



Long-COVID capable of being a disability under the Equality Act

An employment tribunal has for the first time ruled that a person's long-COVID is a disability protected by the Equality Act 2010. However, we must be cautious in assuming that from now on all instances of long-COVID will be a disability – it remains the case, as we wrote in a previous [article](#) on this topic, that some cases of long-COVID will be a disability and others will not. Employers should continue to apply the existing statutory test for disability when faced with employees with long-COVID.

In the (still ongoing) case of [Burke v Turning Point Scotland](#), Mr Burke argues that his employer, Turning Point Scotland, discriminated against him because of his long-COVID. As a preliminary point, the employment tribunal had to decide whether Mr Burke's long-COVID constitutes a "disability" under the Equality Act.

The employee's symptoms

Mr Burke contracted COVID-19 in November 2020 and was subsequently absent from work suffering from COVID-related symptoms for approximately ten months until his dismissal in August 2021. His symptoms worsened after his isolation period, in particular the fatigue he suffered. For example, he needed to lie down after showering and dressing, and he struggled to walk to the local shop at the end of his block. Other symptoms included joint pain, loss of appetite, severe headaches, and sleeping difficulties. The severity of Mr Burke's symptoms fluctuated over time.

Over the course of his sickness absence, Mr Burke had various fit notes from doctors confirming that he was unable to attend work. In the meantime, Turning Point Scotland had referred Mr Burke to occupational health on two occasions (the reports from which both stated that Mr Burke's sickness was "unlikely" to constitute a disability) but his symptoms worsened after each referral and he failed to return to work.

Ultimately, Turning Point Scotland dismissed Mr Burke in August 2021 because it considered that his continued illness meant that "there does not appear to be a potential date on which there is a likelihood of [him] being able to return to full duties in the future".



The legal test

As a reminder of the law, the Equality Act 2010 defines a “disability” as being where a person:

“

- (a) has a physical or mental impairment; and
- (b) the impairment has a substantial and long term adverse effect on the person’s ability to carry out normal day to day activities.”

It was accepted by both the employer and the tribunal that Mr Burke’s long-COVID or “post viral fatigue syndrome” was a physical impairment. The tribunal had to decide whether the impairment had a substantial and long term adverse effect on Mr Burke’s ability to carry out normal day to day activities. We know that “substantial” means more than minor or trivial and that “long term” is taken to mean, “has or is likely to last for at least 12 months or the rest of the person’s life”.

It was clear that the impairment had a substantial effect on Mr Burke’s ability to carry out normal day-to-day activities. He had difficulties standing for long periods, preparing meals and concentrating. In its time frame assessment, the tribunal considered that Mr Burke’s symptoms had started in November 2020 and at the point of his dismissal in August 2021, the employer had admitted to the employee that they could not see “a potential date on which there is a likelihood of [him] being able to return to full duties in the future”. It was therefore held that the adverse effects suffered by Mr Burke were “long term” in nature. Mr Burke’s fluctuating symptoms were taken into account and did not change the findings about the overall effect on Mr Burke caused by long-COVID.

The impact on employers

This case does not tell us that every long-COVID sufferer will be considered disabled; there must be a case by case analysis. However, evidence suggests that others with long-COVID are suffering from similar symptoms to Mr Burke, and with the Office for National Statistics [publishing figures on 7 July 2022](#) that an estimated two million people in the UK were experiencing long-COVID, this judgment could open the gates to many more people claiming protection under Equality Act.

In terms of key steps to take, employers should:

- Be mindful of the fluctuation of symptoms when dealing with employees suffering from long-COVID or other post-viral illnesses.
- Continue to seek input from occupational health where appropriate but bear in mind that the findings of an occupational health report may not account for fluctuating symptoms where the employee’s symptoms worsen after the report is published.
- Provide training to staff on managing employees reporting long-COVID symptoms.
- Make reasonable adjustments (e.g. phased return to work, altered duties, altered working hours) for any employees suffering with any condition that could be a disability.