

Can long Covid amount to a disability?

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Long Covid as a disability

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This view raised some immediate concerns, not least because it seemed to run contrary to the views expressed by the EHRC head of employment policy back in March 2022: that organisations should assume long Covid symptoms meet the threshold to be classified as a disability in order to avoid breaches of equality law.

Two days later, on 9 May 2022, a “clarification” [press release](#) was issued, confirming that the EHRC could not say that long Covid would automatically meet the statutory test for disability as it is not listed as one of the conditions which are expressly stated to each be a disability – such as cancer, HIV and multiple sclerosis. Instead, the statutory definition of disability set out in the Equality Act 2010 would need to be applied in each case. Where this definition is met by someone suffering from long Covid, they will be disabled for the purposes of any disability discrimination claim under the Equality Act 2010.

This was precisely the issue in a preliminary hearing in **Mr T Burke -v- Turning Point Scotland** – was Mr Burke a disabled person in terms of section 6 of the Equality Act 2010 due to long Covid (or post viral fatigue syndrome)? Judgment was given on 27 May 2022, published on 10 June 2022.

Disability defined – a reminder

By way of a reminder, to meet the statutory definition of disability, an individual must have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. “Substantial” means more than minor or trivial; long-term means that it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

What was the outcome in Mr T Burke -v- Turning Point Scotland?

Applying the statutory definition, the Tribunal found that Mr Burke (the Claimant) was disabled. As with many disability cases, the Tribunal had to consider the account given by the Claimant as to his symptoms and their impact, particularly as the GP evidence did not particularise the issues that affected the Claimant. The Tribunal found that the evidence given by the Claimant and his daughter was credible. The Tribunal was willing to accept that the lack of particularisation in the GP records was not an indication that the symptoms did not exist; rather, that the lack of face-to-face consultations was simply a consequence of the severe restrictions on GP contact that were in place at the time, and perhaps led to less exhaustive consultations than would otherwise be the case.

There was also a general acceptance of the fluctuating nature of long Covid symptoms. Indications given by the Claimant during occupational health consultations of both a willingness and a fitness to return to work followed by a subsequent worsening of symptoms and an inability to return were not therefore viewed as issues affecting credibility – instead, they were simply a consequence of the varying nature of long Covid symptoms.

Does this case now mean that long Covid is a disability?

It is important to remember that each judgment in the employment tribunal is very much dependent on the facts presented – nothing in this judgment therefore means that every future case of long Covid will amount to a disability. Long Covid is not currently classified as an “automatic” disability and so the statutory test will need to be applied in each case.

Whilst we are still learning about the impact of long Covid, evidence so far suggests that it can affect individuals in a variety of different ways, and with varying degrees of severity. Employers may well therefore have some employees who have an impairment which meets the statutory test, and some who do not.

If we dismiss someone because they are unable to return to work due to long Covid, does this new ruling mean that we are now more likely to get a disability discrimination claim?

This judgment and the publicity associated with it may mean that some individuals who did not previously consider themselves to be even potentially disabled as a result of long Covid may reconsider the statutory test. However, the case is simply the application of the existing law – it does not change the law, nor apply a different methodology for assessing disability.

This case highlights to employers that good absence management procedures should be in place in all cases that involve challenging long term health conditions. Where a return to work is potentially possible, it is important for employers to utilise occupational health advice in order to consider any reasonable adjustments that could be implemented to help facilitate this. Reasonable adjustments could include changes to working hours, where the employee works and/or how the employee performs tasks. It could also include phased return to work plans and potentially redeployment to other roles.

Where an employee is not fit to consider a return to work, it is really important that employers consider all available options and that they follow their absence management procedures before pursuing a potential dismissal. This could include reasonable adjustments to attendance standards, and considering the possibility of ill health retirement options.

Do we need to change the way we are managing long Covid absence cases?

You should treat a long Covid related long-term absence just as you would any other long-term absence. There are no extra steps that you need to take for an employee off sick with long Covid-19 over an employee off sick with cancer for example. A good employer should be utilising medical advice, putting in place supporting reasonable adjustments and doing their best to help the employee return to work, if they are able. If despite all those measures an employee is unable to return to work, then you may have to consider dismissal or ill health retirement.

How can we make decisions when the medical information isn't clear?

It is true that our understanding of long Covid is still developing and that it appears to affect individuals in a variety of different ways. However, even with impairments which are more familiar, there can often be difficulties in predicting the prognosis for a particular individual or differences in the severity of symptoms that individuals face.

As our understanding of long Covid improves, it may be that different treatment options become available which significantly improve the prognosis and speed of recovery. However, employers need to consider the reasonableness of the actions that they are proposing at the time the decisions are taken. The key here is that you seek medical advice and that you act reasonably on the advice and information available to you, as you would with any other long-term condition.

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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