

Long Covid

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Long Covid

This condition is still very much in its infancy and medical experts are learning more about the long-term effects of Covid-19 all the time. It does appear that long Covid can involve physical and mental conditions. In cases where an employee has been diagnosed with long Covid, it is recognised that the circumstances are harder to deal with than 'simple' Covid-19 absences, and most will be for significantly longer periods.

Is it a disability?

Does the impairment have a substantial (i.e. more than trivial), long-term (i.e. has it lasted or is likely to last at least 12 months) and adverse effect on the individual's ability to carry out normal day-to-day activities?

The long-term component must be in effect at the time that any alleged acts of discrimination are committed. Here, the biggest challenge is likely to be the fact that long Covid is a new condition – and therefore whether it would be likely to last more than 12 months is unclear at the moment. How long an individual has suffered already, as well as the severity of their ongoing symptoms, will clearly be relevant. As time moves on and there is more evidence that long Covid can have significant effects for months rather than weeks, it is becoming more likely that an employee will be able to establish that it is a condition that would be likely to last more than 12 months.

By normal day-to-day activities we mean everyday tasks, but they can include work-related matters. One of the issues is that long Covid is a condition which appears to affect people in different ways. Those who have been worst affected would clearly have their day-to-day activities impacted; in more minor cases, there may still be a dispute as to the impact on day-to-day activities.

Any medical treatments (for example, anti-depressants or anti-anxiety medication) must be ignored – what effects would there be but for the medication?

Remember that an individual may also have existing health conditions that need to be considered – i.e. they may argue that they are disabled not by long Covid alone but by the combination of long Covid and their existing condition(s).

For the moment, you should err on the side of caution and, where there is doubt either as to the long-term nature of the condition or the effects on the individual's ability to carry out normal day-to-day activities, assume that long Covid could be regarded a disability.

Duty to make reasonable adjustments

The duty can arise where a disabled person is placed at a substantial disadvantage by:

- an employer's provision, criterion or practice (PCP)

- a physical feature of the employer's premises
- an employer's failure to provide an auxiliary aid.

You will most likely be considering PCPs such as:

- application of standard absence management processes including triggers, warnings and dismissal
- reduction of pay (many institutions will have been paying full pay for Covid-19 related absences)
- requirement for a certain amount of the working week to be spent on site
- requirement to work full time or to work certain hours.

You may find that some or all of the following adjustments are requested:

- continuation of full pay
- discounting absences for attendance management purposes
- reduction of workload
- adjustment to hours – e.g. later starts
- redeployment
- delay to processes
- delaying termination of contract.

You should consider whether the adjustment(s) will work. What are the costs of the adjustments and what will be the effect on the workforce?

The Employment Appeal Tribunal (EAT) has made it clear that there need not be a "good or real prospect" of a proposed adjustment removing a disabled employee's disadvantage for that adjustment to be reasonable. An adjustment might be reasonable, and therefore required, where there is "a prospect" that it will succeed.

It is normally wise for an employer to consider obtaining an expert opinion on the likely efficacy of any proposed step. This might involve seeking medical evidence on the extent of an employee's disability and its effect on their ability to carry out the job they are employed to do. In cases involving medical conditions that are less familiar, or whose effects are less predictable (such as long Covid), medical evidence may be essential. This is likely to be the case where the impairment is a mental one, where it might be less obvious whether any given step would alleviate or remove the disadvantages experienced by the employee.

The Equality and Human Rights Commission (EHRC) warns in its Code that even if an adjustment has a significant cost associated with it, it may still be cost effective in overall terms - for example, compared with the costs of recruiting and training a new member of staff - and so may still be a reasonable adjustment to have to make.

Employers should not conclude that an adjustment needs to be "cost effective" to be reasonable. Large (and particularly public sector) employers might well be expected, given their resources, to make adjustments that are not, strictly, cost effective. The reasonable adjustments duty clearly anticipates that employers might have to incur reasonable additional costs in order to alleviate disadvantages suffered by disabled employees.

Tribunals should not only consider factors relating to the disabled individual concerned, but should take account of wider implications, such as the effect of the proposed adjustment on the organisation or workforce as a whole. Nevertheless, while recognising that in some cases an adjustment will not work without the co-operation of other employees, the EHRC Code notes that it is unlikely to be a valid defence to a reasonable adjustments claim that staff were obstructive or unhelpful, and that an employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately.

Potential claims

The most likely claims will be of disability discrimination due to a breach of the duty to make reasonable adjustments (assuming that the condition meets the definition of disability).

As in the management of any other long-term illness, there could be assertions of discrimination arising from and/or indirect discrimination if warnings and/or dismissal are considered.

There could also be related claims of discrimination on other grounds – for example, individuals asserting that their sex, race, age or beliefs mean that they are at a particular disadvantage. Whilst there has already been some research carried out as to which individuals are at higher risk, clearly this is still a developing area and would need to be kept under review.

There may also be dispute as to whether individuals should qualify for ill-health retirement, and this could affect whether any subsequent dismissal is unfair if it is not considered prior to dismissal.

The risk of a personal injury claim also remains and it will be important to notify your Employers' Liability insurers in accordance with their requirements under the policy.

Top tips

Clearly this area is very new and we're yet to see (and understand) the true impact of Covid-19 and its long-term effects. Until the time arises where there is a clearer understanding of the condition, here are our five top tips for managing long-Covid employee absences (and reducing your risk).

1. Engage with colleagues in other organisations to share experiences of how they are dealing with these cases
2. Audit – how many employees in the organisation may be affected by these issues?
3. Be properly informed about the medical position including engaging with your OH advisers to evaluate their knowledge and understanding, and identify alternative sources of medical advice as necessary
4. Formulate a strategy for dealing with all aspects of long-Covid cases – otherwise the danger is that decisions will be made on individual aspects which may not fit the bigger picture
5. Re-evaluate the support in place for employees affected by long Covid, including support networks specifically for this new condition, which can be both isolating and frightening.

If you are in any doubt about the issues raised in this article or would like bespoke advice for your institution, please contact [Helen Badger](#) or [Jacqui Atkinson](#).

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