

Employee who had Covid at the date of dismissal, and later developed long Covid, was not disabled

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An Employment Tribunal has decided that an employee who was dismissed shortly after contracting Covid was not disabled for the purposes of the Equality Act 2010. Although the employee did go on to develop long Covid, it could not be said that this was likely to happen on the date she was dismissed.

What happened in this case?

The Claimant was employed by Sense Scotland, a disability services and awareness charity, from 9 July 2019 until her dismissal on 27 July 2021. She tested positive for Covid around 11 July 2021 and self-isolated until around 20 July 2021. The Claimant experienced a variety of Covid symptoms including fatigue, shortness of breath, aches and pains, headaches and brain fog. These symptoms continued even after the end of the self-isolation period and affected many aspects of her everyday life, for example she struggled with shopping and driving and ceased socialising and exercising.

On 26 July 2021, the Claimant booked an appointment to see her GP on 2 August 2021, to discuss the ongoing symptoms. However, Sense Scotland dismissed the Claimant the next day. The Claimant's GP deemed her unfit to work between 2 August 2021 and 27 September 2021 and a diagnosis of "long Covid" was eventually made on 12 September 2021. The Claimant started a new full-time job on 23 September 2021, which she was able to perform with some adjustments.

The Claimant brought various claims against Sense Scotland, including for disability discrimination. A Preliminary Hearing was held to decide whether she was disabled on the

date that she was dismissed.

What was decided?

After being infected with Covid, most people find that their symptoms resolve within four weeks. However, some experience symptoms for longer periods. “Long Covid” is a shorthand term used to describe symptoms that continue after the acute phase of a Covid infection. Employment Tribunals have previously accepted that some people suffering with long Covid will pass the disability test and so be protected from discrimination in the workplace. Indeed, in the recent cases of [Matthews v Razors Edge Group Ltd](#) and [Burke v Turning Point Scotland](#), the employees were found to be disabled by reason of long Covid.

However, not everyone who suffers with long Covid will be disabled. Individuals will have to pass the four elements of the disability test as follows:

1. Does the person have a physical or mental impairment?
2. If yes, does this have an adverse effect on their ability to carry out normal day-to-day activities?
3. If yes, is the adverse effect substantial?
4. If yes, is the adverse effect also long-term i.e. has lasted more than 12 months, or is likely to last more than 12 months (in this context, “likely to” means “could well happen”)?

In this case, the Claimant passed the first three elements of the disability test. However, the Tribunal decided that, at the date of her dismissal, the Claimant’s impairment was properly described as Covid, rather than long Covid (as she had only contracted the disease about two weeks before the dismissal). Nonetheless, they said this had a substantial adverse effect on her day-to-day activities.

However, she fell at the final hurdle. At the time of the dismissal, the substantial adverse effect had only lasted for just over two weeks and the diagnosis of long Covid was not

made until around six weeks after the dismissal. The Tribunal accepted that someone who contracts Covid is at risk of developing long Covid, which, in turn, may last for a year or more. Yet the Tribunal noted that the substantial majority of people who contract Covid do not go on to develop long Covid. While there was a risk that the Claimant would go on to develop long Covid and have it for a year or more, it could not be said that this was a risk that “could well happen”.

Therefore, she failed the long-term element of the disability test.

What does this mean for employers?

This decision does not mean that those who do not have an official diagnosis of long Covid, or who have not been ill for a year, will never be disabled. Rather, it will always be a fact-specific question. Indeed, in Matthews the employee had only been ill for three months at the date of dismissal and had not been diagnosed with long Covid. Nevertheless, the Tribunal was satisfied of the likelihood of the condition lasting up to a year and held that the employee was disabled.

Although Covid is less prevalent today, our understanding of the disease has grown. Employers should be mindful that employees presenting with ongoing Covid symptoms many weeks or months after contracting Covid may be suffering from long Covid. Where it is known, or suspected, that employees have long Covid, they may qualify as disabled. This will trigger the duty to make reasonable adjustments and should also inform any potential dismissal process. Where an employee is disabled, employers will usually be expected to explore other less discriminatory options before moving to dismiss, for example, allowing more time for recovery or redeployment.

[Quinn v Sense Scotland](#)

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss

any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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