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## ARTICLE

### **The Blood on Employers' Hands: Menstruation and Menopause Discrimination in New Zealand Contexts**

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This article considers discrimination in employment resulting from adverse treatment due to menstruation and menopause. It primarily considers case law, empirical research, and legal and policy responses in comparable jurisdictions, intending to underscore similar issues and solutions in New Zealand. It outlines why claims for discrimination by menstruating and menopausal women are suppressed and why there are miscarriages of justice when claims are successfully raised. After analysing the existing framework for menstrual discrimination in New Zealand, this article considers potential legislative solutions that may prevent and offer redress to existing causes of menstrual discrimination, including assessing menstrual leave provisions and the existing scope of sex discrimination within employment law. New Zealand has yet to consider menstruation or menopause discrimination in an employment law context. As such, this article is both relevant to broader discussions of workplace equality and novel in examining New Zealand women's issues.

#### **I Introduction**

On any given day, over 800 million women across the world are menstruating.<sup>1</sup> The average woman will menstruate monthly for approximately forty years, throughout much

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\* LLB, University of Auckland. I wrote this article while living with endometriosis, and while this article was being edited, I began chemical menopause. These experiences have drawn me ever close to the stories of wahine at the heart of this research; this article is dedicated to them and their immense fortitude. My kindest regards must also go to Simon Schofield, Professional Teaching Fellow at the University of Auckland, whose thought-provoking lectures and discussions with me regarding discrimination in employment stirred my initial interest in this topic.

<sup>1</sup> Aishwarya Rohatgi and Sambit Dash "Period poverty and mental health of menstruators during COVID-19 pandemic: Lessons and implications for the future" (2023) 4 *Front Glob Womens Health* 1 at 1.

of which they are likely to be employed.<sup>2</sup> Despite women making up a significant proportion of the workforce, they still often find themselves marginalised by their employers.<sup>3</sup> The social stigma surrounding menstruation and menopause allows this form of sex discrimination to compound, both in the workplace and in the legal sphere.

Under s 21(1)(a) of the Human Rights Act 1993 (HRA), sex is a prohibited ground of discrimination, which is mirrored in s 105(1)(a) of the Employment Relations Act 2000 (ERA). In New Zealand, an employee may choose to bring a claim for sex discrimination through the Employment Relations Authority under s 104 (by raising a personal grievance under s 103(1)(c)), or before the Human Rights Review Tribunal under s 22 of the HRA. These sections are substantively similar in their definitions of unlawful discrimination in employment; however, in *Air New Zealand Ltd v McAlister*, the Supreme Court noted:<sup>4</sup>

The principal difference arises out of the fact that [s 22 of the HRA] deals with hiring practices, whereas [s 104 of the ERA] governs those already in employment relationships.

An election must be made by the employee at the outset of the process as to whether to bring their claim through the Employment Relations Authority or the Human Rights Review Tribunal.

This article is intended to provide an overview of menstruation and menopause discrimination in the workplace, discussing how inadequacies in the law and workplace culture lead to insufficient protections for menstruating and menopausal women.<sup>5</sup> Part II discusses the nature of this discrimination in New Zealand. Part III analyses two potential opportunities for law reform. Part IV provides a conclusion.

## II The Issue

This Part theorises that menstruation and menopause discrimination in employment is reinforced through two core practices. First, through a conservative social dynamic, discussed in Part II(A), which pressures women to conceal their menses and menses-related symptoms at work. Secondly, through poor outcomes in the courts, discussed in Part II(B), women have been unsuccessful in sex discrimination cases on a narrow legal interpretation of the comparator test. These two practices are interlinked: as few women are successful in the courts, other women hide their menses and suppress similar experiences with discrimination. This propagates a self-enforcing cycle where attitudes to menstruation and menopause fail to progress in the workplace, keeping widespread stigma about women's health intact and the diverse needs of the majority of working-aged women silenced.

### *A Suppression of menstruation and menopause in the workforce*

Women who menstruate or experience menopause often experience an array of disruptive physical symptoms: headaches, insomnia, hot flushes, nausea, back pain,

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2 At 1.

3 Anne-Marie Mooney *Gender Injustice: An International Comparative Analysis of Equality in Employment* (Ashgate, Abingdon (UK), 2004) at 102.

4 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [22].

5 The term "women" will be used throughout this article for consistency, however not all those who menstruate identify as women: intersex and transgender individuals can also menstruate.

cramping, incontinence and dizziness.<sup>6</sup> Such symptoms have been compared to sickness, including influenza, with a woman's experience during her menses often being termed "the period flu".<sup>7</sup> Despite the usually debilitating nature of such symptoms, many women continue to work through these experiences, as menstruation and menopause remain socially viewed as an ailment to be contained.<sup>8</sup> For example, an Air New Zealand employee experienced severe menopause symptoms for over a decade, and despite her suffering, she commented that she "would never tell [her] bosses".<sup>9</sup> She connects this to overhearing the President of her union tell a group of women that "if [they] ever used their menstrual cycles as an excuse to take time off from work, [they] would never have equality in the workplace". Similarly, a New Zealand builder admitted that she had never told a man on site that she was menstruating because "they would never socially accept that".<sup>10</sup> She added that if she took sick leave for menstruation, she would be met with harsh judgement. Interestingly, the experiences of these two women in isolation at least suggest that suppression of menses-related symptoms may be likewise commonplace in traditionally male-dominated industries like construction, and in working environments with a closer gender balance, like travel and tourism.

Indeed, the experiences of these two women are far from isolated, as the pressure on women to hide their menses and their often life-altering symptoms sits hand in hand with a culture of presenteeism in the workplace. A recent study in The Netherlands reported that the average productivity loss of menstruation-related presenteeism sits at 33 per cent, a mean loss of 8.9 working days annually.<sup>11</sup> Women must pretend to be well despite their menses in employment as "... women are more successful ... if they appear unencumbered by their menses".<sup>12</sup> Women don their uniforms and work while bleeding, sweating, aching and suffering. Ironically, this ongoing suppression of menstruation and menopause symptoms has the consequence of limiting workplace productivity and capital growth.<sup>13</sup> Both women and employers thus fail to achieve desirable outcomes.

Further, there is a risk that women who suppress symptoms of menopause and menstruation might also remain silent if they experience workplace discrimination. The adverse outcomes for women who do pursue legal action are likely to deter other women from making such claims, as "inappropriate legal responses can reinforce stereotypes of

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6 Clearblue "10 period symptoms: everything you need to know" (24 February 2023) <[www.clearblue.com](http://www.clearblue.com)>; Southern Cross "Menopause" (May 2019) <[www.southerncross.co.nz](http://www.southerncross.co.nz)>; Online Menopause Centre "Menopause Nausea – What are the Causes and Treatments?" <[www.onlinemenopausecentre.com](http://www.onlinemenopausecentre.com)>; My Menopause Centre "Menopause and dizziness" <[www.mymenopausecentre.com](http://www.mymenopausecentre.com)>; and Kimberly Holland "What to do About Menopause-Related Insomnia" (13 November 2023) Healthline <[www.healthline.com](http://www.healthline.com)>.

7 Crestwood Medical Center "Is it the 'Period Flu'?" (2023) <[www.crestwoodmedcenter.com](http://www.crestwoodmedcenter.com)>.

8 Kellie Scott "#MenstruationMatters: Taboo around menstruation causing women shame, researcher says" (25 May 2016) ABC News <[www.abc.net.au](http://www.abc.net.au)>.

9 Yvonne Van Dongen "Hot topic: menopause in the workplace" Employment Today (online ed, New Zealand, August 2014).

10 Maggie Shui "Tradies just wanna have sanitary bins at work" (8 June 2023) 1 News <[www.1news.co.nz](http://www.1news.co.nz)>.

11 Mark E Schoep and others "Productivity loss due to menstruation-related symptoms: a nationwide cross-sectional survey among 32748 women" (2019) 9(6) BMJ Open 1 at 1.

12 Jill M Wood "(In)Visible Bleeding: The Menstrual Concealment Imperative" in Chris Bobel and others (eds) *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, Singapore, 2020) 319 at 328.

13 See, for example, Amelia K Mardon and others "Problematic Periods Costing Young Women—The Impact of Menstrual Symptoms on Work and Study" (2024) 65 ANZJOG 535.

women as unreliable, disruptive or uncompliant".<sup>14</sup> When women hear about unsuccessful litigation, they are less likely to raise such matters themselves, deeming the risk too high. One such risk is privacy.<sup>15</sup>

Perhaps the most telling explanation for the dearth of case law is that menstruation is ultimately a private health matter. Disclosing private health conditions in the public record is daunting and may prevent many, if not most, individuals from pursuing claims altogether.

More research is needed to determine the extent of this discrimination across the workforce, asking women about their experiences with past and current employers in relation to menstruation and menopause. This research should be conducted externally rather than by the employer, as women may fear that concerns they raise will be used against them. Regardless, the limited case law is likely unreflective of the true nature of menstruation and menopause discrimination in New Zealand, where women are implicitly trained to hide their symptoms: to work through severe pain, discomfort, and bleeding, all with a smile on their face.

#### B *When claims are made*

Claims for menstruation or menopause discrimination are rare across all jurisdictions, compounded by cultural stigma. However, some case law exists and can be used to examine a flaw that persistently prevents claims from succeeding: the unclear comparator group for menstruating or menopausal women.

One of the earliest decisions was heard in the United States in *Harper v Thiokol Chem Corp*.<sup>16</sup> The case concerned whether the employer's unwritten medical policy requiring women to have a "normal menstrual cycle" before returning to work was discriminatory. The employee, Ms Harper, suffered a miscarriage and was cleared to return to work. However, due to an "abnormal menstrual cycle", she was dismissed following the expiry of her maternity leave. The Court held Ms Harper's dismissal was unlawful as she was effectively denied employment opportunities because a burden was imposed on her as a woman that men need not suffer.<sup>17</sup> Here, the Court recognised that a menstruating woman cannot be compared to a man who has no equivalent biological experience.

However, the Court in *Harper* may have been lenient with the finding of sex discrimination because Harper had a miscarriage, and thus could connect her discrimination to the protected characteristic of pregnancy and childbirth.<sup>18</sup> This protected characteristic is also a feature of the New Zealand statutes.<sup>19</sup> Conversely, in *Jirak v Federal Express Corp*, it was held that there was no legal basis for discrimination for a menstruating woman suffering menstrual cramps, as "... menstrual cramps are not a medical condition

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14 Beth Goldblatt and Linda Steele "Bloody unfair: Inequality related to Menstruation—Considering the Role of Discrimination Law" (2019) 41(3) Syd LR 293 at 306.

15 Hilary H Price "Periodic Leave: An Analysis of Menstrual Leave as a Legal Workplace Benefit" (2022) 74(2) Okla L Rev 187 at 207.

16 *Harper v Thiokol Chem Corp* 619 F Supp 2d 489 (5th Cir 1980).

17 At 492.

18 At 491.

19 Employment Relations Act 2000, s 105(1)(a) and (2); and see also Human Rights Act 1993, s 21(1)(a), that specifically includes "pregnancy and childbirth" as part of the prohibited ground of discrimination of sex.

related to pregnancy or childbirth".<sup>20</sup> Women whose claims fit within the narrow protection of pregnancy and childbirth where the comparator group is clear may accordingly be more likely to have success.

This assumption was affirmed in the recent United States decision in *Coleman v Bobby Dodd Institute Inc*.<sup>21</sup> Coleman, a worker at a call centre, was suffering from heavy bleeding during pre-menopause. She bled through her clothing onto the employer's furniture and was given a formal warning. Eight months later, despite wearing sanitary protection, Coleman again bled onto company property. She was dismissed for poor hygiene and brought a claim for sex discrimination under Title VII of the Civil Rights Act.<sup>22</sup> She was unsuccessful as she failed the Court's interpretation of the comparator test: Coleman could not prove that a man with faecal incontinence would not have also been dismissed for "soiling" company property.<sup>23</sup> Though initially planned for appeal, a settlement was reached.

There are two problems with the comparator in *Coleman*. First is the Court's willingness to use faeces as a comparator to menstrual blood; as such, a comparator ensures that "menstrual blood elicits disgust, hate, and revilement and necessitates containment and sanitization [sic]".<sup>24</sup> Secondly, this comparator appears to involve one party without a disability and one with a disability. In most cases, menstruation is a regular part of a woman's life.<sup>25</sup> There was no argument from Coleman to suggest that her heavy menses were due to any disability. However, for a man with faecal incontinence to soil company property, he presumably would have had a medical condition (a protected characteristic in Title VII) that caused frequent and unpredictable bowel movements. This does not give rise to a fair comparator.

As seen in *Coleman*, New Zealand sex discrimination claims also require successful passing of the comparator test, since under s 21 of the HRA:<sup>26</sup>

... differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.

The central issue with menstruation and menopause-related discrimination cases is that there is no clear comparator. Some cases, like *Harper*, take a progressive approach to a comparator, recognising that a man has no equivalent biological experience to menstruation or menopause.<sup>27</sup> However, these decisions seem only to apply where a woman can fit her experience of menstruation or menopause within the context of pregnancy, a protected characteristic.<sup>28</sup> Conversely, in *Coleman*, the best comparator the Court could establish to a bleeding woman was a man with incontinence.<sup>29</sup>

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20 *Jirak v Fed Exp Corp* 805 F Supp 193 (SD NY 1992) at 195.

21 *Coleman v Bobby Dodd Institute Inc* No 4:17-CV-00029, 2017 WL 6762403 (11th Cir 2017).

22 Civil Rights Act 42 USC § 2000e.

23 *Coleman*, above n 21, at [5].

24 Ela Przybylo and Breanne Fahs "Feels and Flows: On the Realness of Menstrual Pain and Crippling Menstrual Chronicity" (2018) 30 FF 206 at 207.

25 It must be acknowledged, however, that some women experience medical conditions that impairs menstruation and menopause.

26 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

27 *Harper*, above n 16.

28 *Jirak*, above n 20.

29 *Coleman*, above n 21.

Any indication of how the New Zealand tribunals and courts might address a comparator in a claim for menstruation or menopause discrimination remains unclear. In 2022, a woman named “Sarah” made a complaint to the Human Rights Commission on the basis of sex discrimination, claiming that her employer discriminated against her after taking one day of sick leave for menstruation. However, the claim was settled privately.<sup>30</sup> The employer was never named. Perhaps worse than providing significant financial compensation to an employee would be the reputational loss suffered by the employer. Here, the employer could avoid media scrutiny by a settlement, leaving both New Zealand law unclear and the employer’s name unsoiled.

In other jurisdictions, cases of sexual harassment, rather than sexual discrimination, regarding menstruation have been more successful. In *Baker v John Morell & Co*, Baker was successful in claiming sexual harassment under Title VII after being refused access to the bathroom, leading to her bleeding through her clothes.<sup>31</sup> However, *Baker* concerned a wide array of harassment claims, including comments of a sexual nature and the claimant’s protected medical condition under Title VII. Likewise, in the United Kingdom, the claimant in *Best v Embark on Raw Ltd* successfully argued that she was harassed on the grounds of both sex and age in response to her employer’s unwanted comments about her going through menopause.<sup>32</sup>

However, such cases could not be brought in New Zealand, as “discrimination on the basis of sex is a concept which is separate and distinct from sexual harassment in the workplace”.<sup>33</sup> Sexual harassment is limited under s 108 of the ERA to “sexual intercourse”, “sexual contact”, “sexual activity”, or other conduct “of a sexual nature”.<sup>34</sup> This limits a successful claim, as in *Baker*.<sup>35</sup> Similarly, *Best* was based upon provisions in the Equality Act 2010, which imposes obligations on employers that there are no equivalent to in New Zealand.<sup>36</sup>

### III Legislative Reform

This Part discusses two options for legislative reform: first, in Part III(A), whether New Zealand should legislate a menstrual leave provision under the Holidays Act 2003 (HA); and secondly, in Part III(B), whether New Zealand should make menstruation and menopause a protected characteristic under s 21(1)(a) of the HRA.

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30 Josephine Franks “Woman criticised by manager for taking sick day for period pain settles complaint” (24 February 2022) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

31 *Baker v John Morell & Co* 382 F Supp 3d 816 (8th Cir 2004).

32 *Best v Embark on Raw Ltd* [2022] UKET 3202006/2020.

33 See Brian Grosman and John Martin *Discrimination in Employment in Ontario* (Canada Law Book Incorporated, Canada, 1994) at 90. This source concerns Ontario, but the law is similar in New Zealand, with sexual harassment and sex discrimination treated distinctly in the Employment Relations Act. “Discrimination”, including sex discrimination, can be raised as a personal grievance under s 103(1)(c), whereas “sexual harassment” can be raised as a personal grievance under s 103(1)(d).

34 Employment Relations Act, s 108.

35 *Baker*, above n 31.

36 *Best*, above n 32, at [42]; and Equality Act 2010 (UK), s 26.

### *A Menstrual leave provisions*

Any accommodation for menstrual leave in New Zealand would best sit under subpart 4 of the HA, which deals with sickness and bereavement leave. It would follow s 62 of the HA, which serves “to provide all employees with a minimum entitlement to paid leave in the event of their sickness or injury”.

Whether or not menstrual leave should be specifically provided for in New Zealand law is a contentious issue. Proponents argue that such a legislative provision would foster awareness of women’s menstrual health in the workplace, encouraging positive relationships between employers and their menstruating and menopausal employees.<sup>37</sup> Currently, employers may individually enact menstrual leave provisions, though few do. Pasifika Media Network (PMN) became the first New Zealand workplace to openly instil a menstrual leave policy, providing employees with 12 paid days of menstrual leave each year.<sup>38</sup> PMN adopted the provision stating that it was “an opportunity to dismantle the fakamā or shame around menstruation and menopause”. This sentiment is certainly commonplace among those who advocate for entitlements to menstrual leave, arguing that such a policy would push back against cultural silence of menstruation and menopause.<sup>39</sup>

However, critiques of menstrual leave are commonplace, with many arguing that such legislation is benevolently sexist.<sup>40</sup> Feminists against menstrual leave point to the patriarchal undertones of its adoption in other countries. For example, Zambia refers to menstrual leave as “Mother’s Day”, attaching the concept to child-rearing and domesticity.<sup>41</sup> Likewise, Japan uses menstrual leave as a “barometer” for reproductive ability and advises women to take leave to “protect their future motherhood”.<sup>42</sup>

Many feminists also fear that legislating for menstrual leave would create privacy issues. To take menstrual leave, women will first have to reveal they are menstruating, which “could activate objectification, sexism, and discrimination, even if at an implicit level”.<sup>43</sup> “Sarah”, who complained to the Human Rights Commission, was criticised simply for revealing to her employer that she had used a day of sick leave for menstruation.<sup>44</sup> Evoking a menstrual leave provision without considering the judgement and stigma that may arise would be unwise. Privacy concerns are also likely to be more harmful to intersex or transgender individuals, who may not wish to “out” themselves by revealing that they menstruate.<sup>45</sup>

Beyond direct discrimination, women who use menstrual leave might be discriminated against in indirect ways.<sup>46</sup> Poorly enacted menstrual leave policies might silently reinforce the glass ceiling. Women who take time off work for menstrual leave may be deemed

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37 Rachel Levitt and Jessica Barnack-Tavlaris “Addressing Menstruation in the Workplace: The Menstrual Leave Debate” in Chris Bobel and others (eds) *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, Singapore, 2020) 561 at 567.

38 Sela Jane Hopgood “How a Pasifika media company came to be a leader in the menstrual leave movement” (7 April 2022) The Spinoff <[thespinoff.co.nz](http://thespinoff.co.nz)>.

39 See Part II(A). See also Jeffrey Fermin “What Is Menstrual Leave And Why The US Should Adopt It” (28 February 2023) AllVoices <[www.allvoices.co](http://www.allvoices.co)>.

40 Levitt and Barnack-Tavlaris, above n 37, at 566.

41 At 563.

42 At 562.

43 At 568.

44 Franks, above n 30.

45 Levitt and Barnack-Tavlaris, above n 37, at 568.

46 See Human Rights Act, s 65.

lesser employees by their co-workers and supervisors, failing to be considered for promotions and other career opportunities due to periods of what may be viewed as unexplained or unnecessary absenteeism.<sup>47</sup> The model of the ideal worker who works eight-hour days, five days a week, irrespective of personal and domestic needs, reflects this. The attitude of an Air New Zealand union president that there would “never be equality in the workplace” if women took time off while menstruating or menopausal supports this rhetoric.<sup>48</sup> In addition, men could use women’s absences to further their resources and appear to be more valuable, committed workers, able to put in long hours and perform as the “ideal worker” must. As a result, women may be hesitant to take menstrual leave, as “the existence of menstruation leave does not necessarily improve working conditions for women if women fear that using such leave will disadvantage their prospects of workplace advancement”.<sup>49</sup> Given the heavy stigma that currently surrounds menstruation and menopause, legislating for menstrual leave in New Zealand could have unintended consequences and result in further obstacles to women’s equality in employment.<sup>50</sup>

#### B Menstrual leave provisions

Under the current legislative framework, there is a significant disparity in the treatment of menstruation and menopause compared to pregnancy and childbirth. Pregnancy and childbirth are specifically protected characteristics under s 21(1)(a) of the HRA.<sup>51</sup> New Zealand should consider amending this section to protect menstruation and menopause as a prohibited ground of discrimination. A United Kingdom working report on menopause recommended that:<sup>52</sup>

... a new protected characteristic ... would provide direct and clear protection to those experiencing discrimination because of menopause and recognise the impact of menopause on the lives of working women and others who experience it.

The same principle should extend to both menstruation and menopause, where the experiences of women are substantively similar and interlinked.

Two reasons support adding these prohibited characteristics. First, this would clarify the comparator test to be applied in determining discrimination. As a common law jurisdiction, New Zealand largely depends on precedents to determine case outcomes. No recorded cases exist in New Zealand, so the courts will likely look to overseas approaches, such as the narrow comparator applied in *Coleman*.<sup>53</sup> Other claimants may continue to experience adverse outcomes where they cannot confine their claim of sex discrimination within the protected characteristics of pregnancy and childbirth, as in *Jirak*.<sup>54</sup>

If menstruation and menopause were made protected characteristics, such cases of discrimination would only have to overcome the question of whether claimants have

47 See generally Joan Williams *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, New York, 2001) at 2.

48 Van Dongen, above n 9.

49 Goldblatt and Steele, above n 14, at 308.

50 See Part II(A).

51 Mirrored in the Employment Relations Act, s 105(1)(a).

52 House of Commons: Women and Equalities Committee *Menopause and the workplace: First Report of Session 2022-23* (HC 91, 28 July 2022) at [92].

53 *Coleman*, above n 21.

54 *Jirak*, above n 20.

suffered a material disadvantage on the grounds of menstruation or menopause. This removes the inherent inadequacy of an individualised, court-imposed comparator, where “... little direction emerges as to the[ir] formulation”.<sup>55</sup> For example, under the current protection of s 21(1)(c), the appropriate comparator for a pregnant employee is a non-pregnant employee.<sup>56</sup> Adding menstruation and menopause would set out the comparator: a non-menstruating employee in the same circumstances. Women would no longer have to contort their claims to fit within the protected characteristics of pregnancy or childbirth, or be forced to subject their case to the social appreciation of the presiding decision-maker in their application of the comparator test.

Secondly, introducing these protected characteristics would benefit women and employers more broadly. Legislation specifically recognising these interests would make it easier for both employees and employers to be alert to this type of sex discrimination when it occurs. For example, it is widely understood that comments by an employer that they would not offer a promotion to a pregnant employee because of their pregnancy would likely constitute sex discrimination. However, comments like those made to “Sarah”, berating her for taking a day of sick leave for menstruation, might not be viewed by employers or employees as meeting the same standard.<sup>57</sup> Directly protecting menstruation and menopause makes it clear to employers and employees alike that these comments and actions are sex discrimination and should be treated as such. Including additional protections for women only on the grounds of pregnancy and childbirth is archaic. It reinforces aged, misogynistic stereotypes of a woman’s role as a mother and domestic labourer. Additional comparators should not only apply to women who conceive and give birth, while menstruating and menopausal women are forced to sit in courtrooms. It should go without saying that their experience of bleeding cannot be compared to a man defecating.<sup>58</sup> Such new protected characteristics would be justifiable based on clarity and fairness.

### C Policy reform

Outside the scope of legislative reform, employers would be well served to implement policy changes on an individualised, flexible basis to better support menstruating women. The inevitable problem with such considerations is that they might turn entirely on the social or cultural whims of the employer.<sup>59</sup> Further, many employers may resist making positive accommodations due to cost burdens.

However, there is a strong argument for employers to enact substantive policies for menstruating women in their workplace. Employers that are among the first to enact such positive accommodations would receive a strong reputational benefit and could be more likely to attract capable, educated women into their workplaces. Many such policy accommodations, though requiring some initial expenditure, would reduce absenteeism and presenteeism in the workplace, benefiting the employer financially. Such policy implementations might include offering employees the opportunity to have flexible

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55 Asher Emanuel “To whom will ye liken Me, and make Me equal? Reformulating the Role of the Comparator in the Identification of Discrimination” (2014) 45 VUWLR 1 at 11.

56 *Beauchamp v B & T Co* (2011) Ltd [2022] NZHRRT 10 at [21].

57 *Franks*, above n 30.

58 *Coleman*, above n 21.

59 See for example *Schmidt v Solis* 891 F Supp 2d 72 (DC 2012) at 81, where an American employer granted the plaintiff flexible working conditions for endometriosis, then revoked these conditions later with no notice.

working arrangements relating to menstruation or menopause in their independent or collective employment agreements. Currently, under s 69AAB of the ERA, an employee may apply for flexible working arrangements at any time, but the grounds for employers to refuse such accommodations are broad.<sup>60</sup>

Employers would be well-served to accommodate all employees, not just menstruating women, with the opportunity for flexible working arrangements.<sup>61</sup> Such arrangements will likely increase productivity, job satisfaction and employee health and well-being. Notably, this will not apply to all workplace industries, particularly those in retail, hospitality and trade.<sup>62</sup>

In striving to run more modern workspaces and provide better working conditions, employers must move in a way that considers the needs of women. Such policy changes make sense in a post-pandemic world where the nature of the workplace is changing.<sup>63</sup> Employers who do not act risk marginalising women in their ranks. They should rethink their workplace environment and current accommodations for menstruating and menopausal women, to foster healthier and more supportive environments for them at work—but also to prevent what may well be protracted and complex discrimination cases from arising.

#### IV Conclusion

Despite how nebulously New Zealand law currently treats menstruation and menopause discrimination in the workplace, a variety of solutions are available. This article has argued that the social attitudes that force women to hide their menses in employment, and the unsuccessful application of the comparator in existing case law, can be addressed by legal reform. Adding menstruation and menopause as protected characteristics under s 21(1)(a) of the HRA would pose fewer challenges than a statutory menstrual leave provision while working towards the same goal of enhancing equality for women in the workplace. However, regardless of legal outcomes, employers should adopt their own policies and consultation processes to better support menstruating and menopausal women. Employers and legislators alike should be reminded that “[t]he position of women will not be improved as long as the underlying causes of discrimination against women ... are not effectively addressed”.<sup>64</sup>

60 See Employment Relations Act, s 69AAF.

61 House of Commons: Women and Equalities Committee, above n 52, at [49].

62 Price, above n 15, at 221.

63 Stephanie Dhue “Hybrid work is the new normal, as companies rethink work habits and office and retail space” (13 July 2023) CNBC <[www.cnbc.com](http://www.cnbc.com)>.

64 *Report of the Committee on the Elimination of Discrimination against Women* UN Doc A/59/38 (Part 1) (18 March 2004) at 81.