

# ‘Long covid’ upheld as a disability by Employment Tribunal

By Joseph England

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## Introduction

1. In the first instance case of [Burke v Turning Point Scotland](#) ET Case no. 4112457/2021 (judgment sent to parties 30 May 2022), the ET analysed the Claimant’s reliance on ‘long-covid’ and found that it did amount to a disability and therefore a discrimination claim could proceed.
2. The physical impairment relied upon in this case was “post viral fatigue 10 syndrome” or “long COVID”. This had been a diagnosis made by a GP after approximately one month after the Claimant’s first positive test.

## Explanation

3. The effects on the Claimant are explained from para. 15 and include:
  - The claimant first contracted COVID-19 with a positive test on 15 November 2020. (J7)
  - The symptoms of COVID were “very mild at first” for him albeit his wife was severely affected. He described his symptoms as being “flu like” over the isolation period.
  - However, after the isolation period, he developed severe headaches and symptoms of fatigue. He stated that in the time following isolation, after “waking showering and dressing”, he would require to lie down to rest from fatigue and exhaustion and that he struggled standing for long periods. He had been accustomed to helping around the house in activities such as cooking meals, ironing and shopping but those activities ceased due to a lack of energy. He had been accustomed to walking to the local shop “at the end of my block to buy a newspaper” but that became difficult and ceased. Problems were exacerbated by joint pain in his arms, legs and shoulders together with a loss of appetite.
  - He also found that his concentration was not the same in that he could be watching a TV programme and “drift off”.
  - Additionally, his sleep pattern was “wrecked” as he would wake up and be unable to return to sleep.
  - He did not feel well enough to socialise or attend important events such as his uncle’s funeral on 12 December 2020 because of fatigue and headaches which was very much out of character for him. Additionally, in December 2020, albeit three households were permitted to meet indoors, he did not attend any Christmas celebrations.
  - The claimant advised that his health had gradually improved and as at April 2022, no longer suffered from joint pains and headaches but still experienced some fatigue and his sleep pattern was still very disrupted leading to tiredness in the day. However not until around beginning January 2022 had he “began to feel better” with continuing fatigue being the main issue and flare up of joint pain.

4. The Tribunal concluded firstly that long covid did exist, a point not always accepted (although seemingly not challenged here). The Judge noted, “The information on COVID has included the phenomenon of long COVID as a recognised difficulty and the possible outcomes of those contracting COVID19. The TUC report makes reference to their members’ experience of the 15 condition and that was largely reflective of the claimant’s evidence on the matter.”
5. Accepting that the Claimant’s report of his symptoms was not exaggerated, the Tribunal accepted the symptoms as reported by the Claimant and his daughter. The effect was held to have an adverse effect on the claimant’s ability to carry out normal day to day activities, notably “with fatigue being the main issue latterly”.
6. Whether his condition was long-term was a more complicated issue and the Tribunal notes, “It would appear that such is the nature of this particular condition that it is very difficult to predict when it may be resolved”. The Respondent was then hung by its own words used to justify dismissal. Their justification to the Claimant that “there does not appear to be a potential date on which there is a likelihood of you being able to return to full duties in the future” and “due to the uncertainty around a potential return to work date” was what enabled the Judge to conclude “it could well happen that the condition and substantial effects would have lasted until end November 2021 thus complying with the condition that the substantial adverse effect was “long-term”.

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