

BRAIN FOG & UNLAWFUL DISCRIMINATION RISKS

Employment Law



BRAIN FOG

Brain fog has been in the news lately because of its association with Long Covid and the menopause. But what is brain fog and how should employers support staff suffering from it?

Topics covered:

- What is Brain fog
- What causes it
- Is it a disability
- Performance management
- Reasonable adjustments
- Discrimination
- Harassment
- Medical advice

Brain fog

WHAT IS BRAIN FOG?

Brain fog is not a medical term but used to describe a range of symptoms including:

- ✓ Poor concentration
- ✓ Feeling confused
- ✓ Thinking more slowly than usual
- ✓ Fuzzy thoughts
- ✓ Forgetfulness
- ✓ Lost words
- ✓ Mental fatigue

Brain fog can feel similar to the effects of sleep deprivation. Experiencing brain fog does not mean there have any been structural changes to the brain as there would be in a condition such as dementia. Most people will recover from the symptoms of brain fog (source NHS website).

WHAT CAUSES BRAIN FOG?

There are a wide range of potential causes. It can occur after contracting Covid-19, known as Long Covid; after other infections or a head injury; during the menopause or as a result of medication. It is common in people suffering from depression, stress or anxiety.

Brain fog can also be caused by emotional and social factors such as persistent chronic overwork or caring responsibilities, or stress coping with illness and treatment. In the menopause an indirect contributor to brain fog can be the effect of poor sleep.

In pregnancy, brain fog could be mental impairment by popular beliefs of 'baby brain' rather than any underlying harmful effect of pregnancy on the brain, or impairment to cognitive function. Brain fog can be caused by a negative placebo effect.

IS IT A DISABILITY UNDER THE EQUALITY ACT 2010?

Probably not on its own (in most cases) but it could be a side effect of a disability.

Definition of a disability under S6 of Equality Act 2010

A physical or mental impairment that has a substantial and long-term adverse effect on the ability to carry out day to day activities.

Whether a person would be deemed disabled or not under the EqA is a legal test rather than a medical one, although of course medical evidence is important.

Where there is a dispute over whether a person is disabled or not it will ultimately be for an employment tribunal to decide. In some cases the courts have determined that the effects of conditions such as the menopause, anxiety disorder or depression have had such an adverse effect on an individual they should be regarded as disabled under the EqA.

(Also note that some conditions are automatically defined as a disability so applying the S6 test is not necessary: these are blindness or sight impairments, severe disfigurements, cancer, multiple sclerosis and HIV).

An employer must not unlawfully discriminate against a disabled worker and has a duty to make reasonable adjustments to the features of the workplace that put the disabled worker at a substantial disadvantage compared with their non-disabled colleagues.

PERFORMANCE MANAGEMENT

Performance management is a legitimate and important tool that needs to be deployed for the sake of the business and staff who often suffer from the impact of their colleague's underperformance or lack of contribution to team-work.

Employers should not view performance management as an unnecessary risk they would rather avoid but a positive step to enable the employee to thrive at work.

Where an employee may have a disability the employer will need to consider any reasonable adjustments it needs to make to its performance management processes.

One of the particular challenges with Long Covid is whether it meets the EqA definition of a 'long-term' condition: long term is defined 'lasted or likely to last 12 months ; or occurs on and off throughout a person's life.

There is still a great deal the medical community need to learn about Long Covid and at the time of writing there have been no tribunal judgments on this issue.

REASONABLE ADJUSTMENTS

A supportive employer, which is also alert to the risk of disability discrimination claims, will encourage employees to speak to their line manager or HR and to attend an Occupational Health assessment. The exact approach will depend on what is causing the problem but employers need to consider and apply reasonable adjustments.

Long Covid

With Long Covid it could be difficult for employers to obtain clear medical evidence on which to base their decisions, as not enough is yet known about the condition.

The TUC has recently called for Long Covid to be recognised as a disability although the Government has not yet indicated any intention to do so. An occupational health specialist may still be able to provide advice on what adjustments may help to support an employee with particular symptoms.

Failure to make reasonable adjustments will put employers at risk of disability discrimination claims and potentially other indirect discrimination claims based on the fact that certain groups, such as older people and ethnic minorities, may be at a higher risk of developing Long Covid.

There is helpful guidance on [Long Covid for employers and managers](#) on the Faculty of Occupational Medicine of the Royal College of Physicians' website.

The menopause

The menopause is (hopefully) becoming less of a taboo subject as more businesses realise they need to create a supportive environment for the increasing number of older women in their work force.

Employers need to cultivate a comfortable environment where women who are suffering menopausal symptoms can speak out about this entirely natural process without embarrassment or fear of ridicule. Implementing a menopause policy or having an internal support network will help.

Menopausal symptoms can vary widely and as mentioned earlier, brain fog can be a direct side effect of disrupted sleep. Stress, anxiety and depression are also common symptoms.

However, employers must never start side-lining a woman because she has asked for some reasonable adjustments or reached a certain age bracket. To do so could raise the inference the employer's actions are tainted with negative and stereotyped assumptions about how the menopause might affect a woman's ability to do her job.

This could amount act of unlawful direct disability disclination (and potentially sex discrimination too). Even if the woman would not be deemed disabled under the EqA because her menopausal symptoms do not meet the S6 test, she might still be able to bring a direct disability discrimination claim based on discriminator's 'perception' of her as a disabled person (known as perceived disability).

Hidden disabilities

If an employee is constantly making mistakes recording information or data, logging temperatures for example, this may not be due to brain fog or mental fatigue but a so-called hidden disability such as dyslexia.

Employees are not legally obliged (in most cases) to disclose their illnesses or disabilities to their employer. Nevertheless the employer should still make sensitive enquiries with the employer about why a function of their role is causing them particular difficulties.

Employers should take legal advice from an employment lawyer if an employee claims that performance management (or indeed disciplinary action) is an act of bullying or discrimination.

UNLAWFUL DISABILITY DISCRIMINATION

Section 15 of the EqA prevents an employee from being discriminated against for 'something arising from their disability'.

For example, if the employee has cancer and suffers from poor concentration as a result of their medication or anxiety over their condition or the treatment, then the poor concentration is "the something" that arises from the disability. i.e. the cancer.

If the employer then disciplines the employee for mistakes due to their poor concentration, the disabled employee will have a claim under section 15 for discrimination arising from disability. However, the employer would have a defence to this claim if it could show an objective justification for its actions.

For example, if the poor concentration of the disabled employee would put themselves or others at risk of harm then the employer would be justified in moving them to another role, or even dismissing them, assuming that no reasonable adjustments could be made to the role to prevent the risk of harm.

If employee's poor concentration was causing financial loss the employer would again need to consider what reasonable adjustments could be made to the role. This might include lightening the employee's workload or giving them longer to complete the task rather than re-deploying or dismissing them.

The example also demonstrates how S15 claims and S21 claims (failure to make reasonable adjustments) are often interlinked.

REFERING TO BRAIN FOG

It could be insensitive or offensive to refer to somebody's brain fog, depending on what is said and the context.

Definition of harassment under section 26 of Equality Act 2010

Unwanted conduct that violates a person's dignity or subjects them to an intimidating, hostile, degrading, humiliating or offensive environment.

There is clearly a difference between a sensitive conversation with an employee about what may be affecting their performance or causing sickness absence and making stereotyped and offensive jokes which could be said to relate to sex, age or some other protected characteristics.

COPING WITH BRAIN FOG

According to the NHS website, this includes:

- Staying hydrated
- Getting enough sleep
- Regular exercise especially outdoors
- A health balanced diet and healthy weight
- Taking regular breaks and doing things that you enjoy
- Socialising with friends
- Stop smoking and keeping alcohol within reasonable limits.

FOLLOWING MEDICAL ADVICE

If an employee is complaining of brain fog it is a situation where employers need to tread carefully.

Employees have a right to a private life and any inference of the employer blaming the employee's mental fatigue on their life-style choices could result in accusations of bullying or discrimination. That said, it is reasonable to expect the employee to take some responsibility for their health conditions and recognise the effects that their conduct or performance may have on their colleagues.

If the employer is making reasonable adjustments suggested either by OH or the employee themselves, the employer can certainly expect the employee to be taking any recommended steps to improve their situation.

In respects of alcohol misuse the Health and Safety Executive recommends a supportive approach before considering dismissal [Managing drug and alcohol misuse at work: Develop a policy – HSE](#)

SUPPORTING YOUR EMPLOYEES

There is no one size fits all but rest and relaxation appear to be a key recommendation from most medical experts.

Encourage staff to take all their annual leave entitlements and switch off when they are away from work. For those people who like to work outside of normal hours encourage them to use an auto-delivery device so their emails are delivered during normal hours.

There is no indication that the Government plans to introduce a legal right to switch off from work (as recently introduced in Portugal) but a survey of 1,050 UK adults conducted by IPSOS found that 60% of employees were in support of such a law.

Some other effective ways of coping with poor concentration or memory loss are using digital reminders, lists and planning aids. These will benefit the whole organisation.

Finally would some genuinely pleasurable social activities help boost morale? As a general rule, our mental performance tends to improve when we are in a better mood as we feel more energised and motivated.

Read more on [Acas – Long COVID – advice for employers and employees](#)

LEGAL SUPPORT

For detailed employment law advice tailored to your business contact our Employment lawyers at Clarkslegal LLP.



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