

Insights

CORONAVIRUS (UK): IS 'LONG-COVID' LIKELY TO BE CLASSED AS A DISABILITY UNDER THE EQUALITY ACT?

Feb 04, 2021

SUMMARY

This post considers whether 'long-covid' is likely to be classed as a disability under the Equality Act 2010, and provides practical guidance for employers.

At the time of writing, it is estimated that approximately 100 million people have now contracted Coronavirus. Whilst the majority of those infected go on to make a full recovery, some suffer continuing symptoms once the initial infection has gone. These symptoms are commonly referred to as "long-covid". According to the NHS, some of the most commonly encountered symptoms of long-covid include; (i) extreme tiredness; (ii) shortness of breath; and (iii) problems with memory and concentration. A recent study estimated that there are currently 60,000 people in the United Kingdom alone suffering from long-covid.

Ultimately, some of those suffering from long-term health conditions may be classed as disabled under the Equality Act 2010 ("**EQA**"). This article considers the circumstances in which long-covid would be classified as a disability under the EQA.

Definition of a disability under the EQA

The EQA prohibits discrimination in respect of numerous protected characteristics, including disability. Section 6 and Schedule 1 of the EQA define a "disability". It is important to note that the legal definition of disability does not always reflect what people may ordinarily class as a disability, and attention should be paid to the legal definition to prevent individuals who are not suffering from symptoms typically associated with a disability being overlooked.

Some conditions do not need to meet the legal test as they are classed as "deemed disabilities". These include conditions such as blindness, cancer and multiple sclerosis. There is also a category of excluded conditions such as a tendency to steal, set fire or physically abuse others. In most circumstances, however, the question of whether an individual is disabled will be based on the following definition:

“A person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities”.

As you would expect after reading the definition, the question of whether an individual is disabled under the EQA is very fact dependant. This prohibits a “one-size fits all” approach, as it is not uncommon to find two people both diagnosed with the same medical condition, with only one being classed as disabled under the EQA.

Is long-covid likely to be a disability under the EQA?

The most effective way to determine whether long-covid is likely to be classed as a disability under the EQA is to break down the definition set out above into four stages. As noted above, this test will need to be applied on a case by case basis.

Step 1

The person has a **physical or mental impairment**

In most cases, a person suffering from long-covid is likely to be able to show that they are suffering from a physical or mental impairment. This is particularly the case given that many medical practitioners are recognising long-covid as a legitimate condition.

Step 2

which has an effect on their ability to carry out **normal day to day activities**.

Before assessing whether the effect is substantial, it must be established that the condition has an effect on the individual’s ability to carry out normal day to day activities. EQA guidance stipulates that “normal” day to day activities are “things some people do on a regular or daily basis” and gives examples such as; (i) shopping; (ii) reading and writing; (iii) carrying out household tasks; (iv) walking and travelling by various forms of transport; and (v) taking part in social activities. Case law has also confirmed that in certain circumstances the effect on an individual’s abilities at work should be taken into account.

Step 3

This effect must be **substantial**

The EQA provides that substantial means “more than minor or trivial”. Guidance also states that “the requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of a disability as a limitation going beyond the normal differences in ability which may exist amongst people”. Ultimately, whether a person suffering from long-covid can demonstrate that the impairment has as substantial adverse effect on their ability to carry out normal day to day activities will be fact specific. However, it is certainly possible for long-

covid to have a substantial effect provided the symptoms experienced are sufficiently serious. Media reports have cited sufferers who have found it difficult to hold conversations and have struggled to take even a short walk, which makes it likely that some sufferers will experience symptoms which have a substantial effect.

Step 4

The effect must be **long term**

This limb of the test may create the greatest hurdle for an individual to overcome. An impairment will have a long term effect only if:

- it has lasted a period of 12 months; or
- the period for which it lasts is likely to be 12 months (or more); or
- it is likely to last for the rest of the life of the person impacted.

As the Coronavirus has only really been present in large numbers in the UK since March 2020, and long-covid develops after the initial infection, it is currently difficult to say with any certainty if long-covid will constitute a long term condition. However, a recent survey of confirmed sufferers has found that many were still unable to work at full capacity 6 months after infection. Therefore, depending on research over the coming months, there is a possibility that an Employment Tribunal could find that long-covid is likely to last for 12 months or more. The symptoms of long-covid may come and go. This is a common feature of other conditions, such as Chronic Fatigue Syndrome and there is case law to support the fact that Chronic Fatigue Syndrome can constitute a disability under the EQA. As a result, it is feasible that in certain circumstances long-covid could also be held to be a disability, if all limbs of the test are satisfied.

Tips for employers

Employers should be mindful of the potential for long-covid to be classified as a disability under the EQA and should take steps to ensure that they do not directly or indirectly discriminate against those suffering from the condition. The EQA also imposes an obligation on employers to make reasonable adjustment to help reduce the disadvantages experienced by disabled employees in the workplace, for example through physical aids. Accordingly, the following practical steps should be taken to help manage this potential risk:

- Consider the condition of the individual to establish whether it is likely to amount to a disability.
- If you feel the individual is likely to be disabled, you should obtain medical advice, consult with them and consider making reasonable adjustments. In the context of long-covid,

reasonable adjustments may include flexible working patterns and reduced hours to help the individual better manage their symptoms.

- Ensure that the individual is not discriminated against due to their illness. For example, treating an individual less favourably because they are suffering from long-covid would, if they are disabled, amount to either direct or indirect disability discrimination.
- Maintain communication with those suffering with the condition. A collaborative approach can help identify suitable reasonable adjustments and is likely to aid the recovery of the individual.
- Ensure that those dealing with sickness absence recognise the symptoms of long-covid to help identify when an individual may be suffering from the condition. This will be particularly useful when an individual historically had an above average amount of sickness absence. By spotting the issue early, there is a greater likelihood of managing the situation.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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