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Employment Newsletter

AUGUST 2022

Inclusivity in the workplace and the risks of discrimination. We look at the pitfalls and the good practices that will avoid them.

This newsletter covers:

- Flexible Working: Are Women Being Discriminated Against?
- Menopause in the Workplace.
- Why Pronouns Matter in the Workplace.

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Introduction

As we emerge from the pandemic, both inclusivity in the workplace and new flexible ways of working have been hot topics. The rights of transgender employees and also those with menopausal symptoms are two issues that have regularly been in the news. Meanwhile, the workplace has seen huge changes in the past few years with the advent of remote working. One by-product of the pandemic has been a sharp increase in the number of flexible working requests that employers are receiving.

Content included in this newsletter:

In this newsletter we explore these issues with a view to ensuring employers are up to date on recent developments and are aware of the risks, but also know how to mitigate those risks. This includes the following articles:

1. **Flexible Working: Are Women Being Discriminated Against?** We look at two recent cases concerning flexible working and the 'childcare disparity', where an employer's policy over working arrangements may disadvantage women more than men due to their generally greater childcare commitments.

2. **Menopause in the Workplace.** With women of menopausal age making up 23% of all women in employment, we explore the need for employers to understand menopause and adopt appropriate working policies.

3. **Why Pronouns Matter in the Workplace.** Gender recognition and the rights of transgender employees, the importance of an inclusive approach, as well as the legal protections available to those employees who may hold conflicting beliefs.

Flexible Working: Are Women Being Discriminated Against?

There have been two recent cases concerning flexible working and the 'childcare disparity', where an employer's policy over working arrangements may disadvantage women more than men due to their generally greater childcare commitments.

The Equality Act 2010 states that a person indirectly discriminates against another if they apply a provision, criterion or practice which puts an individual at a disadvantage in relation to a relevant protected characteristic, which includes sex, unless it is proportionate to pursuing a legitimate aim.

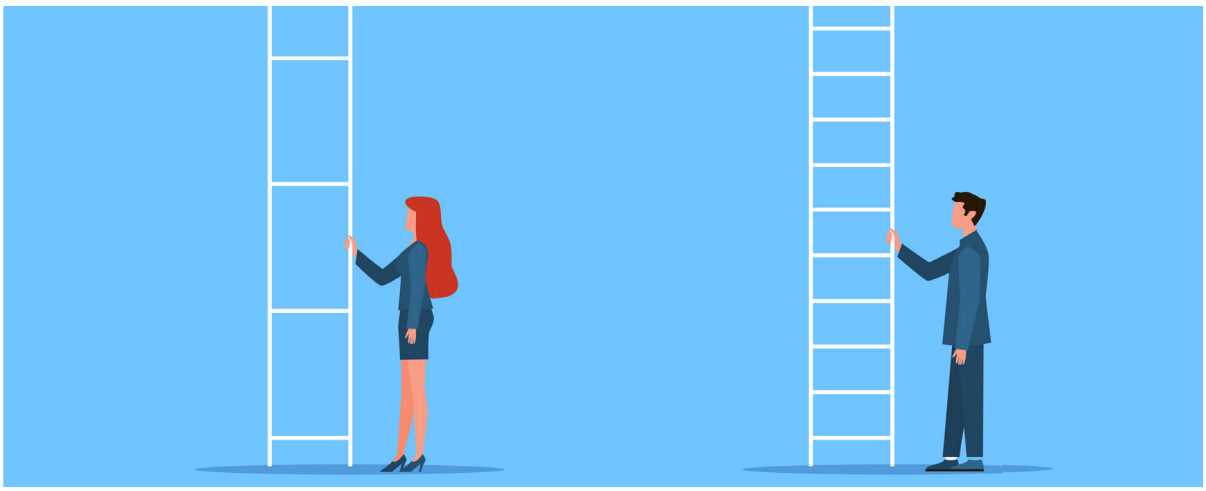
Dobson v North Cumbria Integrated Care NHS Foundation Trust

Mrs Dobson was a community nurse, whose employer wanted to introduce a 'flexible working' arrangement, which included a requirement to work weekends. Due to childcare commitments, Mrs Dobson was unable to work unsociable hours and was subsequently dismissed.

Mrs Dobson claimed that the provision of weekend working put female employees at a disadvantage when compared to male colleagues and issued a claim in the Employment Tribunal for unfair dismissal and indirect sex discrimination.

Mrs Dobson was initially unsuccessful in her claim with the Employment Tribunal finding that whilst she suffered a disadvantage as a result of weekend working, the rest of Mrs Dobson's mostly female team did not and, therefore, the provision was not discriminatory.

However, on appeal the Employment Appeal Tribunal held that it was well known that women in general, have greater childcare commitments than men, which can affect their working patterns and this should have been acknowledged by the Employment Tribunal. The case was remitted back to the Employment Tribunal for reconsideration.



Thompson v Scancrown Ltd

Women having the greater burden of childcare has also led to the assumption that policies requiring a job to be performed on a full-time basis would have a disproportionate impact on women. Whilst Dobson concerned an employer who wanted to introduce flexible working, Thompson involved an employee who had specifically requested a change in working hours through a flexible working request.

Mrs Thompson worked as a Sales Manager at Scancrown Limited, an estate agency. On her return from maternity leave, Mrs Thompson made a flexible working request to shorten her work hours to enable her to collect her child from nursery. Her employer refused the request, stating that it was not feasible to recruit additional staff to cover the reduced hours and her contractual hours were important for client relationships and potential sales queries. Mrs Thompson resigned from her job and claimed indirect sex discrimination.

The Employment Tribunal held that the refusal of the flexible working request and the practice of requiring employees to work full time put Mrs Thompson at a disadvantage and was indirectly discriminatory. The Tribunal stated that the needs of the business did not outweigh the disadvantage top Mrs Thompson and so the practice could not be justified.

Mrs Thompson was awarded **£184,961.32** including £13,500 for injuries to feelings.

Women who are seeking flexible working arrangements due to childcare commitments will have the added layer of protection from discrimination laws and an indirect sex discrimination claim has proven to be a much more valuable claim than an award for a procedural failure relating to a flexible working request, which can only be for a maximum of eight weeks' pay.

In both cases, the Employment Tribunals accepted that, notwithstanding an encouraging shift in societal attitudes, it is still the case that mothers are more likely to carry primary responsibility than fathers and employers should be sensitive to this issue. However, the Employment Appeal Tribunal in Dobson did state that it is not necessarily the case that a requirement to work certain hours will automatically put women at a disadvantage as some working arrangements may end up being favourable to those with childcare responsibilities.

Menopause in the workplace

Menopause is a normal part of the ageing process and something that almost all women will go through. With women of menopausal age making up 23% of all women in employment, it's important that employers understand menopause and adopt appropriate working policies.

Rising number of claims in the Employment Tribunal

The Menopause Experts Group recently reported a 44% rise in the number of employment tribunal cases in 2021 that cited menopause as an issue, when compared to the number of such cases in 2020. Of these cases, the majority included claims for disability discrimination, unfair dismissal and/or sex discrimination.

The increasingly litigious nature of this issue is a stark reminder to employers that they must be aware of symptoms and be ready to support menopausal employees. Getting that wrong could result in costly legal claims.

The importance of understanding symptoms and being supportive

The recent case of *Rooney v Leicester County Council* demonstrates how employers can find themselves in trouble if they don't understand menopause and its symptoms. Mrs Rooney had been suffering from severe menopausal symptoms including insomnia, confusion, anxiety, memory loss, migraines, and hot flushes. Mrs Rooney was embarrassed by her symptoms and was, at first, reluctant to speak to her employer. When she did, her condition was down-played and poorly handled. For example, when she complained of suffering from hot flushes, her manager simply said he also felt hot in the office, dismissing it as a symptom.

Feeling unsupported, she resigned and brought a range of claims, including sex and disability discrimination claims. In the first instance, the Employment Tribunal (ET) listened to Mrs Rooney's evidence and decided that her symptoms did not amount to a disability. However, on appeal, the Employment Appeals Tribunal (EAT) felt that the ET had not properly considered the evidence of her symptoms. The EAT overturned the decision and sent it back to the ET to be re-considered. Whilst a final decision is awaited, other cases have already established that menopause can qualify as a disability, and the Rooney case highlights how an ill-informed response from managers to menopausal symptoms can upset employees and cause unnecessary legal risks for employers.

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Are changes to the law on the horizon?

There have been increasing calls new laws to protect menopausal women. Proposed changes include allowing them to bring dual discrimination claims based on age and sex, creating standalone menopause provisions in the Equality Act 2010, or by having it classed as a distinct protected characteristic in its own right.

The House of Commons has also asked its Women and Equality Commission to examine existing discrimination legislation and workplace practices to consider whether enough was being done to prevent women losing their jobs or suffering other adverse effects by reason of suffering with menopausal symptoms.

Menopause is a serious workplace issue that is increasingly on the radar of employees and politicians. **ACAS** have resultingly issued some new guidance for employers. To support its staff and avoid damaging litigation being brought against them, **ACAS** suggest that employers:

- Develop a written menopause policy.
- Create an open and safe environment for employees to discuss the menopause, how this affects them and what support they need, ensuring that confidentiality is maintained.
- Train leaders and management in the issues and make sure that they deal with manners delicately and appropriately. Employers should appreciate that everyone is different and it's important to take the lead from the individual employee.
- Consider making adjustments to working practices, such as flexible working, comfort breaks and allowing time off for appointments.
- Consider a menopause risk assessment, where the physical environment is assessed (such as room temperatures, ventilation, access to appropriate toilet facilities and cold water) as well as considering the comfort of uniforms.
- Consider signposting employees to employee assistance programmes or other counselling services, if available.

The full guidance can be viewed ***here***.

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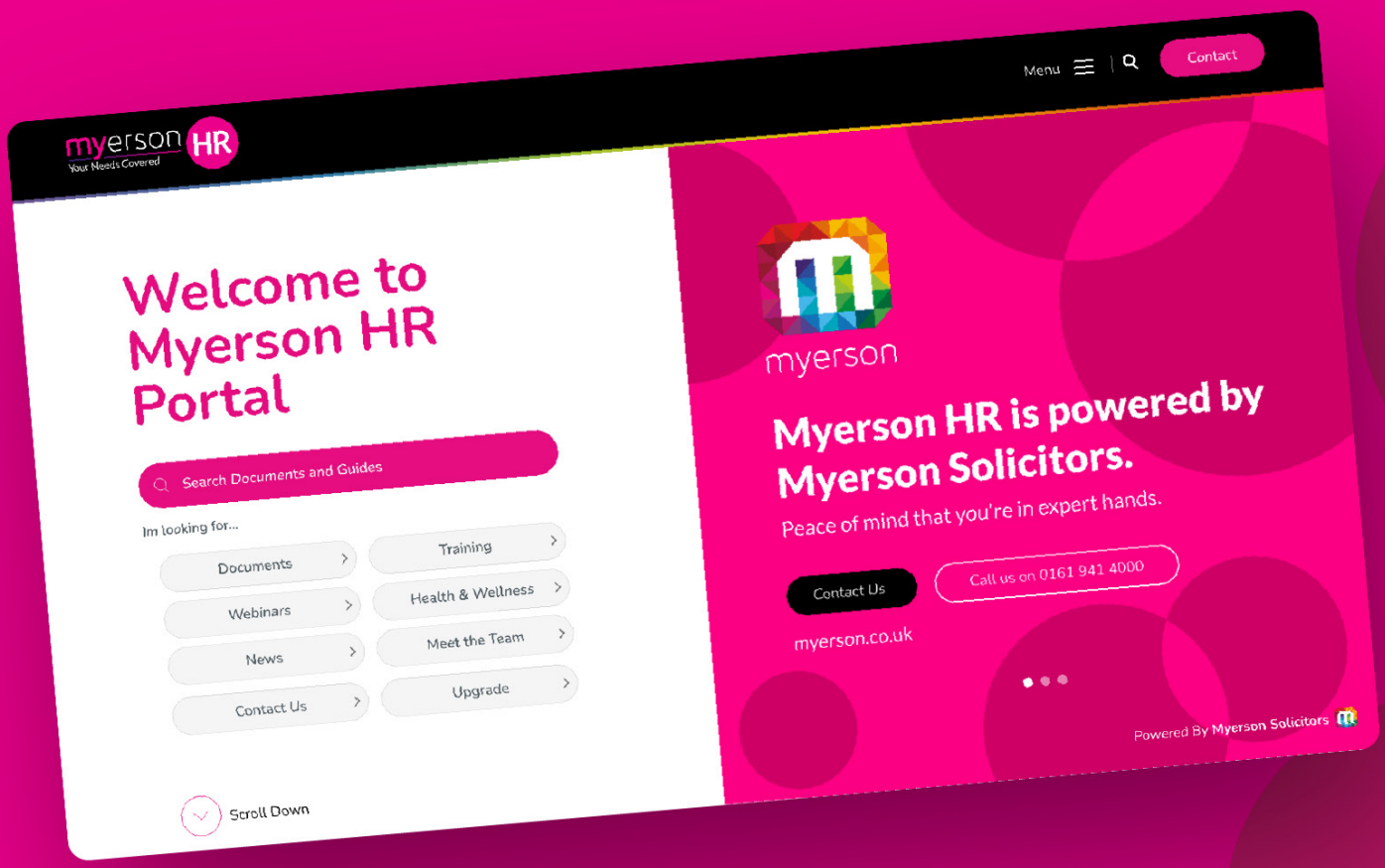

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Why Pronouns Matter in the Workplace

Transgender issues are particularly topical at the moment.

During the recent Conservative Party leadership debates, the issue of self-identification for transgender individuals led to heated discussion between two of the candidates and the professional swimming governing body, FINA, has recently voted in favour of barring transgender women from entering elite women's competitions.

In the workplace, transgender issues are also becoming more prevalent. The Equality Act 2010 protects individuals who are proposing to undergo, are undergoing or have undergone a process of changing their sex. This protection against discrimination and harassment also extends to non-binary individuals – those individuals who do not identify as either male or female.

Gender recognition can pose difficult issues for employers and these issues need to be dealt with sensitively and respectfully. Employers may wish to introduce formal policies about how to manage transgender issues whilst noting that in its guidance, 'supporting trans employees in the workplace', ACAS state that the experiences of transgender individuals are diverse and the approach to specific needs should be 'flexible and tailored'.

Employers should provide training to their employees in order for them to be aware of trans issues, normalise the discussion around gender identity and ensure respectfulness, including using correct names and pronouns a transgender individual wishes to use. Employers may wish to demonstrate inclusivity by encouraging cisgender employees to have their pronouns on email footers, website profiles or names badges, having policies that adopt neutral language or offer non-gender specific facilities.

Aside from the ethical reasons for being an inclusive employer, there are legal risks to employers who do not adequately manage trans issues. For example, misnaming or deadnaming (using the name an individual used prior to transitioning) a transgender employee could amount to harassment under the Equality Act and lead to liability against both the employer and the individual employees involved.

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However, employers also need to be aware that its employees may have beliefs which conflict with LGBT+ values. In a number of recent cases the Employment Tribunal attempted to strike a balance between competing viewpoints:

- In *Forstater v Centre for Global Development Europe*, the Employment Appeal Tribunal held that the gender critical views of Ms Forstater (that sex is a biological fact and cannot be changed) were protected beliefs and her views were worthy of respect in a democratic society and this was a substantial reason for her was not being offered employment.

- In *Mackereth v Department for Work and Pensions*, the employer did not discriminate against a doctor when it dismissed him after he refused to refer to transgender clients by their preferred pronouns, due to his religious beliefs. The Employment Appeal Tribunal held that Mr Mackereth was not dismissed because of his beliefs, which are protected by the Equality Act, but for refusing to address service users by their preferred pronouns.

- In *Higgs v Farmor's* School, a Christian teacher was not discriminated against due to her religious beliefs, after she posted transphobic and homophobic views on social media. Rather her dismissal was because the posts themselves were inflammatory. Mrs Higgs has appealed to the Employment Appeal.

It is clear from these cases that whilst some employees may have genuinely held beliefs that conflict with transgenderism and cannot be dismissed because of their beliefs, this is different from being openly hostile.

Employers should be promoting a tolerant and respectful workplace regardless of employee's personal beliefs or circumstances, including for those members of the LGBT+ community.