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Supporting staff with long COVID and making reasonable adjustments

Sabina Mirza

Practice Management Consultant, British Dental Association

As we start to live and work with COVID-19, you will be wanting to review your workplace safety and working arrangements going forward. During the height of the pandemic, many of you urgently put in place a range of flexible measures to continue to deliver your services effectively and efficiently as possible.

At-risk staff, such as those with disabilities or with medical conditions requiring them to 'shield' were able to undertake alternative duties including phone triage or paperwork from home, flexible start and finish times or being allowed additional time to complete tasks. Some of the adjustments implemented during the pandemic may need to continue

for your staff. Under the Equality Act 2010 employers have a statutory duty to make 'reasonable adjustments' in the workplace for disabled staff to ensure they are not substantially disadvantaged when compared with people who do not have a disability. A disability is defined as a physical or mental impairment that has a substantial and long-term adverse effect on a persons' ability to carry out normal day-to-day activities.

For some people who caught COVID-19, it caused a variety of symptoms which have persisted long after the initial infection ('long COVID'). The symptoms include extreme tiredness, muscle pain and 'brain fog' which varies in severity and

duration and the recovery period remains uncertain. The Office for National Statistics (ONS) survey reported that an estimated 1.8 million people were experiencing self-reported long COVID symptoms in April 2022.¹ This means there will be individuals for whom long COVID will cause substantial and long-term adverse health conditions, affecting their day-to-day activities.

Long COVID

The Equality and Human Rights Commission (EHRC) has clarified that not all people with long COVID will be classed as disabled under the Equality Act 2010.² Whether a person's long COVID will be considered a disability, will depend on the severity and duration of the symptoms. This issue was recently considered at the preliminary employment tribunal hearing of *Burke v Turning Point Scotland*.³ The Tribunal found that Mr Burke's 'post viral fatigue syndrome' in which he experienced substantial and long-term side effects arising from him contracting COVID-19 in November 2020, was a disability.

This decision does not automatically mean that every person suffering from long COVID will be classed as a disabled person, and each case will need to be reviewed separately and assessed on its own facts. It is advisable for you to carefully consider whether a staff member who reports suffering from long COVID, meets the definition of disability under the Equality Act 2010. If so your statutory duty to make 'reasonable adjustments' in the workplace will apply to them. So, if you agreed for a staff member with COVID related long term heart problems to undertake some duties at home, then if this medical condition is recognised as a disability, it would be difficult to justify why this working arrangement could not continue for that staff member as a 'reasonable' adjustment.

A staff member with long COVID could be discriminated against if their symptoms are not recognised in line with the definition of disability under the Equality Act. If the employer fails to implement reasonable adjustments, the staff member could pursue a disability discrimination claim. Therefore, it is advisable for you to apply the same considerations to a staff member with long COVID as

you would for a staff member with any long-term health condition or disability. There is no cap on the award a judge can give for disability discrimination so it is always better to take a cautious position. Furthermore a discrimination claim, whether successful or not (especially if related to COVID-19) is likely to generate negative publicity for a dental practice. It may also create irreparable damage to your dental practices image and patient base, where some of your patients will have disabilities or suffer from long COVID.

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The duty to make reasonable adjustments

The onus is on the employer to show any adjustments implemented are reasonable when a disabled person is placed at a substantial disadvantage. Sometimes, it can be difficult to determine what is considered 'reasonable'. An employer is not obligated to make an adjustment where this would result in disproportionate cost which is likely to outweigh the benefit or cause significant disruption to the business. For example, an adjustment a small dental practice may be able to afford may not be considered at the same level of 'reasonableness' an adjustment a large corporate dental practice could make. What is crucial here, is that the employer tries to reasonably accommodate the staff members' needs; to reduce or remove the disadvantage the disabled person faces.

Identifying 'reasonable adjustments'

The first step is to understand from the staff member how their health affects them and what support they need to perform their job. This can be achieved by having an open discussion with the staff member

so they are able to share details about their health and identify the adjustments they think would be appropriate. Having regular meetings such as one-to-one or return to work interviews after long-term sickness will allow the staff member to communicate their needs and to assess what adjustment (if any) have worked well for them or not in the past.

It is also advisable to review staff member fit notes for sickness absence where their doctor will set out the recommendation for a employees return to work, such as a phased return, amended duties, altered hours or workplace adaptations. You should also consider requesting the staff member to agree to an occupational health assessment. An occupational health assessment can be very helpful to assist you to better understand the staff members health/disability, the prognosis and consider the recommended reasonable adjustments.

Keep a record

It will be helpful to keep a note of your discussions and the reasonable adjustments that have been implemented. You should also regularly review any adjustments to ensure that these remain effective. Many people will recover from long COVID thus the adjustment may only be required on a temporary basis. If you are unable to accommodate reasonable adjustments, you should communicate this clearly with the staff member and explain your reasons. There is a risk this could lead to a claim for disability discrimination, therefore you should speak with the BDA Advisory Team to obtain advice to mitigate this risk. ♦

References

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