

Employment Tribunal decides that long Covid may amount to a disability

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In *Burke v Turning Point Scotland* an Employment Tribunal decided that an employee who had suffered with Covid symptoms for around nine months was disabled and could proceed with a disability discrimination claim.

What happened in this case?

Mr Burke was employed as a caretaker from April 2001. He caught Covid in November 2020. After the initial isolation period, his symptoms continued and included serious fatigue, severe headaches, joint pain, and insomnia. His symptoms meant he could not undertake ordinary household tasks such as cleaning, ironing, or cooking and would tire very easily.

Mr Burke went on sick leave from November 2020. He obtained Fit Notes from his doctor, which suggested that he had long Covid and post-viral fatigue syndrome. The employer sought two occupational health reports in April and June 2020. These contradicted the Fit Notes and stated that Mr Burke was fit to return to work and that it was unlikely that he was disabled.

However, Mr Burke's symptoms worsened, and he did not return to work. The company eventually dismissed him on the grounds of ill-health in August 2021. Mr Burke brought a claim for disability discrimination. A preliminary hearing was held to decide whether Mr Burke was "disabled" for the purposes of discrimination law (being the first hurdle required to progress a disability discrimination claim).

What was decided?

The Employment Tribunal found Mr Burke to be a credible witness who had not exaggerated his symptoms (especially when there was no financial benefit to him in remaining on long-

term sick leave) and that the post-viral fatigue syndrome caused by Covid amounted to a physical impairment.

The Tribunal also decided that the condition had a substantial impact on his ability to undertake day-to-day activities and (at the time of his dismissal) his symptoms were likely to last for 12 months. Therefore, the Tribunal concluded that Mr Burke was disabled and could proceed with his claim for disability discrimination.

What does this mean for employers?

Last month, we [discussed](#) the question of whether long Covid could amount to a disability. Despite some confusing guidance from the Equality and Human Rights Commission, we concluded that long Covid would, in some cases, amount to a disability. This latest decision supports that view.

Employers should be aware that employees with long Covid may be disabled, meaning that they will be protected from discrimination and that reasonable adjustments should be made for them. This could include things like offering a phased return, a part-time hours arrangement or adjusting trigger points in absence management policies.

This decision is also a useful reminder for employers not to rely on occupational health reports to make conclusive determinations about whether or not an employee is disabled.

[Burke v Turning Point 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 Managing Associate Emily Plosker (emilyplosker@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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