



Power Hour – Update on Discrimination

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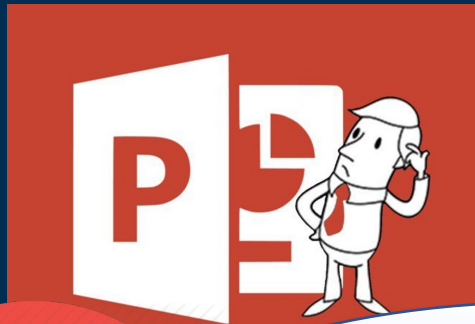
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CHAT

Aims

- Understand the legal framework for equality
- Understand the interaction between equality, long-Covid, 'Covid security' and business needs
- Provide an update on recent case law in relation to the Equality Act 2010

Agenda

- Legal framework
 - Protected characteristics
 - What amounts to unlawful discrimination
 - Disability: Additional Protection
- Equality & Covid-19
 - Long-Covid implications
 - Return to work vs working from home
 - H&S and reasonable adjustments

The Legal Framework



The Legal Framework

- The Equality Act 2010
- EHRC Employment Statutory Code of Practice
 - <http://www.equalityhumanrights.com/publication/employment-statutory-code-practice>

The protected characteristics

- Age
- Disability
- Gender reassignment
- Marriage/civil partnership
- Pregnancy/maternity
- Race
- Religion/belief
- Sex
- Sexual orientation



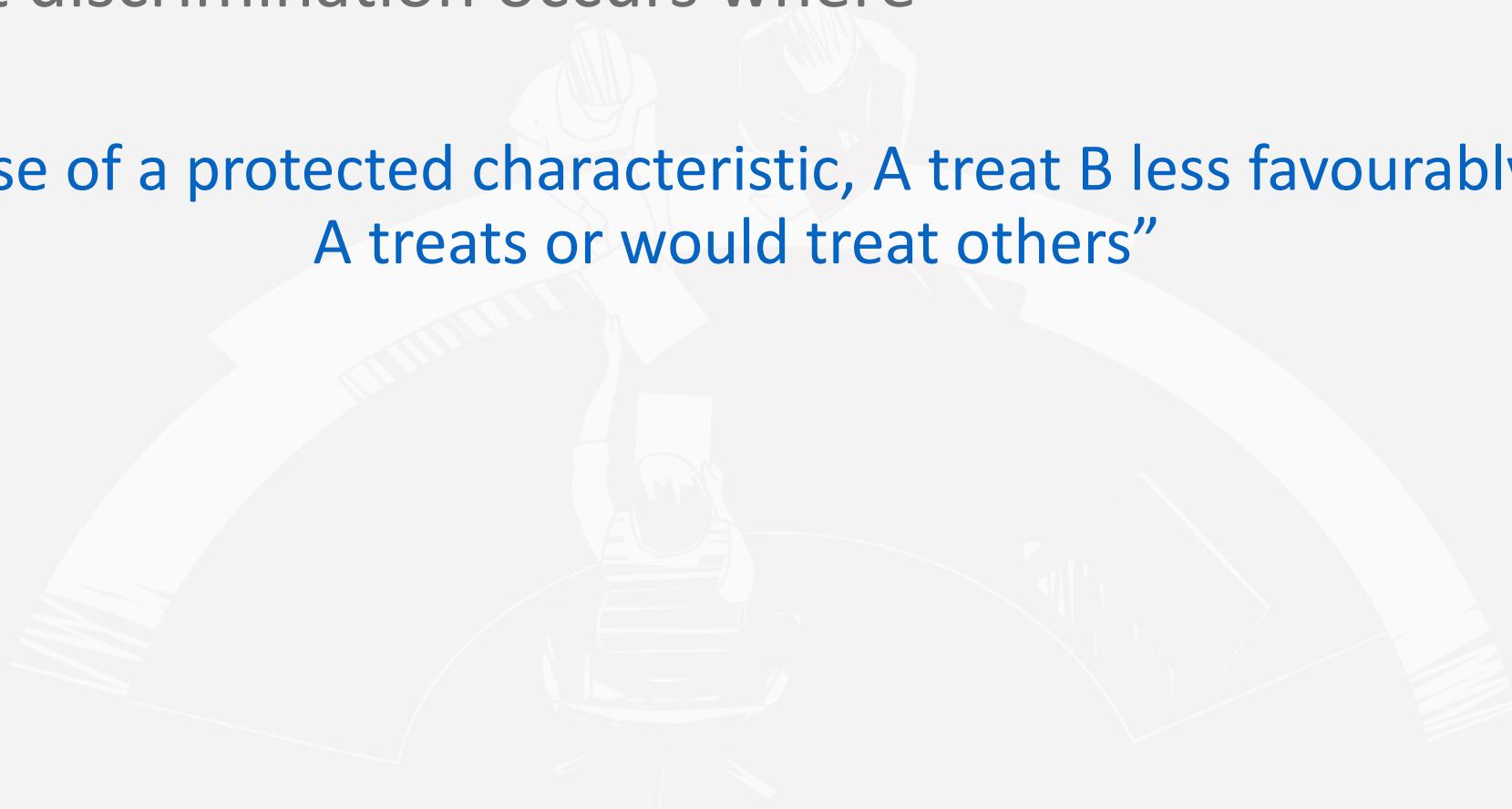
Forms of Unlawful Discrimination

- Discrimination may take the following forms:-
 - Direct discrimination;
 - Indirect discrimination;
 - Victimisation;
 - Harassment
- There are also additional forms of discrimination in disability
 - Discrimination *arising from* disability
 - Failure to make reasonable adjustments

Direct Discrimination

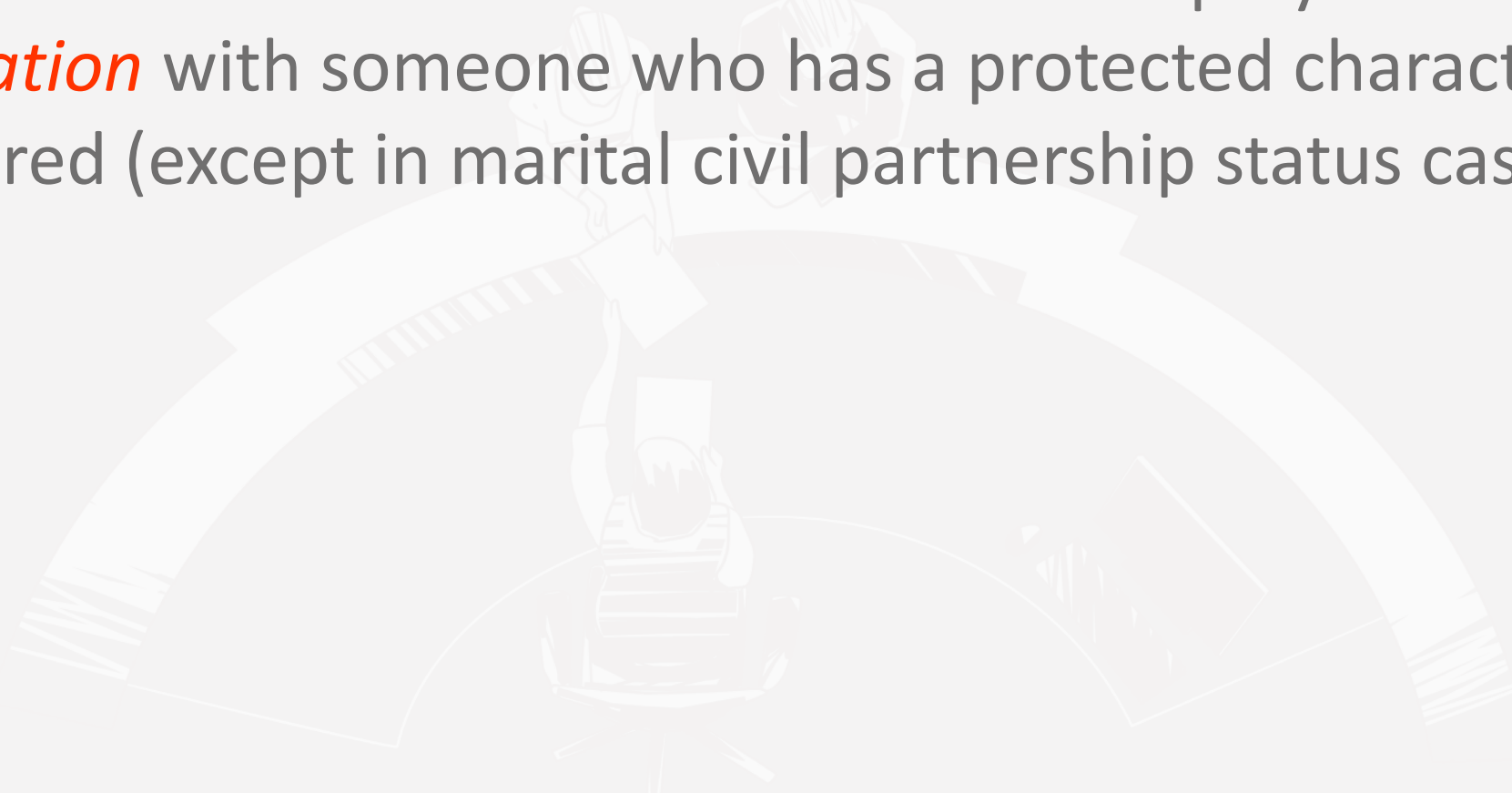
- Direct discrimination occurs where

“because of a protected characteristic, A treat B less favourably than A treats or would treat others”



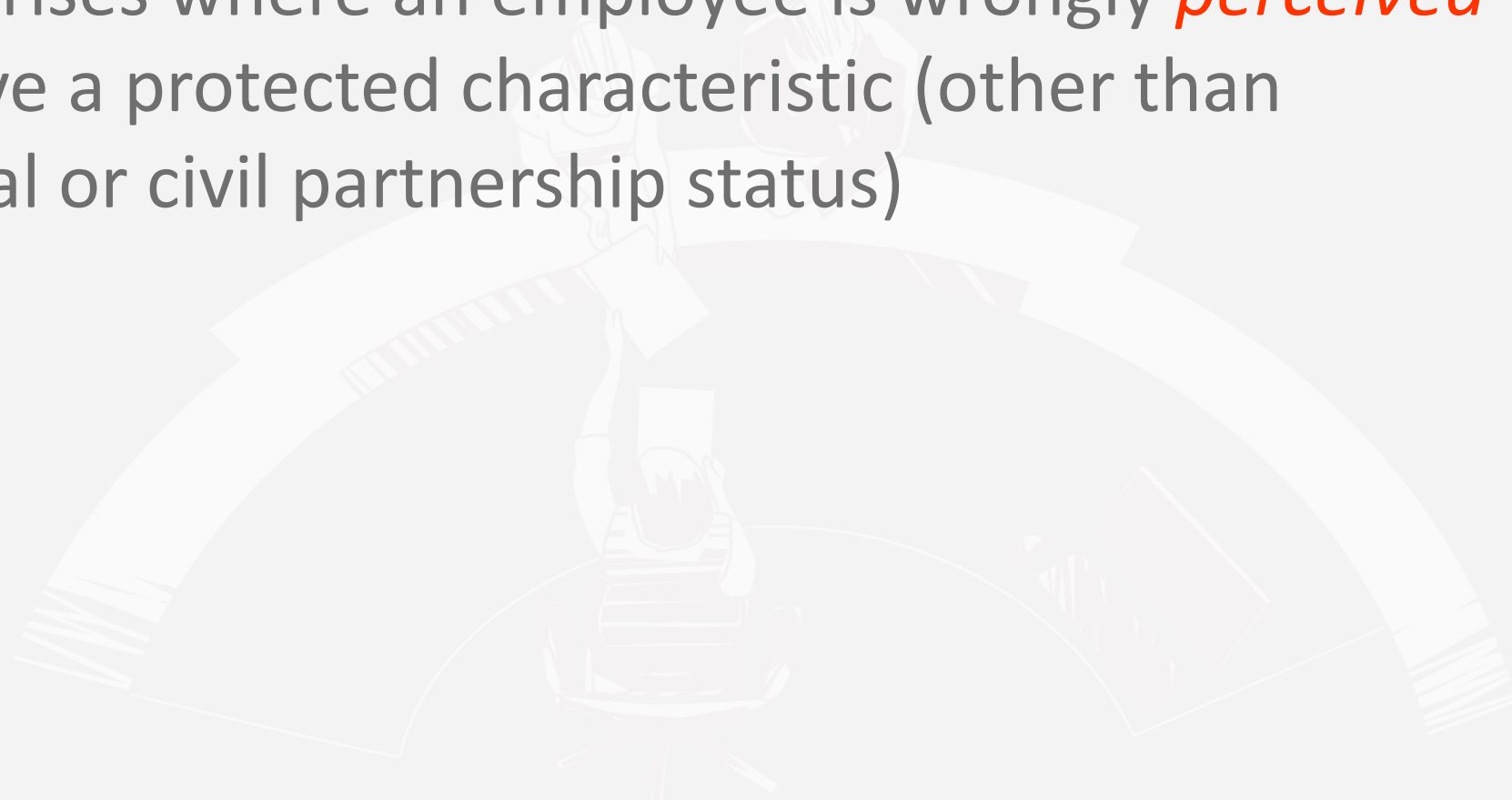
Direct Discrimination: Association

- Less favourable treatment because of an employee's *association* with someone who has a protected characteristic is covered (except in marital civil partnership status cases)



Direct Discrimination: Perception

- This arises where an employee is wrongly *perceived* to have a protected characteristic (other than marital or civil partnership status)



Direct Discrimination

- Practical steps:-
 - Be consistent
 - Be open and transparent
 - Be as objective as possible
 - Ensure that notes are as clear and detailed as possible. These might be disclosed if a claim is brought!

Indirect Discrimination

Indirect discrimination occurs where :-

- A applies to B a provision criterion or practice ('PCP')
- B has a protected characteristic
- A also applies (or would apply) that PCP to persons who do not share B's protected characteristic
- The PCP puts or would put persons with whom B shares a protected characteristic at a particular disadvantage compared to others
- The PCP puts or would put B to that disadvantage
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim

Indirect Discrimination: Objective Justification

- An employer can avoid liability by justifying indirect discrimination
- The actions must be “*a proportionate means of achieving a legitimate aim*”
- The burden is on the employer to prove justification

Indirect Discrimination

Practical Steps to avoid indirect discrimination

- Will the policy or procedure disadvantage a particular group
- Consider whether it is a legitimate business reason for the policy or procedure
- Balance the organisations need for the policy, practice or procedure against the disadvantage it may cause to individuals and protected groups
- Be flexible: Consider alterations to the policy practice or procedure or make individual exceptions where is warranted and does not prejudice the organisation or employees

Harassment

- Harassment occurs where:-

A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either

- Violating B's dignity; or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

Harassment

- In deciding whether conduct shall be regarded as having the required effect the following must be taken into account:-
 - B's perception;
 - Other circumstances of the case;
 - Whether it is reasonable for that conduct to have that effect
- Motivation is irrelevant
- One off incidents can amount to harassment

Harassment – Practical steps

- Set out standards of acceptable behaviour and ensure all staff understand them
- Monitor workforce behaviour and enforce appropriate standards (disciplinary procedure if necessary)
- Ensure employees are aware of organisation's procedures for reporting discrimination and inappropriate behaviour
- Encourage them to use the procedures to report wrong doing
- Remain alert to signs that an employee may be suffering from harassment
- Don't wait for individuals to complain

Victimisation

- Victimisation occurs where
 - A subjects B to a detriment because either:-
 - B has done a *protected act*;
 - A believes that B has done, or may do, a protected act
- Victimisation is usually alleged to have been committed by an employer that is already or has been the subject of discrimination complaint (e.g. an unsuccessful applicant who has already brought a claim of discrimination)

Victimisation

- Keep claims and complaints of discrimination and harassment confidential (where possible)
- Maintain independence
- Scrutinise management decisions
- Monitor the workplace for signs of victimisation

The definition of disability

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities"

Section 6(1) Equality Act 2020

Discrimination 'arising from' disability

- Discrimination *arising from* disability occurs where
 - A treats B unfavourably because of something arising in consequence of Bs disability;
 - A cannot show that the treatment is a proportionate means of achieving a legitimate aim

Discrimination 'arising from' disability

- Discrimination 'arising from' a disability can be objectively justified
- Employer must show that is proportionate means of achieving a legitimate aim
- Burden is high on employers

Disability Discrimination reasonable adjustments

- In addition, a duty is imposed on employers to make *reasonable adjustments* to premises or working practices to help disabled employees
- A failure to comply is a form of discrimination

Disability Discrimination reasonable adjustments

Where A's

- Provision criterion or practice (PCP); or
- Physical feature;
 - Reasonable steps to avoid disadvantage;
 - Provide auxiliary aid
- Places disabled person at a substantial disadvantage
- Knows or ought reasonably to know

Covid-19 Considerations



Equality & Covid-19

- Particular circumstances
 - Disability, pregnancy, BAME etc.
- Additional risks
- Particular challenges
- Assess H&S risks
- Consider reasonable adjustments
- Beware the unjustifiable negative impact!

Long Covid

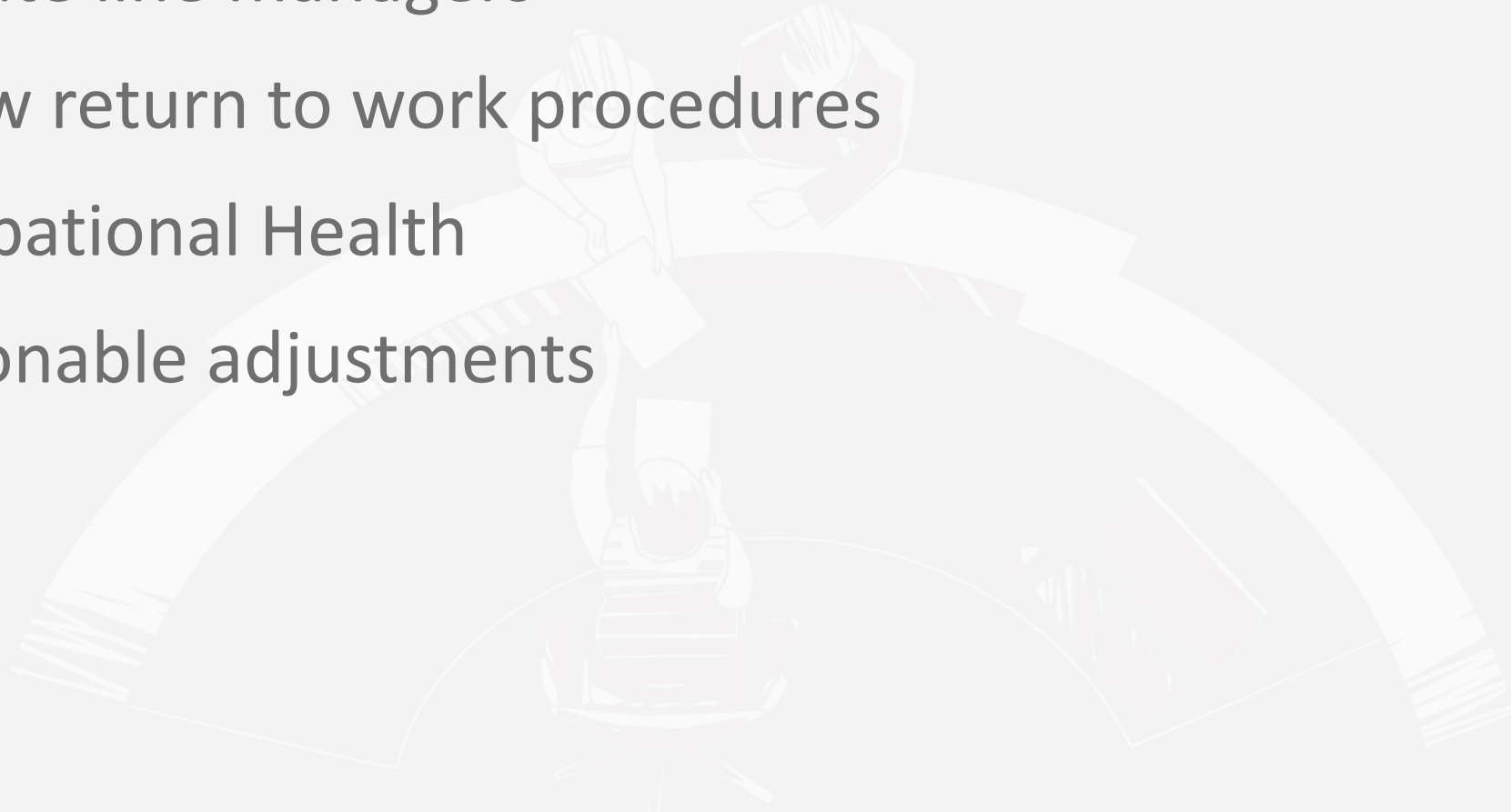
- Poor health for a long period after getting Covid-19
- 1 in 10 exhibited symptoms for a period of 12 months or longer
- Similar to ME?
- Challenges
 - Symptoms may come and go

Long Covid

- Disability for the purposes of the Equality Act?
 - Specific facts of the case
 - Pre-existing conditions
 - Not automatically a disability
 - *Chief Constable of Dumfries & Galloway Constabulary v Adams*

Long Covid – Practical Steps

- Educate line managers
- Follow return to work procedures
- Occupational Health
- Reasonable adjustments



Reasonable adjustments

- Consider specific needs or concerns raised by the employee
- Determine what is reasonable/feasible

"ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case"

(EHRC Code paragraph 6.29)

Reasonable adjustments - Examples

- Alternation to timings (start, finish, breaks)
- Altered hours of work
- Alterations to patterns of work
- Alteration to workload
 - Fewer tasks than normal within a specific time period
 - More time to complete tasks
- Working from home
- Equipment adjustments
- Modifying Absence Management procedures

Factors to take into account

- The extent to which the adjustment would have ameliorated the disadvantage
- The extent to which the adjustment was practicable
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities
- The financial and other resources available to the employer
- The availability of external financial or other assistance
- The nature of the employer's activities and the size of the undertaking

Equality & Covid-19

- Work from home where possible
- Can the workplace be made Covid-19 secure?
 - Regulation 16 Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020
 - Risk assessment to determine particular risks to the employee

Prosser v Community gateway Association Ltd ET/2413672/2020

- Discrimination against a pregnant worker?



Contact details



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