

EMPLOYMENT LAW

NEWSLETTER

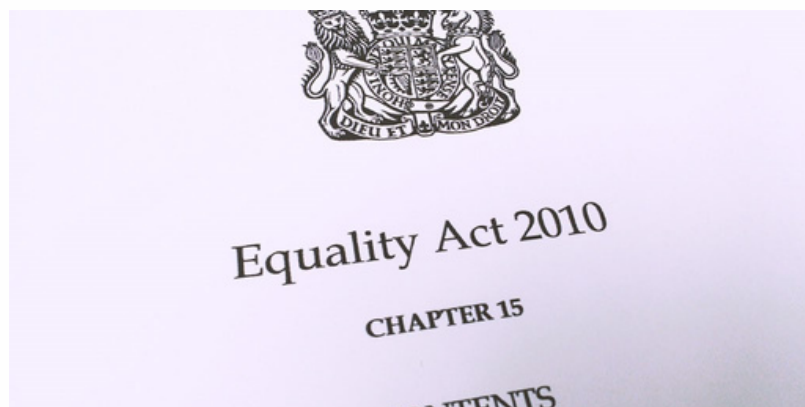
Welcome to the latest edition of our employment law newsletter. In this edition we consider the recent successful sexual harassment claim brought by Mr Finn against his employer, The British Bung Manufacturing Company Ltd, as well as the case of *Burke v Turning Point Scotland* in which Long Covid was held to be capable of amounting to a disability. We also look at the role of an investigator within disciplinary and grievance processes.

CAN CALLING SOMEONE 'BALD' AMOUNT TO SEXUAL HARASSMENT?

The law

The Equality Act 2010 (EA 2010) sets out various protections from discrimination both in and out of the workplace, including protection from harassment.

Sexual harassment arises when a person engages in unwanted conduct towards another related to their sex, and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them to work in.



Whether the conduct in any situation will amount to sexual harassment will depend on the circumstances, the perception and effect on the complainant and whether it was reasonable for the conduct to have that effect. Unwanted conduct can include a wide range of behaviours.

The facts

In the case of [Finn v The British Bung Manufacturing Company Ltd](#) Mr Finn had worked for the British Bung Manufacturing Company since 1997 until his dismissal in May 2021. The employer was a small family business, with a predominantly male workforce.

Before Mr Finn's departure he had two separate altercations with another member of staff, Mr King, with it being found in both instances that Mr King had threatened violence towards Mr Finn. During the first of those altercations Mr King also called Mr Finn a "bald *****".

As part of a wider set of claims being pursued by Mr Finn the Employment Tribunal had to consider whether the calling of Mr Finn a "Bald *****" amounted to harassment related to Mr Finn's sex. The tribunal did not hesitate to find that being spoken to in such a derogatory manner was unwanted conduct, despite strong language being commonplace within the working environment. The tribunal also found that Mr King had crossed the line when making such personal remarks regarding Mr Finn's appearance and that he had done so with the intent to threaten and insult. The tribunal also considered that baldness is much more prevalent in men (three of the tribunal members were both male and bald) than women, whilst acknowledging women can also be bald. Accordingly, it also held the unwanted conduct was related to Mr Finn's sex. It was not, however, considered age discrimination.

As the purpose and intent of Mr King's unwanted conduct was clear the tribunal did not have to go on to consider the effect of the conduct and, in particular, whether it was reasonable for the conduct to have the effect it did on Mr Finn.

What is also interesting about this case is that the first altercation giving rise to the sexual harassment claim took place some 18 months prior to Mr Finn's dismissal. Strictly speaking it was therefore out of time.

The Tribunal took several factors into account when exercising its discretion to extend time. These not only included the fact the complaint had merit with it being in the public interest to extend time, but also there was no prejudice to the employer by doing so. The first altercation was investigated at the time with contemporaneous statements taken. Mr King also attended the tribunal hearing to give evidence and had a clear recollection of events. Mr Finn had also urged his employer to exercise leniency after the first altercation to ensure Mr King was not dismissed, as he was a single father, with the tribunal not considering it improper or unreasonable that Mr Finn would wish to resurrect matters when threatened again.

How can employers protect themselves from harassment claims?

Whilst it can be difficult for an employer to avoid something like the above happening altogether, pro-active preventative steps can and should be taken to help limit risks.

Not only should employers ensure they have strong equality and anti-bullying and harassment policies in place, additional preventative steps should also be considered, such as regular training, with staff clear on what is and is not acceptable behaviour and how they can and should report any concerns.

In the event of a complaint, prompt steps should always be taken to investigate the same, including speaking with any key witnesses, as well as taking appropriate disciplinary action, where required.

Do also bear in mind that sexual harassment is not always unwanted conduct by a member of the opposite sex, as in this instance both of the employees were male.

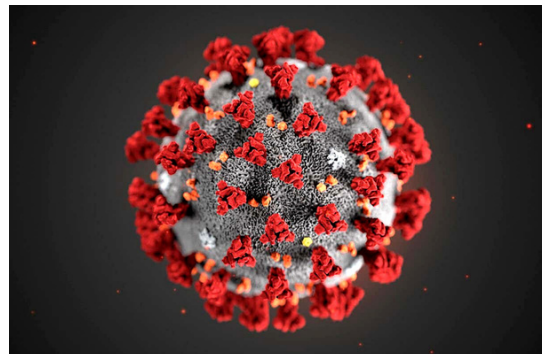
Where there are concerns of potential sexual harassment complaints or claims from an employee, taking early legal advice is always recommended.

DOES LONG COVID AMOUNT TO A DISABILITY?

As expected, in the recent case of *Burke v Turning Point Scotland*,^[1] an employment tribunal has found that an employee suffering from long COVID symptoms was disabled for the purposes of Section 6 of the EA 2010.

The law

For the purposes of Section 6 an individual is disabled if they have a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities.



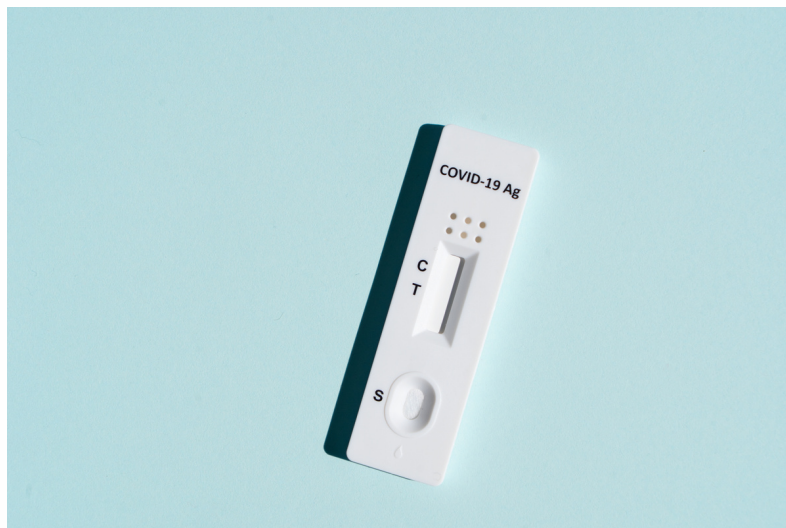
In accordance with Section 212(1) of the EA 2010 “substantial” means more than minor or trivial. Schedule 1 of the EA 2010 also provides that the effect of the impairment is long term if it “has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected”. Also in accordance with Schedule 1 if the impairment, whilst ceasing to have a substantial adverse effect, is likely to reoccur then it is to be treated as continuing.

[1] *Mr T Burke v Turning Point Scotland* [2022] 5 WLUK 490 (27 May 2022)

The facts

Mr Burke was employed by Turning Point Scotland in a caretaker/security role between April 2001 until his dismissal on ill-health grounds in August 2021. He first contracted COVID in November 2020 and never returned to work, remaining signed off until his dismissal.

Whilst his symptoms were described as “very mild at first” after the isolation period he developed severe headaches and fatigue symptoms. Mr Burke reported having to rest from fatigue and exhaustion after “waking, showering and dressing” as well as struggling to stand for long periods. He also suffered with joint pain and loss of appetite, as well as concentration issues and a disrupted sleep pattern. He struggled with general day to day activities such as cooking and shopping.



Whilst his health gradually started to improve he found his symptoms unpredictable. He would have periods of improvement, only for symptoms to later flare up again. The symptoms and their unpredictability also mirrored reports of long COVID symptoms in a TUC report issued called “workers experience of long COVID”. Accordingly, the tribunal had no issue in considering them as likely to reoccur and therefore deeming them to have long term effect.

It should be noted that whilst the tribunal found Mr Burke disabled, the question of whether Turning Point Scotland acted fairly in dismissing him on ill-health grounds is a matter for separate determination at a later date.

Conclusion

The above decision confirms the consensus that long COVID can, in appropriate circumstances, amount to a disability. This will, however, always be fact dependent.

This decision is not only relevant to instances of long-term sickness absence following COVID but is also of potential importance where individuals suffering from long COVID have a high level of short term absences due to symptom flare up, or other potential performance concerns, requiring the potential need to make reasonable adjustments. In any instance, where there are absence or performance concerns that may be linked to a disability and where you wish to invoke any form of capability process, legal advice should always be taken first.

MISCONDUCT AND GRIEVANCE INVESTIGATIONS

It is important when dealing with either a potential disciplinary matter, or a staff grievance that appropriate investigations are completed before any decisions are made.

Whilst the nature of these investigations will always be fact specific below are some key points to always consider.

Appoint an impartial investigator

Decide who is to oversee the investigation. This should be someone who has had no direct involvement in the matters to be investigated. For disciplinary proceedings this should be someone different to those overseeing the disciplinary process, including any appeal.



Ensure the investigator appreciates what is required of them

The investigator needs to ensure they:

- clearly identify the issues to be investigated, identifying any questions that need to be asked;
- identify who they need to speak to as part of the investigation, including any potential witnesses that may help corroborate the events complained of, or otherwise;
- go into the investigation with an open mind, not a pre-determined decision which could cloud judgment and adversely impact on the direction of the investigation and questions posed;
- compile full written records of all investigation meetings. We recommend using a note-taker (clearly identified as such) to save the investigator having to multi-task, risking gaps (these notes should be shared with the person interviewed after the meeting);
- are comfortable that all reasonable investigations have been concluded before reaching any final conclusions; and
- fully explain any conclusions reached at the end of the investigation as part of their written findings. If they do not accept someone's version of events why was this?
- Investigators must also be discreet and professional, only disclosing elements of the investigation on a strictly need-to-know basis in order to effectively and fairly progress the investigation.

**Other points to consider**

Depending on the frequency in which such investigations arise having a pool of trained investigators within your business should be considered.

If your investigator needs any support and guidance during the process how will they acquire this? This can be provided by internal HR support, although care needs to be taken to ensure they do not seek to influence the findings and conclusions reached.

Lightfoots can assist in drafting grievance procedures and advising you how to deal with grievances, specific or otherwise, in a way that helps you minimise the risk of claims. Our Newsletter of October 2021, Issue 6, details tips for conducting grievance investigations.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter, so please do get in touch with us if that's the case (contact details below):

1. Providing template Equality and Diversity and Anti-Bullying and Harassment policies or reviewing existing policies to ensure they remain fit for purpose.
2. Advice and guidance on investigating any complaints of sexual harassment, bullying, discrimination or any other forms of conduct.
3. Advice and guidance on best practice when it comes to invoking capability processes or considering potential dismissal on the grounds of ill-health.

Please note that the information in this newsletter is not designed to provide legal advice or create a solicitor – client relationship. No liability is accepted for any loss caused in reliance upon its content. You should always seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

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