Is “long Covid” a disability?

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With an estimated 1.8 million people in the UK now suffering with long Covid, employers need to consider how to manage staff with the condition. In this article, we explain why long Covid may qualify as a disability (despite some confused guidance from the EHRC) and the steps that employers should take as a result.

What is a disability?

The Equality Act 2010 defines what "disability" means for the purposes of discrimination in the workplace. A small number of conditions are automatically deemed to be disabilities. These are blindness, certain forms of sight impairment, severe disfigurement, cancer, HIV, and multiple sclerosis.

However, in most cases, the relevant questions for establishing whether a person is disabled are:

- Does the person have a physical or mental impairment?
- If yes, does this have an adverse effect on their ability to carry out normal day-to-day activities?
- If yes, is the adverse effect substantial?
- If yes, is the adverse effect also long-term (e. has lasted more than 12 months, or is likely to last more than 12 months)?

It is not necessary for an impairment to have a medically diagnosed cause. This is because it is the effect of the impairment that matters rather than the cause.

"Normal day-to-day activities" are the things people do on a regular or daily basis, such as shopping, eating, reading, writing, walking, travelling, and taking part in social activities. Deciding whether an impairment has an adverse effect on such activities is usually straightforward.

The more difficult question will usually be whether the adverse effect is "substantial". The Act simply says that "substantial" means more than minor or trivial. Where it is

not clear whether an adverse effect is more than minor or trivial, a number of factors should be considered, including the time taken to complete a task and the way in which it is carried out. In most cases, medication or coping mechanisms which improve or hide the impact of a condition should be ignored.

What is "long Covid"?

After being infected with Covid, most people find that their symptoms resolve within four weeks. However, some people experience symptoms for longer periods. "Long Covid" is a shorthand term used to describe symptoms that continue after the acute phase of a Covid infection. The NHS **Your Covid Recovery** webpage states that long Covid can take two forms:

- **Ongoing symptomatic Covid:** this is where symptoms continue for more than four weeks but fewer than 12 weeks.
- **Post Covid syndrome:** this is where symptoms continue for more than twelve weeks and cannot be explained by another condition

There are many symptoms of long Covid, and the particular combination of symptoms experienced will vary from person to person. The most commonly reported symptoms include the following:

• Breathlessness • Cough • Chest tightness • Chest pain • Palpitations • Fatigue • Fever • Pain • Cognitive impairment (‘brain fog’, loss of concentration or memory issues) • Headache • Sleep disturbance • Pins and needles or numbness • Dizziness	• Abdominal pain • Nausea • Diarrhoea • Weight loss • Joint pain • Muscle pain • Symptoms of depression • Symptoms of anxiety • Tinnitus • Earache • Sore throat • Loss of taste and/or smell • Skin rashes

There is currently no test available to diagnose long Covid and nor are any drug treatments available. Treatment of long Covid is focused on managing symptoms and increasing activity.

Could long Covid be classified as a disability?

The simple answer is: “Yes, but not always”.

In May 2022, the Office of National Statistics (**ONS**) **estimated** that about 1.8 million people in the UK (about 2.8% of the population) have long Covid, with 73% reporting symptoms lasting for 12 weeks or more, 44% reporting symptoms lasting a year or more and 13% reporting symptoms lasting two years or more. Of the 1.8 million, 67% said it had affected their day-to-day activities, with 19% reporting that it had done so in a significant way.

Therefore, a subset of those with long Covid are experiencing symptoms which are having a significant effect on their day-to-day activities, and which have lasted (or are likely to last) for 12 months or more. That being the case, it seems

highly likely that at least some people with long Covid will pass the disability test outlined above and so be protected from discrimination in the workplace. Indeed, in the recent case of **Matthews v Razors Edge Group Ltd**, an Employment Tribunal accepted that an employee was disabled by reason of long Covid.

Yet, on 7 May 2022, the Equality and Human Rights Commission (**EHRC**) – the body responsible for providing guidance on the Equality Act 2010 – tweeted that long Covid should not be treated as a disability. The tweet said that "Without case law or scientific consensus, EHRC does not recommend that "long Covid" be treated as a disability". The post was surprising given that we know that disabilities do not need to have a medically diagnosed cause and that the test focuses on the effect of the impairment on the individual. The ONS figures demonstrate that some people with long Covid are experiencing significant effects on their day-to-day activities, meaning that they might qualify as disabled.

Unsurprisingly, the tweet provoked consternation in many quarters, including amongst those working in the medical and HR arenas. On 9 May 2022 the EHRC issued a "clarificatory" **statement**. The statement said that long Covid was not a deemed disability and, therefore, not all cases of long Covid will pass the disability test. However, it went on to say: "This does not affect whether long Covid might amount to a disability for any particular individual – it will do so if it has a substantial and long-term adverse effect on their ability to carry out normal day to day activities." The statement went on to recommend that employers apply guidance on making reasonable adjustments for disabled people.

So, the EHRC got to the right answer in the end, namely that some people with long Covid may be disabled. The individual will have to pass the four elements of the disability test discussed above. For many, their symptoms will not be serious enough, or sufficiently long-term, but a cohort of unfortunate

people may well pass the test.

What should employers do if a worker has long Covid?

If you know, or suspect, that a worker has long Covid, then you should tread carefully given that they may be disabled. If they are disabled, they will be protected against various forms of disability discrimination. In addition, you would be under a positive duty to make reasonable adjustments for them. This duty arises if they are substantially disadvantaged in comparison to non-disabled persons by either a provision, criterion or practice operated by you, a physical feature of the work premises or the absence of an auxiliary aid. A failure to make reasonable adjustments is discriminatory and gives rise to a separate discrimination claim.

Given these risks, employers should ensure that they take the following steps:

- **Investigate:** gather as much information as possible to understand the worker's health. This includes GP certificates, correspondence, and notes of your own interactions with the worker and notes of any return-to-work meetings. It is advisable to reflect on this at an early stage and keep the position under review. This is especially the case where you are considering taking action against someone for something that may be caused by disability (for example, issuing a warning for high levels of sickness absence).
- **Decide when to obtain specialist advice:** consider carefully when its right to obtain specialist occupational health advice. Depending on the facts, it may be appropriate to wait, but the position should be kept under regular review. As time goes on, the individual's condition may evolve from one which does not meet the disability test, to one that does.
- **Give clear instructions when seeking specialist advice:**

when instructing specialist advisers, take care to summarise accurately the knowledge of the worker's health and ask the adviser to provide a view on whether the individual is disabled by reference to the different elements of the disability test in the Act.

- **Follow up where necessary:** where the specialist advice is imprecise, incomplete or contradicts other evidence, this should be followed up and further advice sought. This is a particular risk in relation to long Covid, where knowledge of the condition is still in its early stages. Crucially, occupational health reports should not be viewed as determinative, but should be treated as part of the overall picture.
- **Be pragmatic and don't be afraid to make adjustments**: making adjustments will not necessarily be viewed as a concession of disability status and may help to resolve the issue in hand. Where you have information which suggests that the individual may be disabled, it would be sensible to address the issue of adjustments in a proactive way. For those with long Covid, this may include things like:

- adjusting the trigger for disciplinary action in sickness absence policies;
- offering a phased return from a period of sickness absence;
- providing additional rest breaks;
- agreeing flexible working arrangements such as part-time hours and/or homeworking;
- changing the worker's job role and/or adjusting their workload; and/or
- providing access to a counsellor.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss your Covid strategy or any other issues relating to the content of this article, please contact Principal Knowledge

Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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