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Taking the temperature on SECTOR RISKS

LEGAL UPDATE

As employees with Long COVID return to work, employers need to consider their responsibilities.

LONG COVID and workplace risk

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Long COVID is a condition where an individual continues to have COVID-19-related symptoms at least 12 weeks after the initial infection, without any alternative explanation or diagnosis[1]. This is estimated to affect more than 1 million people in the UK but remains relatively poorly understood, with no way of predicting who will contract Long COVID, how the symptoms will present themselves or how long they will last.

In the workplace, Long COVID has led to challenges, with some employees needing to take extended periods of sickness absence. But what is often more problematic operationally is planning for those employees whose symptoms are fluctuating[3], meaning sickness absences may be for shorter but more frequent, sporadic periods.

Employers are often left piecing together fragmented information in the absence of clear diagnoses and considering what their obligations and duties are to employees with Long COVID.

Is Long COVID a disability? Possibly

For the purposes of the *Equality Act 2010*, an individual is disabled if they have a physical or mental impairment which has a long-term (12 months or more)

and substantial (more than minor) impact on their ability to carry out normal day-to-day activities.

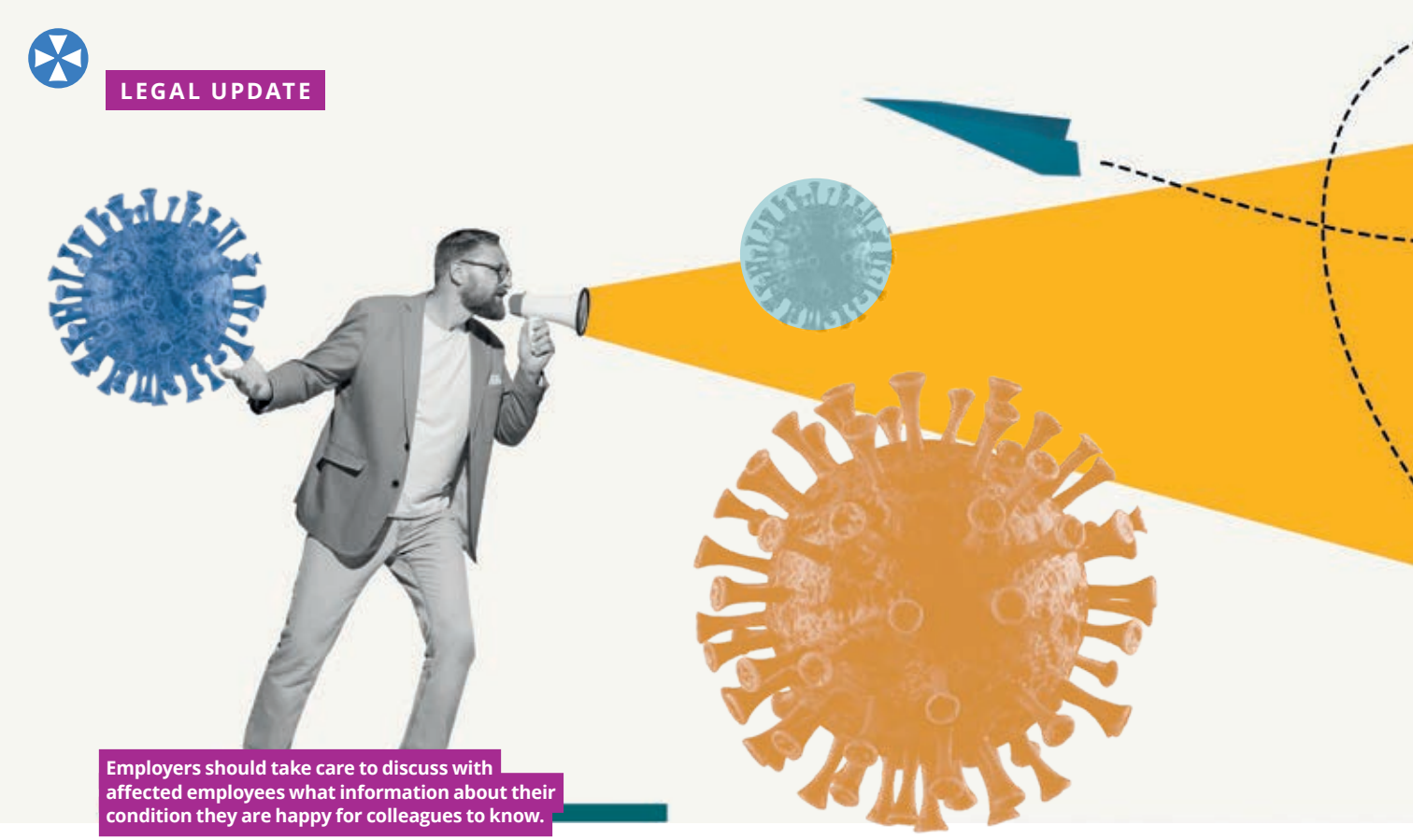
The issue of whether Long COVID satisfies this definition was considered by the Employment Tribunal in the Scottish case of *Burke v Turning Point Scotland 2022*[3]. Mr Burke was a caretaker who tested positive for COVID-19 in November 2020. He had a variety of symptoms, such as headaches, mobility issues, fatigue, problems with sleeping and pains in his joints, which fluctuated but were generally severe. He was absent from work on sick leave from his COVID-19 diagnosis until his dismissal, nine months later. His sick pay was exhausted by June 2021, and he was subsequently dismissed in August 2021 on capability 'ill-health' grounds.

What is often more problematic operationally is planning for those employees whose symptoms are fluctuating.

Mr Burke brought a number of claims in the employment tribunal, including disability discrimination. As a result, the Tribunal had to determine as a preliminary issue whether Mr Burke was disabled according to the *Equality Act 2010*. It was held that Mr Burke was indeed disabled.

Much has been made in the media of this case, with some reporting 'Long COVID recognised as a disability'. While this was correct in the *Turning Point* case, it does create a misleading impression that anyone with Long COVID will be disabled. In fact, every case will turn on its facts.

In considering whether Long COVID amounts to a disability, an employment tribunal will apply existing and well-established principles, albeit in relation to a new medical condition. While the symptoms suffered by Mr Burke are typical of Long COVID, it is conceivable that another Long COVID sufferer, whose symptoms differed, either in terms of the day-to-day impact or their severity, may receive a different ruling.



Employers should take care to discuss with affected employees what information about their condition they are happy for colleagues to know.

What does that mean in practice? Does an employer have to treat an employee differently if they have a disability? Put simply, yes they do. Employers have a positive duty to consider reasonable adjustments where they know, or ought reasonably to have known, that an individual is disabled and must not behave in a way which places the employee at a disadvantage because of their disability.

Knowledge

In some cases, knowledge will be straightforward: an employee will have a diagnosis of Long COVID and will tell their employer. However, in other cases (and far more common) is a less straightforward situation. An employee may consider they have Long COVID but not yet had a formal diagnosis. Or they may simply present with some symptoms post-COVID-19 infection which impact their ability to attend work or function fully in their role.

The employer will be deemed to have 'constructive knowledge' where the information available means they ought reasonably to have known the condition constituted a disability. An employer cannot hide behind the fact that they were not told an employee had Long COVID or were not presented with a neat and clear-cut diagnosis where all the signs were apparent.

It is important for managers and/or HR departments to be educated to spot the signs of Long COVID and to create an environment where employees feel comfortable talking about their condition and asking for help where needed. Return to work meetings play an important part. They will help employers better understand any limitations a Long COVID sufferer faces, and to devise measures to counter them to meet the needs of the business and to support the employee.

The mental impact of Long COVID should not be underestimated. Again, return to work meetings provide an opportunity to support an employee who may be apprehensive about returning to the workplace and may be feeling vulnerable and isolated.

In the absence of an open and approachable workplace, employees may be inclined to soldier on when unwell.

For employees who are unable to return to work and remain on long-term sickness absence, employers need to strike a careful balance. Too much contact may make the employee feel under pressure to return; while too little contact could appear uncaring

and lead to feelings of isolation. Both are counter-productive and create risk for the employer.

In the absence of an open and approachable workplace, employees may be inclined to soldier on when unwell. This could lead to potential mistakes, accidents and a worsening of their condition resulting in time off, and potential legal proceedings. No-one expects line managers to be quasi-medics. However, given the implications for businesses where things go wrong, for example where an employee claims discrimination as a result of suffering a disability-related detriment, or where the employer has failed in its duty to make reasonable adjustments, warning signs should not be missed or ignored.

Reasonable adjustments

What is 'reasonable' will vary from case-to-case.

A tribunal will have regard to various factors including:

- Whether the effect of the adjustment would be to remove or prevent a substantial disadvantage.
- How practical it will be to implement the adjustment.
- The size of the business and resources available to it.
- The cost and disruption associated with implementing the adjustment.

A reasonable adjustment could include a phased return to work programme following a period of absence, or adjusting working patterns or reallocating tasks during periods of 'flare up'. It may also include physical changes to premises or the provision of workplace equipment. The possibilities are many and varied.

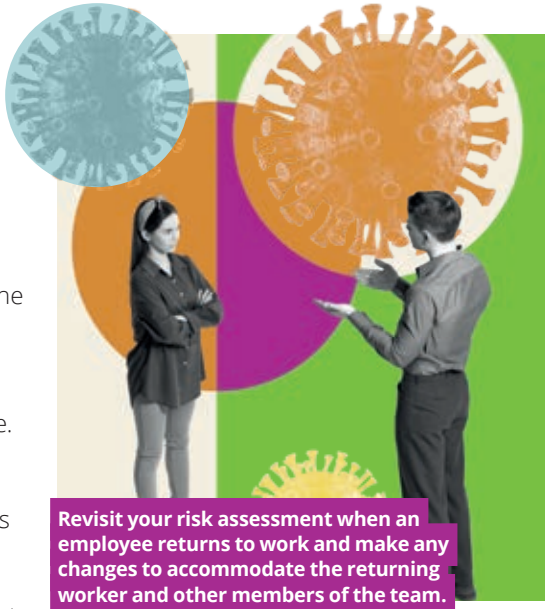
Medical evidence, for example, from an occupational health provider, or from the employee's GP or Post COVID Service, will be important in informing the employer about prognosis, limitations and what can be done to help facilitate and maintain a return to the workplace. However, the employee is an important source of information. Explaining how they feel and what they can and can't do, is invaluable for an employer in establishing what adjustments should be made. There is no one size fits all in terms of Long COVID and reasonable adjustments.

Employers' liability considerations

From an employers' liability (EL) perspective, several laws govern sick leave and managing the return to work. These include the *Health & Safety at Work etc Act 1974* (*HSW Act*) which sets out general duties of employers towards employees. Employers must take steps that are reasonably practicable to try to avoid or reduce the risk to the health & safety

of employees. Further, the *Management of Health & Safety at Work Regulations 1999* (*HSW Regulations*) specify what employers are required to do to manage health & safety under the *HSW Act*.

The main requirement on employers is to carry out a risk assessment, which can be simple. However, an employer should also review its health & safety risk assessment where a worker's health condition makes them or others more vulnerable to workplace risks. Also, if the impact of the workplace adjustments might affect the work and health of others.



Revisit your risk assessment when an employee returns to work and make any changes to accommodate the returning worker and other members of the team.

The point when an employee is returning to work after an illness such as Long COVID provides the opportunity to revisit the risk assessment and make any changes to accommodate the returning worker and/or protect other members of that worker's team. Regular review and/or monitoring of the risks is recommended to demonstrate compliance with the *HSW Act* and *HSW Regulations*.

Warning signs should not be missed or ignored.

Employers should also have health & safety policies developed in consultation with workers and their representatives. In response to a potential EL claim, it is likely an employer would also have to demonstrate the policies have been properly cascaded to management and are being properly implemented.

Claims arising as a result of an employer's alleged breach of its obligations under the *Equality Act 2010* are becoming more common in civil claims, for example, failing to make reasonable adjustments on the worker's return and provide a safe place of work. In addition to these key considerations for employers, it would also be prudent for the employer to engage with its health & safety teams to ensure it is complying with its obligations under the relevant legislation, which have a bearing on an employer's potential future liabilities.

Employers should also take care to discuss with affected employees what information about their condition they are happy for colleagues to know. Divulging confidential health information (special category data) against an employee's wishes may result in a breach of the implied duty of mutual trust and confidence and the *Data Protection Act 2018* and *General Data Protection Regulation*.

The *Turning Point* case is likely to be the first of many in which Long COVID sits front and centre. It has established that Long COVID is a condition capable of satisfying the statutory definition of a disability. With uncapped compensation for successful discrimination claims, employers would be advised to treat suspected Long COVID sufferers as disabled, as well as those with clear diagnoses, ensuring reasonable adjustments are considered and that employees are not unjustifiably disadvantaged because of their condition. Good communication will be a key part of the process and managers must be sufficiently educated to be both confident and competent in spotting the warning signs and potential risks. ●

References

[1]COVID-19 rapid guideline: managing the long-term effects of COVID-19, National Institute for Health and Care Excellence
[2]Self-reported Long COVID symptoms, UK: 10 July 2023, Office for National Statistics
[3]*Burke v Turning Point Scotland 2022*, Employment Tribunals (Scotland)

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