

# MANAGEMENT COUNSEL

Employment and Labour Law Update



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## Let's Talk About Menopause – A Serious Medical Condition That Can Impact Workplace Operations

Though a natural phase of life that impacts a large portion of the population, menopause is rarely mentioned in most workplaces. As society in general more openly addresses the impacts of menopause, employers may want to do the same. Rather than wait until it's a legal obligation, organizations that proactively consider the challenges raised by menopause, and how to support employees during this period of their lives, are more likely to attract and retain the talent that helps keep them successful.



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### Understanding the impacts of menopause

Perimenopause and menopause typically occur between the ages of 45 and 55 and can last for several years; often when those experiencing menopause are in the prime of their careers and making the most valuable contributions to their organizations. Some women continue to experience menopause symptoms for the remainder of their lives. Hot flashes, fatigue, mood swings, disrupted sleep, and difficulty concentrating can temporarily impact an employee's ability to perform their job effectively. While not all those in menopause experience severe symptoms, those who do may require workplace accommodation. According to a study cited by the Harvard Business Review:

[n]early two out of every five women reported experiencing menopause symptoms that interfered with their work performance or productivity each week and contributed to burnout. Almost one in five had quit a job or considered quitting because of their symptoms, underscoring the reality that menopause is not an emotional issue that employers can simply wave off, but a serious medical condition that threatens workplace operations.

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## Legal obligations for employers

Although menopause is not listed as a protected ground under human rights legislation, Canadian human rights tribunals have indicated severe menopause symptoms could be considered a disability and have not ruled out menopause being considered a protected ground given its relationship to sex, age, and disability (all of which are protected grounds under provincial and federal human rights legislation).<sup>2</sup> For instance, failure to address menopause-related needs could be considered discriminatory on the basis of sex, and severe symptoms that significantly impair an employee's ability to work may qualify as a protected disability.<sup>3</sup>

As with any protected ground, employers must also be vigilant about preventing discriminatory or harassing behavior related to menopause. Comments, jokes, or dismissive attitudes can create a hostile work environment, leading to potential liability, including civil wrongful dismissal claims.

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## The business case for supportive practices

Beyond legal compliance, in an era where attracting and retaining talent can be critical to a company's success, it's simply good business to proactively address an issue that directly impacts half the population. Supporting employees through menopause can enhance workplace morale, productivity, and retention. Employees who feel valued and supported are more likely to remain loyal and engaged, reducing turnover costs and enhancing overall organizational performance.

In short, menopause is a workplace issue that demands thoughtful attention. By understanding its impact, complying with the prevailing legal framework, and implementing supportive practices, employers can create an inclusive environment where all employees can thrive and contribute.

## Best practices to support employees

To address menopause in a supportive and legally compliant manner, consider the following steps:

- 1. Raise Awareness:** Encourage open dialogue about menopause to reduce stigma. Provide training for managers

and human resources staff so they are able to address menopause-related issues sensitively.

- 2. Review Policies:** Review and update workplace policies to ensure they are flexible enough to apply to menopause-related accommodation.

- 3. Consider Flexible Work Arrangements:** The symptoms of menopause may manifest themselves differently in different people. A flexible schedule, remote work, or additional breaks are options to consider in assessing how to support employees experiencing symptoms that affect their productivity or comfort.

- 4. Adjust the Workplace:** Simple measures like adjusting the temperature, providing a fan, or creating a quiet space can make a significant difference for an employee dealing with hot flashes or fatigue.

- 5. Maintain Confidentiality:** Ensure that any discussion about menopause-related accommodation is handled with the utmost confidentiality and professionalism, consistent with other health-related accommodation.

- 6. Offer Mental and Physical Health Support:** Menopause can sometimes contribute to anxiety or depression. Providing access to an employee assistance program or mental health resource can be invaluable. An employer may also wish to engage resources to help educate employees about the various options available to address and reduce menopause symptoms.

If you have any questions about these issues or need assistance updating your workplace policies, contact any member of the Sherrard Kuzz LLP team or our firm at [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com).

<sup>1</sup> With thoughtful assistance from Anne Price.

<sup>2</sup> *Cloakey v Rio Tinto Alcan and Others*, 2016 BCHRT 111 (Tyshynski) (age, sex, and disability).

<sup>3</sup> *Munro v Labour Unlimited*, 2023 BCHRT 39 (Buday) (sex); *Grienke v Bethany Care Society*, 2021 AHRC 22 (Munn) (disability); *Lewis v Hour of Power Canada and Another*, 2018 BCHRT 251 (Ohler) (disability).



## DID YOU KNOW?

A worker employed in a position expected to exist for three months or more is considered “regularly employed” for the purposes of determining whether a joint health and safety committee is required under section 9(2)(a) of Ontario’s *Occupational Health and Safety Act*.



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## *Job Posting for “Qualified Woman” Not Discriminatory - Human Rights Tribunal of Ontario*

In *Horne v Public Service Alliance of Canada*,<sup>1</sup> the Human Rights Tribunal of Ontario dismissed an application in which a male applicant claimed a job posting for a “qualified woman” was discriminatory. The Tribunal

relied on section 14 of Ontario’s *Human Rights Code* (“Code”), which states that a “special program” designed to support disadvantaged groups is not discrimination under the *Code*. In this case, the disadvantaged group was women.

The decision is a good reminder of this oft-forgotten, but potentially beneficial, section of the *Code* that allows an employer to engage in action that might otherwise be prohibited (e.g., a hiring preference for an under-represented group), so long as the intended purpose of the distinction is to “relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity.”<sup>2</sup>

### What happened?

The Public Service Alliance of Canada (“PSAC”) posted for the position of Grievance and Adjudication Officer. The posting stated as follows:

As a result of the PSAC Workforce and Availability Analysis and in accordance with the PSAC Employment Equity Plan, the successful candidate for this appointment will be a **qualified woman**. [emphasis in original]

Horne – a male lawyer – applied to the position. He was not interviewed or hired for the position and filed an application at the Tribunal alleging discrimination on the basis of sex. Horne argued that “nothing about the position justified hiring women only and that gender was irrelevant.”

*[t]he Tribunal found PSAC’s Equity Plan constituted a “special program” under section 14(1) of the Code, intended to address the fact that women are “underrepresented and disadvantaged in the workforce as compared to men, especially in professional and management roles such as the one at issue in this Application.”*

In its defence, PSAC argued the decision to limit the position to women was consistent with its Employment Equity Plan and Gender Equity Task Force Report which sought to address under-representation of women in the workforce.<sup>3</sup> According to PSAC, this was a “special program” under section 14(1) of the *Code* which states as follows:

A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic

disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

PSAC also explained the process by which it decides whether to apply an equity designation to any position. When a position becomes vacant, PSAC conducts an equity analysis to identify gaps in workplace representation. The analysis considers data collected in the federal census, and Canada’s labour market, and compares that with the results of PSAC’s internal employee self-identification intake. PSAC’s human resources personnel then review this data to identify gaps for various equity-seeking groups and, if gaps are identified, add an equity designation for the position. In this case, the equity assessment suggested the position should be designated for a qualified woman candidate.

### The Tribunal’s decision

The Tribunal dismissed Horne’s application, finding PSAC did not discriminate against him on the basis of sex or any other protected ground.

Relying on the uncontradicted evidence before it, the Tribunal found PSAC’s Equity Plan constituted a “special program” under section 14(1) of the *Code*, intended to address the fact that women are “underrepresented and disadvantaged in the workforce as compared to men, especially in professional and management roles such as the one at issue in this Application.”

### Interesting Note

Horne also alleged PSAC’s Self-Identification Questionnaire was discriminatory because it posed several questions about a number of *Code*-protected characteristics, such as race, sexual orientation and disability. The Tribunal found the questionnaire was voluntary – not mandatory – and as such not discriminatory.

### Takeaways for employers

As noted above, the decision is a good reminder of this section of the *Code* that allows an employer to engage in action that might otherwise be prohibited, so long as the intended purpose of any distinction based on a protected ground (e.g., sex, gender, race, sexual orientation, disability) is to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity.

If you think this type of “special program” might apply in your workplace, reach out to your Sherrard Kuzz LLP lawyer (or [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com)) to ensure your policies and programs meet the necessary requirements, including having a defensible rationale, supported by compelling evidence.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com).

<sup>1</sup> 2024 HRTO 1788.

<sup>2</sup> *Human Rights Code*, RSO 1990, c H.19, s 14.

<sup>3</sup> PSAC submitted unchallenged evidence of historic and continuing under-representation of women in the workforce.

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## HReview Seminar Series

### Terminating Employment ~ Key Considerations and Best Practices

In recent years, courts appear to be on a mission to strike down a range of termination provisions to the benefit of employees. Even the most experienced HR leaders have found themselves puzzled about what to do next. Join us at this HReview webinar as we discuss:

#### 1. Employment Agreement Language

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  - c. Workplace policies and employee handbooks.

#### 2. Constructive Dismissal

- What is constructive dismissal?
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#### 3. Terminating the Right Way

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- What should you say in a termination meeting? What not to say.
- When and how to protect your business with a non-disparagement clause.
- How to respond to a Service Canada inquiry about an employee's termination.

#### 4. Terminating the Wrong Way

- Recent trends in “bad faith” damages.

**DATE:** Wednesday, June 4, 2025; 9:00 a.m. – 10:30 a.m.

**WEBINAR:** Via Zoom (registrants will receive a link the day before the webinar)

**COST:** Complimentary

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