

Long COVID Guidance

Nearly one million people in the UK have reported having long COVID symptoms which can include extreme tiredness, shortness of breath, memory and concentration problems, insomnia and depression. Medical experts are still trying to understand long COVID which makes it difficult to know how to support staff who are suffering from symptoms. Due to the varying nature of the illness, a one-size-fits-all approach will not work.

This document sets out five scenarios which organisations may face and how to deal with them.

Scenario 1: Staff member returns after COVID-19 with persistent short-term absences

A member of staff returns to active duty and most days feels well however, they have lingering symptoms including fatigue, shortness of breath and muscle aches. They have therefore had a significant number of short periods of sickness absence (one or two days each time), triggering a formal absence review process.

Options to Consider

Underlying Medical Conditions

Where there is reason to believe the absences may relate to an underlying cause, a different approach is required. This means investigating the true medical position either through contact with the staff member's doctor or through the use of an occupational health service. More specialist medical advice may also be required where the opinion of a GP or OH practitioner is inconclusive.

The essential question the organisation is seeking to answer is what level of absence the staff member can be expected to have in the future and for how long this situation is likely to last.

The organisation should explore what steps can be taken which might reduce the staff member's absence levels such as hybrid working, changing work pattern, reduced working hours etc.

Disability and Reasonable Adjustments

The organisation will need to consider if they have a disability as defined by the Equality Act 2010. The key question will be whether their long-COVID symptoms are likely to last for a year or more. This will depend on a medical assessment and it is possible there will be insufficient data to reach a view on this due to the uncertainty around long COVID. However, it is recommended the organisation act on the assumption the condition is a disability and seek to make reasonable adjustments accordingly.

Depending on the nature of their work, it might be reasonable to allow them to work from home on days when they are feeling short of breath, to avoid a commute which may exacerbate their fatigue. Their duties could also be rearranged or made more flexible in order to accommodate symptoms on difficult days.

If the organisation has given serious consideration to these alternatives and the medical prognosis is their absence is likely to continue at a seriously disruptive level for a considerable period of time, then it may be fair to dismiss on the basis of medical ill-health incapability.

Instigating Absence Management Procedure

A short-term absence policy generally involves a certain number of absences triggering a series of warnings, eventually leading to dismissal (if the absences continue). In such case the reason for the dismissal will generally fall under the category of "some other substantial

reason". This is because staff are fit for work at the time of the dismissal however, their levels of absence mean their attendance is not sufficiently reliable for the organisation's needs.

What levels of absence justify the move to dismissal will depend on the circumstances including the nature of the work, the size of the organisation and the impact of the staff member's absence has either on the organisation's ability to deliver a service.

Scenario 2: Staff Member Becomes Very Ill From Long COVID

A member of staff has been seriously ill with long COVID and the length of absence has now triggered the organisation's long-term sickness formal review process.

Options to Consider

Sick pay

Statutory sick pay is payable for up to 28 weeks. In addition, the organisation may operate a contractual sick pay policy for which the staff member may qualify. In general, an organisation is not expected to extend sick pay beyond the period set out in its sick pay policy because a staff member is absent for a reason related to disability.

Instigating Absence Management Procedure

The priority for an organisation facing long-term sickness absence from a staff member is to take steps to ascertain the true medical position. This should be done in consultation with them and involve obtaining a medical report from the staff member's doctor and OH. With more complex cases it may be appropriate to request medical specialist for a more detailed assessment.

One issue which should be explored is if there is anything the organisation can do to facilitate a return to work. This might involve making temporary or permanent adjustments to the nature of the work itself or allowing the staff member to work at home for all or part of the working week. It might also involve a phased return where the staff member returns to work on a limited basis, either working part time or not undertaking a full range of duties building up to returning to a normal working pattern over a period of weeks or months.

However, the staff member may be unfit for work and will remain so until recovered. The key question for the organisation then is how long the situation is likely to continue.

Depending on the prognosis, the staff member's condition may be considered a disability. In this circumstance, the organisation will need to be particularly careful not to rush into any decision to dismiss and look into all possible avenues to facilitate a return to work.

Following a Fair Process

If the staff member does have a disability as defined by the Equality Act 2021, the organisation will not be obliged to hold the job open indefinitely and it may be reasonable to dismiss the staff member on the grounds of medical ill-health incapability if they are not fit to return to work.

When this point is reached depends on the nature of the work and the impact of the staff member's absence on service delivery. A decision to dismiss should not be taken until two medical reports have been obtained and the staff member has been informed the organisation is considering this option, has been given a fair opportunity to make representations and update the organisation on a likely date on which they could return to work.

Scenario 3: Staff Member Returns After Long COVID but is Underperforming

A member of staff had COVID-19 and has now returned to work. While they feel okay most days, it becomes clear they are not performing to pre-absence levels and their work is not up to the required standards. Their line manager arranges an informal meeting to discuss performance concerns. The member of staff explains their poor performance is as a result of the after-effects of COVID-19.

Options to Consider

Identifying the Concerns

An organisation should deal sympathetically with a staff member whose performance suffers as a result of COVID-19. However, it is important to have clear information about the nature of the concerns. If performance is affected by health, whether long COVID or the mental health impact of their illness, the organisation should arrange for an occupational health assessment to identify what steps can be taken to support them. If the assessment indicates this is likely to be a short-term, then the organisation should be patient and consider making a temporary adjustment to their workload or putting measures in place to support them while their recovery continues.

Making Reasonable Adjustments

If it becomes clear the performance issues are more long-term, the organisation should attempt to identify the specific issues leading to the poor performance and deal with those accordingly. If the problem is fatigue, for example, the organisation might consider making adjustments to the working pattern. Such measures may also go towards meeting the organisation's duty to make reasonable adjustments should the condition be serious enough to be considered a disability. It may be reasonable to reduce the workload if this would help them to complete their work to a satisfactory standard.

Dismissal for Poor Performance

The organisation is entitled to require staff to perform to an appropriate standard and if this is not happening after support has been provided and the staff member has been given time to improve, it may be appropriate to instigate the performance management process. This would involve setting out a clear standard of work which the member of staff must achieve over a set timeframe and eventually, after first and final formal written warnings have been issued, terminating their contract with notice. Provided the organisation has done all it can to support them to reach the appropriate standard and followed a fair and reasonable process, dismissal should be fair.

Scenario 4: Front-line Staff Becomes Very Ill From Long COVID

A member of staff worked as a front-line worker for the first 12 months of the pandemic. However, they contracted COVID-19 and has been seriously ill with long COVID. The length of absence has triggered the organisation's long-term sickness absence formal review process.

Options to Consider

Illness Contracted at Work

The concern in this case might be they contracted the illness at work. This will not prevent an organisation from following its normal absence management process. Even when the illness has been caused by the negligence of the organisation, the organisation will not be required to keep the job open indefinitely. Any loss to the staff member as a result might be recovered through a personal injury claim. The organisation should go the extra mile in supporting someone who has worked in such difficult circumstances. Unless the medical assessment makes it clear they are likely to remain off sick for an indefinite period of time, it would be reasonable to provide an extended opportunity to recover.

Scenario 5: Staff Member Becomes Carer for Relative with Long COVID

A member of staff's partner is affected by long COVID. They work full time but have been struggling to balance work activities with caring responsibilities.

Options to Consider

Time off for Dependants

Staff do not currently have a statutory right to time off to provide care for a sick or disabled family member. There is a right to a reasonable amount of unpaid time off to arrange for the care of a dependant when the care arrangements already in place are unexpectedly disrupted. However, this is not applicable in this scenario.

Flexible/Hybrid Working Requests

Staff may consider making a flexible/hybrid working request to help balance commitments. This could be working from home where they could be on hand if their partner needs assistance or a move to part-time working. The organisation should try to accommodate any such request if possible. Under the statutory right to request flexible working the organisation can turn down a request if it has a valid business reason for doing so, a more important issue for the organisation is the potential for an indirect sex discrimination claim. It is likely women are far more likely than men to have to strike a balance between their work commitments and caring responsibilities, even when those responsibilities are for dependant adults rather than children. A failure to make any allowance for staff making such a request could therefore amount to indirect discrimination.

Compassionate Leave

Another option is to consider a period of compassionate leave to allow staff to care for their partner for a period of time. There is no legal entitlement to such leave, although some organisations do provide for it in their contracts of employment. The organisation could also agree to accept a certain level of absence from for the period their partner is ill. Such flexibility may help the organisation to retain staff by allowing them to remain in their role rather than have to choose to leave work altogether. However, if this is granted for one staff member, care should be taken to ensure this is applied consistently across all staff.

Long COVID as a Disability

A disability is a physical or mental impairment which has a substantial and long-term effect on an individual's ability to carry out normal day to day activities. This means the condition must last for a year or be likely to last for a year (or for the rest of the individuals' life if this is a shorter period). Once a staff member has had long COVID for more than a year, it is likely they will be classed as having a disability provided the symptoms are sufficiently serious to have a substantial effect on their life.

The difficult question is if someone who has had long COVID for less than a year would be regarded as disabled. The date which counts is the date of the alleged discrimination. If a staff member is dismissed after having long COVID for six months, the question will be whether at the time of the dismissal the condition was likely to last for at least another six months more. By the time the question comes to be considered by an employment tribunal more than 12 months will inevitably have passed and it will be known for certain whether the condition lasted for a full year. However, the question of how long the effect of the impairment was "expected" to last has to be answered on the basis of the facts known at the time of the alleged discrimination and without the use of hindsight.

This means it is possible a tribunal could rule the condition was not expected to last for 12 months, even if it eventually does. It depends on what the medical evidence was at the time of the alleged discrimination.

As medical knowledge about long COVID and the prognosis of those who suffer from it increases, a clear picture may emerge as to whether it tends to have an effect which exceeds 12 months. This may make it easier to determine the prognosis of a particular individual. Until more is understood about the condition, the question will have to depend on the best evidence available as to the staff member's medical condition at the time of any alleged discrimination.

The effect of an impairment is deemed to be continuous if it is "likely to recur". Again the meaning of "likely" in this context is "it could well happen". This means staff whose symptoms of long COVID are not continuous but who seems to have recurring "off-days" of fatigue, brain fog or shortness of breath may still be disabled if it appears likely such symptoms will recur periodically over a period of 12 months or more.