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LONG COVID: IMPLICATIONS FOR EMPLOYERS

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This briefing, based on an article first published by Slaughter and May for the Employment Lawyers Association (ELA) Briefing, considers whether and when long COVID could amount to a disability under EqA 2010, and what this means for employers.

Introduction

The pathology of long COVID remains little understood, but there is a growing awareness of how it manifests itself. A recent peer-reviewed investigation, led by Oxford University's Professor Trisha Greenhalgh, has examined the experience of long COVID sufferers in the UK.

What we now know is that long COVID can affect anyone, including working-age individuals who were previously in good health, and those for whom the acute illness was not severe. We also know that long COVID can encompass as diverse a range of symptoms as breathlessness, overwhelming fatigue, muscle pains, 'brain fog', chest pains, persistent cough, skin rashes, diarrhoea, and even heart failure and strokes. We also know that those in long COVID support groups are continuing to report symptoms many months after their initial infection.

The definition of disability

Disability is defined under s.6 EqA 2010 as a 'physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'.

The requirement for an impairment

As a novel disease, the term 'long COVID' has no formal medical definition. For the purposes of the definition of disability, however, it is well established that there is no need for a formal medical diagnosis to identify the existence of an impairment. The absence of any formal diagnosis of a 'post-acute' or 'chronic' condition will not, therefore, be determinative.

It is also not strictly necessary to determine the precise nature of the impairment, provided its existence can be deduced from the effect it has on an individual's day-to-day activities. A 'functional' approach is required, which involves identifying the effect of an impairment, not necessarily its clinical name or its underlying cause. This functional approach could be significant in

the context of a long COVID sufferer, who may be experiencing a range of symptoms that are fluctuating, varied and difficult to pin to a specific pathological or mental cause.

Given the breadth of conditions that may amount to a 'physical or mental impairment' under the EqA 2010, a person suffering from long COVID is very likely to be able to show that this requirement has been satisfied.

A substantial and adverse effect on day-to-day activities

A person suffering from breathlessness, chest pain and/or fatigue may well, if the symptoms are sufficiently severe, be unable (or at least find it more difficult) to carry out tasks that most people would consider 'everyday'. In the long COVID context, the more difficult question is likely to be whether, on the particular facts, the effect of such an impairment is 'substantial'.

In answering the 'substantial' question, a tribunal will need to compare a person's ability to carry out normal day-to-day activities against that person's ability had they not been impaired. (This is different to the test regarding the scope of 'normal' day-to-day activities, which will be judged by reference to those activities that can be regarded as 'everyday', and excludes activities that are normal only for a particular person or group.)

In the case of someone who was previously active, able and energetic before contracting COVID, and who experiences a dramatic decline in their abilities, identifying a substantial effect may be straightforward. For others, the effect of the impairment itself may be less clear cut. 'Hidden' symptoms such as a deterioration in memory or attention-span that may result from long COVID are not so easily measured, and the relapsing-remitting nature of some symptoms may mean that the apparent severity of the condition varies from day to day.

It is also important to remember when making any assessment that physical impairments may result in mental effects. Someone who is suffering long COVID may, for example, experience additional strain on their mental health (low mood, heightened anxiety, sleeplessness and even post-traumatic stress), which can potentially impact on their day-to-day activities.

Many patients experience a range of symptoms that a tribunal would consider collectively in reaching its conclusion. The Acas guidance provides an example to illustrate this approach which is potentially relevant to long COVID: 'Tom has breathing difficulties, so he can be slower moving around, lack energy during the working day and have problems sleeping at night. Taken individually, these effects might not be substantially adverse. But taken together, they could amount to a substantial adverse effect' (page 7).

In the context of long COVID sufferers, the assessment of whether an adverse effect is substantial (for which the bar is low, being defined as 'more than minor or trivial') will be highly fact specific and may entail a detailed assessment of the medical evidence. But for a claimant displaying severe and debilitating long COVID symptoms (whether individually or cumulatively), the substantial adverse effect condition may well be satisfied with relative ease.

The requirement that the effect is long term

'Long term' for these purposes means the impairment has lasted 12 months or is likely to last at least 12 months, or is likely to last for the rest of the person's life (Sch 1 para 2 EqA 2010). The first confirmed cases of COVID-19 in the UK were identified on 31 January 2020, and our collective

awareness of long COVID has developed only gradually since then, so it remains too early to say that long COVID has brought about an impairment that has lasted 12 months. However, 'likely' here means 'could well happen' and is a lower test than a balance of probabilities.

In Daouidi, the CJEU held that relevant evidence that a limitation is long term 'includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered'. In other words, notwithstanding that long COVID has been around for less than 12 months, its impact on those suffering with it may satisfy the long-term requirement.

Given the range of possible symptoms, employers will need to consider the cumulative effects of long COVID. In Hay, the EAT considered the case of an individual who was suffering from tuberculosis, as well as a range of other respiratory impairments. The tuberculosis alone would not last 12 months, but the claimant had a 'constellation of symptoms' (not all of which were attributable to the tuberculosis) that would last more than a year.

With each passing week, more evidence becomes available regarding the long-term effect of long COVID and the time horizons for recovery, and by the time a discrimination case founded on an allegation that a long COVID sufferer is disabled is heard in the employment tribunal there is likely to be a clearer understanding of the possible duration of long COVID symptoms. However, any such future tribunal will need to make its assessment of the likelihood of the condition lasting 12 months or more based on the evidence available at the time of the alleged discrimination.

From today's vantage point, those who continue to experience severe symptoms more than, say, six months after initial infection, with no positive indications of improvement, must be well placed to argue that their impairment 'could well' last a further six months, and thereby satisfy the 'long-term' requirement.

What should employers do?

Until more is known about this condition and its long-term impact, employers need to be mindful that an employee or worker with long COVID (or one who is associated with someone suffering from long COVID) may well attract additional protections under the EqA 2010.

Employers will need to make proactive enquiries into the severity and possible duration of the condition as experienced by the relevant individual. Understanding how the symptoms change over time will be an important part of this assessment – if someone experiences cycles of improvement followed by relapses, for example, a mere snapshot at a given point in time will be insufficient, and detailed input from occupational health and/or clinicians should be sought. In the context of an unfamiliar disease with unpredictable characteristics and an unclear prognosis, the need for such pro-active enquiry and ensuring a sound evidential basis for decision-making is particularly acute.

Employers should avoid treating long COVID sufferers less favourably because of the condition itself, but also as a result of anything arising from the condition. Disciplinary action for long COVID-related sickness absence, for example, may well give rise to discrimination arising from disability claims. Behavioural changes or misconduct caused by stress that arises from the effects of long COVID could also trigger this kind of claim (Grosset).

Given the array of possible symptoms that may arise from the condition, it will be difficult to pre-empt those policies that might indirectly discriminate against long COVID sufferers, but allowing flexibility regarding, for example, avoiding early morning or back-to-back meetings for those experiencing exhaustion and fatigue are likely to be helpful.

Similarly, in relation to the duty to make reasonable adjustments, the unpredictability of long COVID symptoms means it is difficult to pre-empt what adjustments may be required to alleviate any substantial disadvantage and to support long COVID sufferers back to work. Timely and thorough engagement with occupational health will help identify the particular support that may be needed, but the typical menu of altering duties, working hours, location of work (such as extended remote working) and phased returns should all be considered.

Documentaries and press articles about long COVID in recent months have helped raise general awareness, but there is also an equal amount of misleading information and opinion that has been shared on social media in particular. Training for managers regarding how to handle staff suffering from both COVID-19 and long COVID will help to ensure that matters are managed sensitively, appropriate support is made available and policies and procedures are not applied in a discriminatory way.

KEY:

EqA	2010 Equality Act 2010
Greenhalgh report	'Persistent symptoms after COVID-19: qualitative study of 114 "long COVID" patients and draft quality principles for services', 20 December 2020
Acas guidance	Disability discrimination: key points for the workplace (July 2017)
Daouidi	Daouidi v Bootes Plus SL [2017] IRLR 151
Hay	Ministry of Defence v Hay [2008] IRLR 928
Grosset	City of York Council v Grosset [2018] IRLR 746

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