **The comparison in E's case should be with someone of his skills and intelligence who was not autistic, ie his own innate abilities if he did not have an impairment. E was disabled.**

Does the employer know about the disability?

- If the allegation is of direct or disability-related (section 15) discrimination, or a failure to make reasonable adjustments, the employer is not liable if they do not know and cannot reasonably be expected to know (constructive knowledge) of the disability.
- Q v L (2019) Employment Appeal Tribunal
- Q applied for an office job with an employer L. Referred to OH for an assessment of fitness for work. Q had been diagnosed with Tourette's and disclosed this to OH. OH reported fit, did not mention the Tourette's. Shortly after commencing work Q's problems became obvious from his behaviour and requests for adjustments.

Q v L (2019) EAT

- Held that the employer did not have actual knowledge of the disability from OH because OH merely advised that he was fit and had not obtained consent to disclose the potential disability. **Employer not imputed with the knowledge of OH.**
- “ The consent was limited to the disclosure of the opinion and did not include the medical opinion on which it was based”.
- NB The judge referred to WRITTEN consent but not legally required.
- BUT the employer had constructive knowledge from Q’s behaviour soon after he was employed. They should have sought further OH advice and whether reasonable adjustments would assist Q to work more effectively.

Should a job applicant/employee disclose their ASD?

- There is no legal obligation, but it may be advisable to make disclosure because an employer then has a duty of reasonable adjustment to recruitment procedures and the physical environment and terms and conditions of employment.
- Can an employer demand a formal diagnosis from a psychologist?
- In practice may be advisable but they are expensive! Employer does not have a duty to pay in most cases. But OH advice may be sufficient.
- Morgan v Northamptonshire Teaching Primary Care Trust (2009) ET
- Job applicant disclosed NHS diagnosis of Asperger's. Offered the job subject to satisfactory references and OH clearance. Reference poor, employer withdrew offer without waiting for OH report on his abilities. Held failure to make a reasonable adjustment.

Should a job applicant disclose their ASD?

- Section 60 Equality Act 2010 the employer must not ask health questions pre-job offer (which can be conditional on satisfactory OH clearance), except where it may be relevant to making adjustments to the recruitment procedure, or relates to an intrinsic function of the job (eg climbing ladders for scaffolders)
- (There are other exceptions but no time to give detail!)
- May be in the applicant's interest to disclose eg may be given more time for written tests, adjustments to the recruitment procedures

Employer's duty towards disabled person

- The employer must not reject them just because of the disability but may reject because of the effects of the disability, eg if the job demands someone with skills in reading and producing documents, or someone in a customer-facing role, they may reject a job applicant on the autistic spectrum who lacks the necessary skills for those jobs.
- BUT they must first consider whether reasonable adjustments may assist in enabling the person with a disability to do the job.
- Important to examine recruitment tests and procedures.
- BT v Meier (2019) Northern Irish Court of Appeal (automated situational strengths test)
- Government Legal Services v Brookes (2017) EAT (MCQ test)

Role of occupational health

- SOM Guidance
- Evaluating and supporting Neurodifferences at work
- Suggests OH initial screening conversation followed by adjustments eg remote working, technology, coaching; if insufficient, specialist review; if insufficient, workplace needs assessment in situ (involving both employer and employee); if insufficient and formal diagnosis not yet made, recommend diagnosis.
- Points out that the cost of adjustments may be less than the cost of the assessment.
- Recommends to skip to workplace needs/diagnostic assessment if imminent risk of job loss or safety risk.

Data protection/consent issues/UK GDPR

- Need consent in most cases to report to the manager. Written consent advisable. Must be informed consent. Advisable to offer a written copy of the report before it is sent and give person a short time to read it and comment if they wish. Consent can be withdrawn.
- **NB this is consent as defined by the common law, not the UK GDPR**
- If the person refuses consent the employer can act on the evidence they already have.
- Consent is not required in exceptional cases: statutory exception eg Public Health Act, order of court or tribunal, or professional body with statutory power, eg GMC, NMC, HCPC, disclosure in the public interest

Access to Medical Reports Act 1988

- **Note: it is REPORTS not RECORDS**
- If a report is requested for insurance or employment purposes from a DOCTOR who is or has been RESPONSIBLE FOR CLINICAL CARE the employee must give WRITTEN consent and given the opportunity to view and reject the report before it is disclosed.
- The Act does not apply to reports from psychologists, nurses, physiotherapists, occupational therapists etc, only registered medical practitioners
- It does not apply to most OH reports, because most written by nurses, and even an OHP is not usually RESPONSIBLE for clinical care

“Forced” subject access requests

- Section 184 Data Protection Act 2018
- It is an offence for a person to require another person to provide them with or give them access to a relevant record (includes health records) in connection with the recruitment of an employee, or the continued employment of a person, or a contract for the provision of services, unless in the particular circumstances it is justified in the public interest.
- ‘Require’ means asking another person, knowing that in the circumstances it would be reasonable for the other person to feel obliged to comply with the request, or being reckless as to that matter.