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Labour Law's (Mis)Management of Menopausal Workers

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Abstract
At the core of this paper is a critique of labour law's engagement with menopausal workers in the UK. The critique is framed by an overarching discussion of the coping strategies adopted when lived realities of menopausal workers disrupt traditional organisational cultures, especially its manifestation in the 'ideal worker' norm. At the core of the paper is an argument that the legal treatment of menopausal workers is failing to encourage effective management of menopause / workplace tensions and, as a result, validates the promotion of this problematic 'ideal worker' norm within organisational cultures. Effective labour laws could however better support menopausal workers: labour laws could encourage long term individual and organisational resilience by adopting more effective anti-discrimination and dismissal protections and more strongly centring negotiation as a realistic strategy for menopausal workers and employers when navigating any tensions that arise.

Keywords Menopause · Employment · Negotiating · Flexible working

Introduction

This paper critiques labour laws engagement with menopausal workers. Drawing on existing literature to provide the context, the paper demonstrates how the majority of menopausal workers often silently endure any difficult symptoms whilst remaining in employment. Far too many, ultimately, exit the labour market or reduce their participation (either in-situ or by reducing hours of paid work or leaving) in order to cope with their lived realities during menopause. These problematic coping strategies are, it is argued here, perpetuated by ineffective anti-discrimination and dismissal laws

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that fail to provide adequate protection or remedies and need to be addressed. Some menopausal workers do, however, attempt to negotiate a new way of working during this period in their working life – a strategy that can benefit them and their organisation and also, of particular appeal given the feminist orientation of this paper, enable existing regimes of power to be challenged. Whilst stronger anti-discrimination laws remain an essential element of labour laws engagement with menopausal workers, effective flexible working provisions can, it is argued, better facilitate negotiation at this time, providing a critical and viable method of managing menopausal / workplace tensions that emerge.

Part 2 begins with an outline of the historically entrenched, gendered and ageist nature of the 'ideal worker' norm within organisational cultures. The menopausal body is then located as a potential disrupter of this norm: tensions can emerge that reveal the fragility of 'ideal worker' expectations. Drawing upon relevant research, three potential reactions to the dissonance experienced by workers with difficult menopausal symptoms (silence, exit and negotiation) are then suggested, before considering (in part 3) how labour law does and should respond.

The core premise of part 3 is to suggest that the current legal framework fails to effectively support menopausal workers who experience menopause / workplace dissonance. A core failure of the legal framework is its implicit support for the 'silence' and 'exit' strategies outlined in part 2 – the implications of which leave the dominant organisational norms unchallenged. Despite the problematic nature of the legal framework as a whole, the section includes exploration of how it might be improved: how existing laws might better support *all* menopausal workers, regardless of their coping strategies. Given its potential to support workplace engagement and to disrupt the gendered norms that are so deeply embedded in organisations the paper is, however, especially keen to encourage and enable greater use of negotiation as a strategy for navigating menopause / workplace tensions. Before embarking on this exploration and presenting the core argument, it is important to define 'the menopause' and its symptoms.

The Menopause and its Symptoms

The menopause refers to a point when menstruation ceases, usually at around 51 years of age but it can happen much earlier and / or as a result of medical treatments. Cis women and some who identify as transgender or non-conforming can experience menopausal-related symptoms for years prior to (known as *peri*-menopause) and following (known as *post*-menopause) this particular moment in their life course. Hereafter the term 'menopause' is used as shorthand for both peri and post menopause, during which time hormonal balance changes. For many the menopause has positive elements. Indeed, it has been described by some as a 'transformative' experience (de Salis et al. 2017) and this aspect of menopause can get lost in the negative narratives and needs to be better recognised (Rowson et al. 2023). The menopause is however a very subjective experience – for some it is positive and steady, but for many hormonal levels can fluctuate to such an extent that a variety of debilitating symptoms can be experienced over many years. Negative symptoms can be physical, including hot flushes, irregular / longer and very heavy periods and associated anaemia,

migraines, tiredness, sleep problems, vaginal dryness and aching joints. Decline in oestrogen levels can also increase the risk of heart disease and pelvic organ prolapse. Symptoms can also be emotional / cognitive, including anxiety, mood swings, loss of confidence or creativity (Goldstein 2000, 316), brain fog, insomnia and memory problems.

Whilst not invalidating the experiences of those for whom menopause is positive, this paper is particularly concerned with the repercussions of difficult symptoms on workplace interactions and the role of labour law in supporting this cohort of workers. Most individuals will go through the menopause whilst in paid employment (Brewis et al. 2020; APPG Report 2022; Women and Equalities Committee 2022) and so the extent and nature of menopausal symptoms is of interest from a labour relations perspective. Research undertaken on behalf of the Fawcett Society in 2022 found that the majority (77%) of menopausal women experience symptoms they describe as "very difficult" (Bazeley et al. 2022, 12). A staggering 69% experience anxiety and depression due to menopause and research has found a shocking increase in suicide rates / thoughts for this age group (Oppenheim 2021). Many reported other "difficult" menopausal-related symptoms including sleep problems (84%), brain fog (73%) or hot flushes / night sweats (70%). A significant number of women experience joint pain and stiffness (69%), low libido (54%), heavy bleeding (44% -on this see also Hinsloff 2021; Gunter 2021), vaginal dryness or urinary tract infections (39%) and heart palpitations (41%) (Bazeley et al. 2022, 12). There is early indication that menopausal symptoms might vary according to national context, ethnic origins and whether able bodied but these intersectional realities of the menopause remain under-researched (see discussion in Brewis et al. 2020, 15; Women and Equalities Committee 2022; APPG Report 2022).

Although academic literature relating to menopausal experiences is still "embryonic" (Riach & Reece 2022, 2) we do now have a clearer picture of the wide variety of symptoms that exist and how they vary between individuals, change across time, can last several years and can be influenced by many factors such as pre-existing conditions, diet, exercise, lifestyle and medication as well as workplace cultures and environments. There is also more media interest and awareness than ever before. In recent years, documentaries have been hosted by celebrities such as Mariella Fostrup, who presented a BBC programme called 'The Truth About the Menopause' in 2018, and Davina McCall, who presented 'Sex, Myths and the Menopause' on Channel 4 in 2021. There has also been an influx of celebrity menopause memoirs and confessional-style personal accounts of symptoms by the likes of Oprah Winfrey, Michelle Obama, Nadine Dorries, the Countess of Wessex and Labour MP Carolyn Harris. Politicians and relevant charities and user-communities and organisations have raised public attention and undertaken high profile research and / or provided guidance, seminars and called for policy reform (see, for example, Equalities Office 2017; Fawcett Society (Bazeley et al. 2022); Women and Equalities Committee 2022 and an All-Party Parliamentary Group Report on Menopause (APPG 2022). It is nonetheless difficult to adequately represent all menopausal experiences, but the following quotes from a variety of sources, provide an important indication of just how debilitating symptoms can be:

…I cry for no reason, feel too sick to eat, my periods are all over the place (spotting, gushing, skipping, you name it!) … I'm turning into a screaming maniac… I am 46 years old and slowly losing my mind (Goldstein 2000, 310).

…I was experiencing that debilitating crashing fatigue that is inexplainable to someone who hasn't experienced it, the mood swings, the rage, the depression and (all the time) gushing away…I hit one day when it was 90 degrees and I was laying on the couch in thermals, flannels, with a blanket on and freezing, too tired and cold to do anything and thinking jeez, I'm just going to lay here and bleed to death (Goldstein 2000, 310).

It's that constant fear that you might have a stain on the back of your skirt that you don't know about…you've reached the point where you think you know how to manage a female body and suddenly it starts to wrongfoot you (Hinsloff 2021).

Menopause has brought my life crashing down around me… I'm no longer the person I was two years ago. I'm frequently exhausted and feel unable to cope at work and at home (Hinsloff 2021).

…you suddenly start to panic, it's like an emotional wave and you think I'm never going to be able to fend these young people off and they are not going to want me… I've lost confidence… (Steffan 2020, 208).

… I had all these weird things, itchy skin, my hair started falling out, terrible flooding… I would sit in my office and I would think I just want to shut the door and just cry 'cause I felt so terrible but had no idea why… it can be quite isolating. (Steffan 2020, 208)

The Menopause as a Disrupter of an Organisation's Dominant Discourse

This section begins with a brief explanation of the 'ideal worker' norm and how this norm is challenged by menopausal bodies at work. Three potential behavioural implications of the dissonance that this clash between lived realities and organisational norms can create is then explained: it is suggested, drawing on existing research, that workers with debilitating menopausal symptoms often cope by adopting certain strategies – many either stay *silent* and endure their symptoms or *exit* the labour market or reduce their participation in-situ, reduce their contractual hours of paid work or leave. These strategies can, it is suggested, have negative repercussions and, significantly, offer little challenge to existing gendered 'ideal worker' norm expectations. Some menopausal workers do however attempt to *negotiate* a new way of working during the menopause. The latter strategy, it is argued, is more beneficial from an individual, societal and organisational perspective and can implicitly challenge damaging dominant discourses not least because it forces organisations to confront and navigate an issue that has long been a taboo topic conveniently ignored by employers and downplayed by workers.

The 'Ideal Worker' Norm

Key traits of the mythical 'ideal worker' have often been associated with the broader idealised notion of the 'liberal self' as both valorise autonomy, independence and self-sufficiency (see Fineman 2019; 2000; 2004; 2012-13). Both assume unaltering individual competence and agency and ignore differences in power or circumstance. They are historically entrenched, having long been apparent in political and legal thought and having always, in a myriad of guises, permeated organisational cultures (see Busby and James 2020, 27). Significantly, the notion of the 'ideal worker', which is specific to individual's experiences of the labour market is problematic for menopausal workers. First, it is clearly ageist as the attributes at its core – especially independence and self-sufficiency - are more likely to be associated with younger bodies. The latter are often perceived as healthier and more vigorous than ageing bodies that are, in comparison, so often associated with deterioration and greater medical interventions (see Fineman 2012-13; Busby and James 2020). Menopausal bodies will be associated with an aging and medicalised body with the potential use of hormone replacement therapy contributing to stigmatization in workplaces. In sum, the natural transition of their older bodies increases their distance from the more youthful 'ideal worker' norm.

Aging can present a "double jeopardy" for women (Brewis et al. 2020, 8, see also Riach et al. 2015 and Thomas et al. 2014) as the 'ideal worker' norm is also gendered. Critiques of organisational relationships with women's bodies highlight how messy lived realities of potentially leaky (Gatrell 2013) and mutable (Witz 2000) and unpredictable female bodies are often perceived to be at odds with what is considered 'normal' (hence 'acceptable' and 'preferable') workplace practice / expectations for the prioritisation of an employer's interests above personal (physical or emotional) ones (Kmec et al. 2014, 64). Women's bodies challenge the established standard /

ideal worker norm which is inherently constructed with male bodies in mind. As Joan Acker notes, "images of men's bodies and masculinity pervade organizational processes, marginalising women and contributing to the maintenance of gender segregation in organizations" (Acker 1990, 139; see also Pateman 1986; 1988). Acker notes how the male body is presented as the gender neutral norm and how this façade leaves "no place… for other 'bodied' processes" (Acker 1990, 151): as a result 'women's bodies… are suspect, stigmatized, and used as grounds for control and exclusion' (Acker 1990). The 'ideal worker' reflects a mythical male worker whose bodily functions are not problematic in the least. Acker refers to human reproduction (Rothman 1989) and expression of emotions (Hochschild 1983) as examples of stigmatised bodily functions, but there is now a plethora of critique exploring how women's bodies are so often constructed as deviant when juxtaposed to the 'ideal worker' norm. For example, tension have been demonstrated in relation to menstruating bodies (e.g. Bobel 2010 and Sayers and Jones 2015), pregnant bodies (e.g. Tyler 2000; Warren and Brewis 2004; James 2007; James 2008; Weldon-Johns 2020) and maternal or breastfeeding bodies (e.g. Haynes 2008; Gatrell 2008; 2011a; 2011b; 2013; Gatrell et al. 2017) at work.

Significantly, it seems that these gendered bodily experiences – or the true extent and implications of them - are often hidden and managed individually by workers because they so clearly represent the direct opposite of what is expected and most valued in organisations. This is a behaviour that workers will have learned over many years: it is a behaviour that has been evident in relation to, for example, menstruation: most girls and women will have experience of concealing and controlling this natural bodily reality in schools, workplaces and other public spaces where it is often met by lack of acknowledgment or accommodation (Bobel 2010; Sayers and Jones 2015). Research also suggests that pregnant and new mothers often suppress the changes they are going through and hide them in order to evade any stigma and avoid marginalisation at work (see, for example, Longhurst 2001; Shilling 2008; Gatrell 2013). As Sayers and Jones comment in relation to menstruation - but the point can be applied to various realities of women's bodies such as IVF, breastfeeding, pregnancy, miscarriage and, importantly, menopause - "it is simply assumed that [the topic] is unspeakable, that women must deal privately with any physical and emotional cost to themselves…." (Sayers and Jones 2015, 96). This is what Shilling, who explored this in relation to maternal bodies (see also Gatrell 2013, 622) but it has a wider significance, has termed "presentational body work" (Shilling 2008, 64). It is "where women undertake work to present their bodies in a way that complies with workplace norms: presenting bodies that are controlled, self-contained and slender" (Haynes 2012, 11). It seems that women still, even in our age of greater awareness of bodily fragility, often repress and ignore their bodies and feelings "so that they can maintain a façade of male-body norm at work" (Acker 1990, 151).

Given the ageist and gendered nature of the historically entrenched 'ideal worker' norm it is unsurprising that menopausal bodies can be marginalised at work. The 77% of menopausal workers experiencing difficult symptoms need to care for their menopausal bodies *and* participate in paid work. Importantly, it seems that women are very aware of the way that menopause is viewed negatively and stereotypically associated with lack of competence or leadership capacity (Kittel et al. 1998; Griffiths et al.

2013; Hickey et al. 2017) and their personal absorption of this stereotype, whether accepted or not, will potentially influence behaviour and perceptions of valid options (see also Grandey et al. 2020). How then might individual workers react when experiencing this complex tension? This question is key because it has huge implications for law's potential role as a supporter of individual menopausal workers, retention of skilled labour and for the feminist agenda at the heart of this paper: the need to reveal and challenge a dominant gendered discourse that permeates organisational cultures. Drawing on existing research, it is suggested that the millions of workers who annually face menopause / workplace dissonance are, during the process of trying "to make sense of it" (Steffan 2020, 195), most likely to either remain silent or exit paid employment. Some menopausal workers, probably a minority at present given their evidenced reluctance to raise concerns and ask for accommodations at work, will however attempt to negotiate a new way of working with their employers. A worker may oscillate between two or even all three of these coping strategies during their menopausal years, but each reaction has significant consequences worthy of further discussion before we consider the legal framework.

Silence

Many workers, when faced with menopausal symptoms that are difficult, will remain silent - concealing and stoically 'working through' any bodily discomfort. Research suggests that the majority of menopausal women at work feel unable or unwilling to disclose their symptoms to employers (Stewart 2018, 42). Indeed, a CIPD study found that only a quarter of menopausal women with difficult symptoms would disclose the real reason for absence at work (CIPD 2022) and the Fawcett Society research similarly found that only 22% were willing to do so (Bazeley et al. 2022). Yet, the CIPD research suggests that over half (59%) of participants in their study of menopausal workers felt that the menopause negatively impacted their work and 30% had, at some point, been unable to attend work as a direct result of menopausal symptoms (CIPD 2022). It is also important to remember that this is a two-way relationship; that whilst "symptoms can make working life more challenging… working life might make menopause symptoms worse" (Brewis et al. 2020, 1; Jack et al. 2019; Grandey et al. 2020).

More research is needed to better explore how, where and why this 'silence' approach to menopause / workplace dissonance might reveal itself in relation to menopausal workers. However, we do know that the behaviour can manifest as "a closing down of their own subjectivities" as reported by Jack et al. in their interviews with menopausal women at work (Jack et al. 2019, 132-3). We know that silencing can occur when "the biorhythms of the menopausal body were portrayed as out of kilter with the temporal expectations of organization, cleaving apart individual and organizational time" (Jack et al. 2019, 132-3). It is where "the stigma associated with unpredictable symptoms … and the lack of ability to control them according to organizational dictum, had behavioural effects" (Jack et al. 2019, 133). Silence as a strategy also resonated strongly in a study by Steffan (2020). Following interviews with 21 women experiencing and managing menopause at work, Steffan found conflicting behaviours were exhibited and that most of the women they interviewed

engaged in "highly resilient and neoliberal discourse around controlling and managing symptoms at work" (Steffan 2020, 195). This discourse was, Steffan noted, presented alongside a "negative, emotive and self-depricating discursive display of fear and of a reduced performative value at work" (Steffan 2020, 196). We also know that women clearly feel the responsibility to manage their symptoms alone when at work: in Stefan's study they spoke about "hiding", "enduring" or "learning to live with" their menopausal bodies (Steffan 2020, 199). As suggested above, many menopausal workers will already have learnt how to hide natural bodily realities that disrupt 'ideal worker' expectations so are experienced at hiding their symptoms to 'fit' into organisational structures that were never designed from, and do not operate from, their perspectives.

Silence can therefore be viewed as a survival mechanism – a way of navigating unknown territory where internal bodily experiences clash with externally imposed and widely accepted gendered organisational norms that reveal themselves in obligations and expectations that can cause difficulties. Significantly, when adopted as a coping strategy in the face of tensions, 'silence' allows such dominant organisational norms to continue unchallenged. Indeed, the very act of stoic concealment of menopausal symptoms (negative or positive) reinforces boundaries that exist between public workplaces and subjective experiences. In turn, 'silence' underscores and promotes, or at least fails to challenge, business preferences for productivity and the vilification of anything that fails to meet the very high standards of the fictitious 'ideal worker'. 'Silence' also fails to challenge stigma (Rowson et al. 2023) or the problematic notion that menopause / workplace tensions are individual concerns with individual solutions. Moreover, our acceptance of the silence strategy is, as Sayers and Jones observed in relation to menstruation but it applies here too, "…a sign of violence. It is a cause of suffering in itself, alongside the physical and emotional suffering that women suppress in order to do their jobs" (Sayers and Jones 2015, 108).

Exit

Unfortunately, many women experiencing dissonance between organisational norms and menopausal symptoms will choose to leave the workplace or significantly reduce their in-work contribution, aspirations or working hours. One study found that those with severe symptoms had a higher chance of exiting or reducing hours (Evandrou et al. 2021). A quarter of those surveyed for the Fawcett Society were reluctant to go for promotion as a result of menopausal symptoms and a quarter were considering early retirement (Bazeley et al. 2022 and in relation to the latter, see also Stevens et al. 2022). Hence, withdrawal / exit is a second way of coping when this dissonance arises / persists. For many, exiting paid employment will no doubt be a last resort – perhaps when other strategies, silence (see above) or negotiation (see below) - have failed. For some 'exit' may be a positive and informed choice that can be viewed as a means of challenging the dominant organisational norms by refusing to participate in the façade that the ideal worker expectations promote. However, if menopausal workers feel, and the majority do (see Bazeley et al. 2022; CIPD 2022), unable to discuss symptoms at work with line managers and if those symptoms are too severe to ignore or manage whilst in paid employment, then 'exit' – be that leaving or reduc-

ing hours or responsibilities – may, rather than being a positive choice, feel like the only viable option remaining to them.

This second strategy of managing the menopause / organisation interface is, like the silence-strategy, of grave concern. From a basic humanitarian health and wellbeing perspective, not least because it has potential ramifications for unemployment, poverty and state dependence later in life (Brewis et al. 2020, 9). As with the 'silence strategy' this clearly has harmful individual consequences and is arguably as much of an, if not a greater, 'injury' to menopausal workers. The fact that so many exit the workplace, do not apply for promotions or reduce their responsibilities as a result also raises broader gender equality concerns: as the APPG Report put it, "with women often at the peak of their careers during the menopause transition, this exacerbates gender inequality in senior roles and adds to the gender pay-gap" (APPR Report 2022, 3; see also Brewis et al. 2020). It also has implications for those sectors (such as the care sector and education and public sector) where women dominate (see discussion in Riach & Reece 2022). With all this in mind, it is imperative that women can remain in paid employment for as long as they wish and are able, and our labour laws need to support this endeavour.

Negotiation

Finally, there is evidence that some workers attempt to negotiate the borders between their private bodily experiences and dominant organisational norms during menopause: this may occur where silence or exit is not possible or wanted – perhaps because the body / mind cannot always hide the realities of physicality / emotions or because workers feel able / willing / wanting to challenge existing boundaries. It is this group of menopausal workers and their employers who, if that attempt is dealt with fairly and considered successful, arguably offer the greatest potential for re-imagining workplace interactions during menopause. Again, we can learn from studies of other relevant body / workplace interactions. A study by Gatrell (2013) of 27 new mothers in professional / managerial work, found that the majority struggled to negotiate the boundaries between motherhood and paid work and found them immutable. Most opted, as those with menopausal symptoms do, to remain silent and stoic and undertook what Gatrell termed "maternal body work" to comply with social norms. However, a minority - interestingly mothers who had experienced marginalisation at work following earlier pregnancies and who valued their skill sets in / contribution to their organisations – chose to try and negotiate the boundaries. They did so through what Gatrell (2013) referred to as "pro-active strategies". These strategies blurred the "metaphorical borders" (Clark 2000). It is a strategy adopted by some menopausal workers too. Indeed, some of the interviewees in Jack et al.'s (2019) study of menopausal workers clearly attempted to negotiate new boundaries. As they put it "some women felt empowered to go 'into the unknown' and carve out new ways of being at work that reorientated their previous sense of selves" (Jack et al. 2019; 134). An earlier study by Putman & Bochantin (2009) also hints at the potentially powerful role of re-framing menopause as a negotiable topic: they found that those who did so were empowered to view the menopause less as an individual concern and more as an organisational issue.

The 'negotiation' required by menopausal workers may be as simple as asking for alterations of the temperature in a workspace, for uniform adjustments or regular toilet breaks. Interestingly, uniforms have been identified as problematic for menopausal workers where the fabric is synthetic and often designed with male workers in mind, such as ambulance staff (Prothero et al. 2021) and the police (Atkinson et al. 2021). It may involve a change in place or nature or timings of work or a change in hours on a temporary or permanent basis. However, research by the Women and Equalities Committee suggests that very few menopausal workers (11%) are currently willing to ask for such adjustments (WEC 2022, 7). Yet, the benefits of negotiation as a strategy are clear. It can lead to practical changes that enable or improve workplace interactions and can empower individuals to develop personal agency and seek strategies for accommodating their menopausal bodies at work. From an employer perspective, it creates a more collegiate workplace and enables staff retention. Framing menopause as a negotiable issue can also, by setting a template for all menopausal workers with difficult symptoms to be heard in the workplace, avoid or reduce the harmful 'exit' and 'silence' strategies referred to above not just for the individual 'negotiating' worker but, significantly, for others in the organisation. Good practice is demonstrated and encouraged and problematic dominant organisational cultures, including the 'ideal worker' norm and the view that personal problems ought not to be aired in the workplace as they suggest a lack of commitment, are challenged. This, in turn, encourages workers and employers to view menopause / workplace dissonance as an organisational issue. The latter helps develop a culture of support, which can in turn have a positive impact on symptoms: studies suggest that greater supervisory support lowered menopausal symptom reporting (see Bariola et al. 2017 and Riach and Jack 2021). Negotiation needs however to become an expected part of workplace cultures and be fully supported by the legal framework so that it is regarded as a 'safe' strategy to pursue. Of particular concern, is the fact that where women do disclose menopausal symptoms, evidence suggests they can experience bullying, mockery or be forced onto performance management processes (see Brewis et al. 2017; Jack et al. 2014) – behaviours that likely promotes silence and exit and maintain the inherently problematic status quo.

Labour Law's (Mis)Management of Menopause

The current legal framework is failing to effectively manage menopause / workplace tensions and, as a result, underscores and perpetuates gendered organisational norms discussed in part 2. Effective labour laws could however better support menopausal workers and encourage long term individual and organisational resilience by adopting more effective anti-discrimination and dismissal protections so as to provide effective redress for those treated poorly as a result of menopausal symptoms and, connectedly, providing a valid and robust safety net for those who want to attempt to negotiate a new way of working during menopause. In this section, relevant sections of the Equality Act 2010 (EA) and the existing right (under the Employment Rights Act 1996 (ERA)) not to be unfairly dismissed are explored. It is clear that, instead of providing a robust legal redress or an adequate deterrent, these legal provisions may

implicitly promote 'silence' and 'exit' as acceptable coping strategies for menopausal workers. Here an argument is presented – based within the context of probable coping strategies, discussed above – for better explicit recognition of the menopause as a natural inevitable bodily event that is worthy of specific legal protection. The discussion of the right to request (RTR) provisions[1] is then presented as a central and useful provision for menopausal workers who are seeking to negotiate more manageable and positive workplace experiences. Whilst explaining how the RTR provision is not devoid of problems, discussion highlights its potential to challenge problematic organisational norms because it provides an established and accepted mechanism for opening conversations and a space for voicing and accommodating subjective lived experiences.

Anti-Discrimination and Unfair Dismissal Provisions

The menopause, unlike pregnancy and maternity, is not a protected characteristic in its own right and there is no automatic protection against dismissal because of menopause related symptoms. The EA offers legal remedies to eligible workers who have experienced discrimination (direct or indirect), harassment or victimisation based on one of the protected characteristics it lists (s.4). Of most relevance are age (s.5), disability (s.6), sex (s.11) or gender reassignment (s.7). There have been no menopause-related cases reported under the latter and a limited number of cases have relied on age discrimination provisions in the event of poor menopausal-related discrimination. It is noteworthy that menopause can of course begin and end at a variety of ages – although it's stereotypical association with ageing is well documented, so one might imagine this to be the more appropriate protected characteristic upon which to base a claim. Claimants, as with other discrimination actions can however struggle to locate an appropriate comparator and this can end hope of a successful claim. The claimant in *N v Greater Glasgow Health Board*[2] attempted to argue that a female in a different age bracket who was not exhibiting the menopausal symptoms was the correct comparator but this was rejected and the claim stuck out as having no reasonable prospect of success. In comparison, in *A v Bonmarche Ltd* (in administration)[3] the comparator was assumed to be "another employee who was not a female of menopausal age" but exhibiting the same behaviours as the claimant. In this case the tribunal found the treatment of the claimant, which included referring to her as "a dinosaur", constituted unlawful harassment on the ground of age because a female not of menopausal age (but otherwise exhibiting the same behaviours) would not be treated in that way. Whilst not a popular avenue for claims in its own right - many age-related discrimination claims seem however to be attached to disability and sex related claims.

One might imagine, given the gendered nature of menopause, that sex discrimination provisions offer an appropriate option for legal redress under the current EA. However, claims for sex-discrimination are also a rather awkward fit for claimants

[1] Employment Rights Act 1996 s. 80F

[2] ET Case No. 4105459/22

[3] ET Case No. 4107766/2019

who have been poorly treated as a result of behaviour that has its roots in menopausal symptoms. There have been successful menopause-related sex discrimination claims, which offers some practical hope to those seeking a legal remedy after experiencing discrimination / harassment at work. For example, in *A v Bonmarche Ltd* (in administration)[4] the tribunal found the behaviour of her manager, which included refusing to adjust the temperature in the workplace and referring to her as "a bit menopausal", was both demeaning and humiliating. Similarly, in *Merchant v British Telecom*[5], the tribunal found that the employer's willingness to terminate a menopausal worker's employment over job performance issues constituted sex discrimination because the employer's treatment of this employee was different to that of others. He had based his evaluation of her capability on assumptions about menopause he had garnered from his wife's experiences and, as such, failed to adequately investigate her particular experiences or to compare her situation to other non-female specific health conditions. Hence he did not treat her in the same way that he would have treated a man with similar symptoms when applying the performance management policy.

Overall, sex discrimination provisions might provide a logical legal action in the event of menopausal-related discrimination or harassment, but it is not a perfect fit. Menopause was not on the minds of the drafters of the EA or, indeed, its predecessor the Sex Discrimination Act 1975. Menopause is clearly an inconvenient appendage that has yet to be fully accepted as an issues worthy of legal protection in its own right. This development is similar to that of early attempts to 'fit' pregnancy and maternity-related discrimination into the legal framework (see James 2008). Moreover, the current sex discrimination provisions are problematic because they necessitate a fusing of menopause with a person's biological sex, which is unhelpful for those who experience harm as a result of menopause / workplace dissonance but do not identify as cis-female.

To bring a claim for disability discrimination, currently the most common discrimination action for menopause-related harms, claimants must show that they are 'disabled' within the EA definition (s.6). Menopausal workers might be uncomfortable with having to self-identify in a way that ignores the fact that menopause is a natural and inevitable aspect of female ageing. The definition requires a claimant show a physical or mental impairment that has a substantial and long-term adverse effect on the individual's ability to carry out normal day to day activities (s.6). The threshold is high (Lawson 2011) and includes being able to demonstrate that the disability has lasted, or is likely to last, 12 months or more. Not all have been sympathetic to the notion that menopausal symptoms can be a 'disability' within the meaning of the Act. In *Donnachie v Telent Technology Services Ltd*[6] the employer argued that the claimant's symptoms, which included hot flushes, sleep disturbance and anxiety, were typical of menopause and therefore not 'substantial' within the meaning of the EA s.212. Fortunately, the tribunal held that 'typical' symptoms were not outside the

[4] *Supra* n. 3.

[5] ET Case No. 1410305/11

[6] ET Case No. 1300005/20

scope of the EA (see also *Davies v Scottish Courts and Tribunals Service*[7] and *Ibolya Kun v Cambridge University Hospital NHS Foundation Trust*[8]) and this approach has been rightly commended, especially when compared to the more restrictive approach adopted in the USA (see Crawford et al. 2022).

It is clear that the onus is firmly with the claimant to provide evidence of the impact of the menopausal symptoms, which is inevitably case specific. In *Daley v Otivia*[9] the claimant described her symptoms – which included hot flushes, night sweats, joint pains, anxiety and memory lapses - and their impact on her day-to-day life in very great detail and was successful in establishing her case. Others failed to convince tribunals that the effect of their menopausal symptoms was more than trivial on their day to day lives. The ET in *Rooney v Leicester City Council*[10] found that the claimant, a child social care worker, was not 'disabled' despite her range of symptoms (including insomnia, anxiety, migraines and hot flushes) lasting for two years and having a detrimental impact on her self-esteem and confidence. At the hearing the claimant had noted how her symptoms led to her "forgetting to attend events, meetings and appointment, losing personal possessions, forgetting to put the handbrake on her car and forgetting to lock the car, leaving the cooker and iron on…" and how she "spent prolonged period in bed due to fatigue / exhaustion". In coming to its decision the ET judge highlighted the lack of support for the claimants statement in the GP's medical records and how in the latter there was reference to her ability to attend a gym, swim and run. The judge also highlighted the claimant's carer role and suggested that this undertaking suggested she was not disabled. Fortunately, the *Rooney* decision was overturned on appeal[11] where doubts were raised around the approach taken and the need for a tribunal to balance what a claimant can do with what she cannot was rightly emphasised (as discussed in *Ahmed v Metroline Travel Ltd*[12]). However, whilst the mixed success (see, for example, *Leonard v Southern Derbyshire Chamber of Commerce*[13], *Rose v Commissioner of Police for the Metropolis*[14] and *Chan v Stanstead Airport Limited*[15]) is to be expected as claims will be decided on a case by case basis, it reveals an unwillingness or discomfort amongst employers to accept the messy realities of menopause as a legally protected 'disability'. Indeed, in *Chan* the employers pushed the claimant for more medical evidence, yet upon receiving it remained unconvinced despite obvious connections between her behaviour and menopausal symptoms.

Claimants who do manage to satisfy the definitional hurdle then need to link their menopausal 'disability' to the poor treatment that has been experienced (*Lee v*

[7] ET Case No.4104575/18

[8] ET Case No. 3201544/18

[9] ET Case No.1308074/19

[10] ET Case No.2600242/19

[11] UKEAT/0064/20/DA

[12] UKEAT/0400/10/JOJ

[13] 2001 IRLR 19

[14] ET Case No.3203055/19

[15] ET Case No. 3205543/22

Chief Constable of Essex Police[16]). That success in gaining a remedy depends upon the willingness and ability of claimants to articulate their symptoms and the consequences of them within a framework that is renowned for its strict and medical model foundations (see discussion in Bell 2015 and Almond et al. 2022) is problematic, especially given what we know about the dominance of the 'silence' strategy amongst menopausal workers. It is also exacerbated by the fact that GPs, who often lack training in menopausal matters (see APPG 2022 and Women and Equalities Committee 2022), might not always explicitly note the word 'menopause' or 'perimenopause' and treat the symptoms without doing so (see *Chan v Stanstead Airport Limited*[17] where the symptoms of 'stress and anxiety' were treated). A further, related, hurdle in relation to disability claims is the need to demonstrate that the employer had appropriate knowledge of the 'disabling' menopausal symptoms. For direct disability claims (EA s.13) actual knowledge is needed. For claims relating to something arising in consequence of a disability (s.15) or a failure to make reasonable adjustments (s.21) actual or constructive knowledge is needed. This, again given what we know from research about the reluctance of those with menopausal symptoms to reveal or discuss symptoms, is problematic for our cohort of potential claimants. Indeed, in *McMahon v Rothwell and Evans LLP and anor*[18] the claimant had downplayed and under-reported her symptoms because she had not wanted to appear unreliable. The claimant thus remained unaware of the detail needed to establish that her employer had the knowledge required (see too *Gallacher v Abellio Scotrail Ltd*[19] and *Lingard v Leading Learners Multi Academy Trust*[20]). As stated above, the persistence of the problematic 'ideal worker' norm and the absorption of that ideal by workers themselves means that many have often concealed or downplayed their symptoms. This coping strategy may have helped them engage and remain in the workplace but, in the event of wanting to claim disability discrimination, that stoicism then runs counter to what is needed to gain legal redress. Fundamentally, disability discrimination provisions offer the best option for legal redress but were never designed with menopausal symptoms in mind and are, at best, an awkward fit: the hurdles outlined here require clear medical evidence and expert navigation, despite some purposeful judgments in specific cases, to be successful and claimants are having to focus on the symptoms rather than the cause of menopause – which is age and gender related.

In sum, successful EA cases demonstrate that those with menopausal symptoms who are poorly treated as a result *might* – subject to the many hurdles - be able to establish an EA claim and access a remedy. These provisions and the relevant cases potentially operate as a deterrent, providing a disincentive for poor behaviour among those employers who are aware of the potential legal ramifications. However, the uncomfortable fit of menopausal realities into the various EA provisions is clear. It is also important to note that any litigation is plagued by the usual barriers to accessing justice – including time limits and lack of legal aid and advice and that the onus

[16] ET Case No.3201274/19

[17] *Supra* n. 15.

[18] ET Case No.2410998/19

[19] ET Case No.4102245/17

[20] ET Case No. 2401985/17

is placed on individual to pursue their claims as well as poor remedy enforcement mechanisms for those who are successful (see Busby and McDermont 2020). Overall, the EA offers very limited value for those seeking a retrospective remedy once they have exited the workplace (voluntarily or otherwise) and, as it stands, is a weak 'threat' to employers who mistreat menopausal workers.

The EA could however be improved by simply adding menopause as a specific protected characteristic as has recently been suggested (see Women and Equalities Committee 2022; Waughray et al. 2022). This would be a symbolic legal recognition that to discriminate against those who are struggling with menopausal symptoms, whatever the severity, is unacceptable. This would provide a clearer avenue for claimants who are treated poorly, instead of requiring them to piggy-back on legal avenues that do not reflect their lived realities. This could, in turn, help support the re-framing of detrimental menopausal symptoms as organisational concerns. It would also help empower those who want to negotiate rather than remain silent or exit - and encouraging employer-led action to avoid or mitigate potential claims and encourage engagement in solution-focussed discussions. Unfortunately, the appetite for the introduction of such hard law amendments is not currently evident: a proposal by the Women and Equalities Committee to begin consulting about the introduction of a new protected characteristic was recently rejected by the previous government as "counterproductive" (WEC 2023, 77).

Unfair Dismissal

The ERA offers a remedy to employees who have been unfairly dismissed. Imposing a duty to act fairly when dismissing, the remedy is available only to employees with two years continuous employment. It is therefore immediately limited in scope but might be of use to some who are dismissed, or who felt forced to resign, as a result of menopausal symptoms. The fact that the health concerns of the claimant in the *Merchant* case[21] were not adequately investigated prior to dismissal led the tribunal to find that she had been unfairly dismissed. In *Davies v Scottish Courts and Tribunal Services*[22] a claim for unfair dismissal was successful because it was found that the employer had failed to take into account evidence of the impact of her menopause, that was detailed in an occupational health report, upon her concentration and behaviour. Both cases refer to a lack of investigation on the part of the employer but also, impliedly, place the onus on claimants to be able to adequately articulate the nature and extent and impact of her menopausal symptoms. This again reveals tensions between the legal rights and lived realities of menopausal workers, as very few are comfortable discussing menopausal symptoms in the workplace (see above) and would fall foul of not having the evidence of impact needed to effectively and retrospectively support a solid claim.

As with the EA claims, there is potential for success, but it is limited in terms of eligibility to claim and full transparency around symptoms are crucial and the same limitations around access to justice and enforcement of remedies also apply here.

[21] *Supra* n 5.

[22] ET Case No. S/4104575/17

Better protection against unfair dismissal would be possible with the introduction of automatic day one protection on a par with s.99 of the ERA for pregnancy and maternity. The ERA might also accommodate greater leave entitlements for those with particularly onerous menopausal symptoms that need attention or for attending GP appointments during working hours as suggested recently by the Women and Equalities Committee (2022). As argued above, it is crucial that legal remedies provide an effective safety net for those who exit or are forced to leave work as a result of menopausal symptoms, and also encourages accommodations – if only to avoid a potential claim - where possible. As with the anti-discrimination provisions, we need a strong statement that dismissal on the grounds of menopausal symptoms will not be tolerated. This provides a stronger incentive for employer engagement with menopausal workers and a framing of the issue as organisational rather than individual. It may be that soft law approaches were favoured by the previous government and an increasing number of employers do offer mandatory equality and diversity training on age, gender and menopause and informal workplace menopause networks (Brewis et al. 2017; APPG 2022). However, the latter rely on the good will of employers and, as Gatrell observed in relation to motherhood, "feminist theorists have waited in vain for organisations to be proactive in securing mothers' positions" (Gatrell 2013, 641). Menopausal issues are, unsurprisingly, even less well accommodated within organisations and hence reliance on employer-led initiatives, although a part of the solution, is unsatisfactory in isolation.

The Right to Request Flexible Working

There is scope for improving the existing EA and unfair dismissal provisions in a way that better supports those who needs retrospective remedies. In order to really encourage and enable negotiation as a realistic coping strategy we also need to arm individuals and employers with useful tools to help them (re)negotiate boundaries between menopause and organisational norms / expectations, whilst in situ. The only existing legal provision that offers hope in this regard is the current RTR provisions. Available to all employees since 2014, the right to request flexible working[23] is, following a recent consultation, now a day one right in England, Wales and Scotland.[24] The RTR provision provides a statutory procedure under which employers must consider requests to alter working patterns, locations or hours. Requests have to be dealt with in a reasonable manner and within a reasonable time frame of two months. It applies to all businesses, regardless of their size and employees can now make two requests a year. Importantly, as a result of recent amendments, employers must now consult with employees unless approving requests in full – which is of fundamental significance to the argument advanced in this paper, of the need to provide opportunities for negotiating new ways of working during menopause.

The appeal of the RTR provision for those wanting to engage in formal negotiations with their employers because of menopausal symptoms is immediately obvi-

[23] Employment Rights Act 1996 s.80 and Flexible Working Regulations 2014

[24] Flexible Working (Amendments) Regulations 2023; for all other amendments see the Employment Regulations (Flexible Working) Act 2023

ous: it provides a structured, established and recently improved process at the heart of which is a legal right to have requests for flexibility considered regardless of the trigger for that request. There are however a number of flaws with the right, some of which are generic and some of which are more specific to our cohort. First, whilst employers must consider requests and must do so in a reasonable time there are eight broad grounds upon which a request can be rejected.[25] These include the burden of additional costs, inability to reorganise work amongst existing staff, detrimental impact on performance and detrimental impact on work quality. Hence employers are legally bound to consider requests but are ultimately in control of whether and how far they are willing to modify existing arrangement in any attempt to navigate tensions during menopause. All employees can do is raise the issue and highlight what flexibility / accommodations might help them better manage menopausal symptoms that impact on wellbeing and performance, but there is no right to be accompanied to a meeting and no right to a statutory appeal on the grounds of refusal. Hence, if no satisfactory accommodation is made – menopausal workers may feel even more inclined to exit or remain silent in the future. The needs of the business are always prioritised in the process and the employee would be wise – although the need to show how a request would impact the business is no longer legally required - to acknowledge this and manage expectations accordingly.

Secondly, changes are not necessarily permanent but non-permanence needs to be agreed. The option of non- permanence is to be welcomed given the fluctuating and temporary nature – albeit that symptoms can last years – of menopausal symptoms. However, trying to agree a timeframe could be difficult for menopausal employees and greater ad-hoc informal flexibility, which is being mooted by the government as a way forward in its bid to make flexible working 'the default' (WEC 2023), might be more beneficial. Thirdly, and relatedly, the nature of the process is such that whilst it may reveal individual cases that would – because of the severity of menopausal symptoms - trigger reasonable accommodation obligations under the EA (s.20), it may exclude requests for simpler accommodations that employees may feel is too trivial for a RTR application. The latter, as stated above, may be of particular significance in bids to navigate menopausal symptoms at work but workers might be reluctant to use such a formal process. Yet a modification in uniform requirements, the use of a desk fan, more frequent toilet breaks, or time off for medical appointments might make a huge difference to the individual worker. Here, again, the government's commitment to exploring mechanisms for improving more ad-hoc, case -specific and informal flexibility is to be commended and greater support for those starting a formal RTR process might urge more employers to develop wider policies for informal discussions and negotiations.

The recent reforms go some way to shifting the onus onto employers to seriously engage with requests for flexibility and there appears to be positive leanings toward making the process less formal and easier to implement. It is not the panacea that we might hope for – it does however offer a statutory right to highlight the tensions and negotiate a solution that might mitigate the harm being experienced by individuals. Hence, it is arguably, despite flaws and the fact that it would be of greater use if sup-

[25] Employment Rights Act 1996 s.80G

ported by more specific and robust anti-discrimination and unfair dismissal protections, the best current legal option for challenging the problematic organisational norms and expectations - and their consequences when menopause / workplace tensions arise - outlined in part 2.

Conclusion

At the core of this paper is an argument that the current legal framework fails to robustly protect menopausal workers from discrimination and dismissal and, hence, implicitly accepts silence or exit as an acceptable response to menopause / workplace dissonance. Having argued that current equality laws and unfair dismissal provisions fail to offer effective protection or redress in the event of menopause-related poor treatment at work the paper has offered some suggestions for how the current framework might be improved. Moreover, the RTR provisions were presented as a means of encouraging negotiation which is viewed as a more effective and useful coping strategy with wide benefits for all concerned. Fundamentally, it is important that laws challenge what Crawford et al. call "the assumption built into the law of employment – expressed by employment law's silence on the issue – that most workers will not experience symptoms of menopause" (Crawford et al. 2022, 54) or that it will be managed perfectly well by women because it is part of their inherent and natural biological trajectory. Assessments consistently highlight the dissonance between the public worlds of organisation and private (bodily) experiences throughout the life course: as Grandey put it, "bodily experiences are incongruent with ideal worker expectation" (Grandey et al. 2020, 8). Yet the current legal framework continues to support exit or silence above negotiation (and inclusion) as accepted strategies in the event of menopause/workplace dissonance and the lived experiences of menopausal workers are ignored. Implicitly, biology is conveniently blamed for their predicaments and their 'chosen' solutions but, as Bobel notes, "blaming biology for the behaviour of women (or men) is a classically anti-feminist position" (Bobel 2010, 37). Ultimately, ignoring the role of traditional, gendered and ageist organisational norms and inadequate laws in creating and perpetuating menopausal / workplace tensions is at best short sighted and at worst causes unnecessary harm to individuals and businesses, as well as society and the wider economy. At its core the lack of acknowledgement of menopausal realities is poignantly anti-feminist because it is a "failure to take women at their word and validate their experiences" (Bobel 2010, 37); something that can only be rectified in this context when laws create and support ways for individuals and employers to respectfully and non-judgementally air and manage the menopause.

There is a clear limit to what laws can achieve in a context that has historically ignored and shamed, rather than respected and supported, natural and inevitable bodily changes. The menopausal body threatens the historically embedded preference for, and valorisation of, labour market predictability and maximum economic productivity as personified in the mythical 'ideal worker' norm. We are however entering a new era where menopause is less of a taboo topic and where politicians, the public, the media and the more proactive employers and organisations are engag-

ing with its realities and its implications. This provides greater ongoing opportunities for much needed academic engagement and reflection and this article adds to that literature by starting an important and much needed conversation about the potential (and limits) of labour law to better support menopausal workers.

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