

Mind the (Legal) Gap: Sexual and reproductive health in employment law

While New Zealand employment law offers protections for pregnancy, childbirth, and breastfeeding, it remains silent on other critical aspects of health that significantly impact the lives of those impacted.

Sexual and reproductive health, particularly for women and those with female reproductive systems, has become increasingly topical, and rightly so. Historically, it's an area that has been underfunded, overlooked, and poorly understood, despite affecting nearly half the population.¹ In the context of the paid workforce, this neglect can be partly attributed to the fact that men previously made up the majority of the workforce. But that's no longer the case, with women's growing participation in the labour market having been a significant contributor to New Zealand's economic development.²

The reality is that sexual and reproductive health can significantly impact a person's ability to engage in and maintain employment. Although there are some existing legal protections, health matters like menstruation, perimenopause, menopause, endometriosis, and infertility are not specifically dealt with in our current legal framework. These issues can seriously impact wellbeing, job performance, and participation. Given this, it's worth considering a few of these health concerns and whether the current the framework adequately guides employers as to how to respond.

Legislation

Although there is currently no specific statutory recognition of these health matters within New Zealand employment law, several existing legal obligations may be applicable. Under section 36 of the Health and Safety at Work Act 2015, a person conducting a business or undertaking (PCBU) has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers while at work. This duty encompasses both physical and mental health. Consequently, it may be interpreted to require consideration of these health matters, particularly where associated symptoms have a material impact on a worker's ability to safely perform their role.

Furthermore, the Human Rights Act 1993 addresses unlawful discrimination in the workplace. Section 21(1)(a) of the Human Rights Act prohibits discrimination based on sex, and s 22 applies this protection specifically to employment relationships. It makes it unlawful for an employer – or anyone acting on their behalf – to treat a person less favourably on any prohibited ground, including to:

- Refuse to hire a qualified applicant for available work;
- Offer less favourable terms and conditions of employment, including benefits, training, or promotion opportunities;
- Terminate employment or subject the employee to any other form of disadvantage not applied to others in similar roles; or
- Force or pressure an employee to resign or retire.

Discrimination on the basis of sex may, in certain circumstances, include a failure to reasonably accommodate gender-specific health conditions, such as menstruation, perimenopause, menopause,

¹ Statistics New Zealand "Women in paid work" (March 2019) Stats NZ < <https://www.stats.govt.nz/news/women-in-paid-work/>>.

² Manatū Wāhine, Ministry for Women "Labour market participation" (December 2025) < <https://www.women.govt.nz/women-and-work/labour-market-participation/>>.

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endometriosis, and infertility, thereby potentially constituting unlawful discrimination.

Individual Health Issues

Perimenopause & Menopause

Perimenopause is the transitional phase leading up to menopause, where levels of oestrogen and progesterone, two key hormones, start to fluctuate. The onset typically occurs around the age of 45, but it can be earlier. The decline in hormone levels, particularly oestrogen, and are associated with a wide range of symptoms. This includes hot flushes, night sweats, sleep disturbances, brain fog, short-term memory difficulties, reduced concentration, anxiety, mood changes, depression, urinary and bladder issues, headaches, and heart palpitations. The severity and duration of these symptoms differ between individuals, but for many, the physical and cognitive effects are significant and enduring. Menopause is the point in time where there has been no menstrual period for one year, and typically occurs around the age of 51.³

The symptoms of perimenopause and menopause may, in turn, affect attendance, productivity, confidence, and overall engagement with work. Despite this, they remain a largely invisible issue in most employment settings. Many women report feeling unsupported, misunderstood, or reluctant to disclose what they are experiencing, for fear of stigma or lack of empathy in the workplace.⁴

While New Zealand employment case law involving perimenopause and menopause is limited, the District Court case *CD v ACC* offers some insight. In assessing a woman's work incapacity, the court recognised

surgically induced menopause as a contributing factor, suggesting a willingness to acknowledge menopause as relevant in work-related contexts.⁵

There are relevant cases in other jurisdictions too. In the UK decision *Rooney v Leicester City Council*,⁶ the Employment Appeal Tribunal found that an employee experiencing severe menopausal symptoms met the legal definition of disability. This judgment reinforced earlier, tribunal decisions which held that significant menopausal symptoms can amount to a disability. Other UK employment cases have similarly acknowledged the impact of menopause on an employees health and wellbeing. In one instance, a woman was dismissed for alleged dishonesty successfully claimed disability discrimination, with the tribunal accepting that her menopausal symptoms particularly confusion and forgetfulness had contributed to the conduct in question.⁷

Although UK law differs from New Zealand's, these cases reflect a growing judicial willingness to recognise menopause as a valid ground for protection. In theory, sex-based discrimination under the Human Rights Act or the Employment Relations Act could offer similar protection in New Zealand.

Menstrual & Reproductive Health

The topic of menstrual leave has become the subject of discussion after an Auckland woman, took a day of sick leave due to menstruation-related illness and subsequently made a complaint to the Human Rights Commission, alleging sex discrimination. She had communicated her reason for leave to her manager, who she says criticised her the following day, stating that a period isn't a good enough reason to take sick leave.⁸ Section 65 of the Holidays Act entitles

³ Menopause & Wellness "Creating a new pathway in menopause care" (2024) Menopause.org.nz <https://www.menopause.org.nz>.

⁴ Dita De Boni "Menopause could be grounds for fighting workplace dismissal at some point soon" (8 June 2025) The Post <https://www.thepost.co.nz/business/360713862/menopause-could-be-grounds-fighting-workplace-dismissal-some-point-soon>.

⁵ *CD v Accident Compensation Corp* [2021] NZACC 189.

⁶ *Rooney v Leicester City Council* [2021] UKEAT 000104_21_0710.

⁷ *Davies v Scottish Courts and Tribunals Service* [2017] UKET S/4104575.

⁸ Human Rights Commission "Period stigma in the workplace - a human rights issue" (24 February 2022) Te Kāhui Tika Tangata Human Rights

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employees in New Zealand to paid sick leave where they are unable to work due to illness or injury. The dispute was taken up and settled by the Office of Human Rights Proceedings, which considered it as a claim of gender discrimination. This case demonstrates an emerging recognition of the legitimacy of taking sick leave for health conditions associated with menstruation. While the use of sick leave for menstrual symptoms remains contested, some jurisdictions have either introduced or are considering introducing specific entitlements to menstrual leave.

Employers may choose to introduce their own workplace policies, though menstrual leave remains uncommon. Pacific Media Network became one of the first companies in New Zealand to adopt a menstrual leave policy, offering E tū union members an additional 12 days' paid leave annually for menstruation and menopause-related symptoms.

Infertility

Fertility treatment is another health consideration that affects many in the workplace. Currently, there is no legislative framework or established case law in New Zealand addressing the rights of employees undergoing such treatment. Infertility is not only a medical condition but also a source of profound psychological stress. Many individuals continue working while navigating treatment, which can be physically demanding, emotionally draining, and logistically challenging. The intensity of the process varies depending on the type of treatment, and the financial burden adds yet another layer of pressure for employees.

While there is limited case law in the New Zealand context, international developments offer some guidance. In *Mayr v Bäckerei und Konditorei Gerhard Flöckner*, the European Court of Justice held that a

woman undergoing in vitro fertilisation (IVF) is not considered pregnant until implantation of the fertilised ovary.⁹ However, the Court found that adverse treatment of a woman due to her IVF treatment constitutes sex discrimination, as IVF is a procedure exclusive to women.

This reasoning could be adopted for similar cases under s 21(1)(a) of the Human Rights Act. In some situations, fertility-related discrimination may also fall under s 21(1)(h), which covers physical and mental impairments, protecting individuals with disabilities. For instance, an employee may have an underlying medical condition causing infertility or experience mental health challenges related to treatment. In such cases, employers may be required to consider reasonable accommodations, depending on the circumstances.

Around one in four couples in New Zealand experience infertility.¹⁰ In the absence of specific legal protections, employees undergoing treatment often rely on sick leave, annual leave, unpaid leave, or special leave to manage its demands.

The emotional toll of infertility is significant, with many individuals experiencing increased anxiety and depression. From both a legal and ethical standpoint, it is in employer's interests to support affected employees by offering flexibility and understanding. This approach not only supports employee wellbeing but also helps individuals stay connected and productive at work during an intensely challenging time in their lives.

Concluding Comments

Sexual and reproductive health is an increasingly important and evolving area within employment law. Health matters such as perimenopause, menopause, menstruation, endometriosis, and infertility, while not yet explicitly recognised in legislation, have clear and

Commission <https://tikatangata.org.nz/news/period-stigma-in-the-workplace-a-human-rights-issue>.

⁹ *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* (C-506/06) [2008] IRLR 387 (ECJ).

¹⁰ Fertility NZ "Infertility in New Zealand" (September 2021) Fertility Week 2021 <<https://www.fertilityweek.org.nz/fertility-topics/any-us-can-face-challenges-building-whanau/infertility-new-zealand/>>.

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significant impacts in the workplace. In the absence of specific legal requirements, it falls to employers to take initiative by developing their own supportive practices and policies. Introducing measures such as tailored leave entitlements demonstrates good practice and can play a crucial role in supporting affected employees. Ultimately, these steps foster greater engagement, wellbeing, and retention, outcomes that benefit everyone involved in the employment relationship.

Want to know more?

If you have any questions, please contact our specialist [Employment Team](#).