



**Informing Progress** - Shaping the Future

## **FOIL UPDATE 16<sup>th</sup> June 2021**



### **Covid 19**

This virtual event, held on 15<sup>th</sup> June, was hosted by the FOIL Retail Sector SFT. Its aim was to look at how legal liability is likely to develop within the retail sector as it emerges from the pandemic.

**Heidi Swales – Kennedys**

#### **The use of face coverings in retail settings**

Some customers are exempt from wearing face coverings on the grounds of a disability, whether 'real' or perceived. The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place (England) Regulations 2020 (the CV Regulations) came into force on 24 July 2020. Reg. 3(1) provides that no person may, without reasonable excuse, enter or remain within a relevant place without wearing a face covering. Relevant place includes a shop or retail outlet.

Reg 4 states that for the purposes of Reg 3(1), the circumstances in which a person has a reasonable excuse include those where—

(a) he cannot put on, wear or remove a face covering—

(i) because of any physical or mental illness or impairment, or disability (within the meaning of section 6 of the Equality Act 2010), or

(ii) without severe distress.

S6(1) of the Equality Act provides that a person has a disability if—

(a) he has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

However, Reg 4 of the CV Regulations contains a further exemption where a person has a reasonable excuse (as defined by the regulations) not to wear a face mask, including where they are accompanying, or providing assistance to, another person who relies on lip reading to communicate with them.

A memorandum to the CV Regulations provides further guidance to retailers, who are expected to use their discretion and judgment when considering reasonable excuses as exemptions. To refuse entry to retail premises to someone who has a reasonable excuse not to wear a mask is unlawful. Yet further guidance from the Equality Commission is to the effect that disabled individuals should not be routinely challenged to prove that they are exempt.

Ss 15 and 19 of the Equality Act are of particular relevance.

Under S15 a person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and cannot show that **the treatment is a proportionate means of achieving a legitimate aim** (emphasis added as this test is referred to later). S19 covers indirect discrimination where a person discriminates against another if he applies to that person a provision, criterion or practice which is discriminatory by reference to protected characteristics of that person, which include disability. On top of that, S20 of the Equality Act imposes a duty to make reasonable adjustments to promote access to the service offered so that it may be enjoyed by the disabled person, to as close an extent as it is possible to achieve.

Against this background, Ss 15 and 19 have caused considerable concern to retailers, faced with the unique problems of the pandemic. As an employer, the retailer's primary duty of care is to its employees. This offers the prospect of that duty being viewed as a legitimate aim if the retailer implements a policy which might otherwise be viewed as indirectly discriminatory against an individual. Similarly, there might be operational reasons to support what might otherwise be viewed as a discriminatory system, e.g., where self-isolation has led to staff shortages which threaten the ability of the business to deliver its services.

An example cited was of a retailer who, in December 2020, had imposed a strict requirement for face masks or visors to be worn on its premises. The retailer argued that this was a proportionate response to the increase in the number of staff who had tested positive and were self-isolating from September 2020 onwards and into 2021. This was necessary both to protect the health of the workforce but also to protect the business.

The speaker was of the view that this was a legitimate aim and proportionate stance, particularly in the light of further waves of the pandemic. She invited comment from other delegates on their experiences.

One delegate's experience to date related primarily to litigants in person claiming that they had been wrongly challenged for not wearing a face mask. These covered a period when some retailers had not got to grips with the regulations. Some of these confrontations had been filmed and others looked as though they may have been orchestrated. Those claims that were being paid were low value. There was no widespread experience of accompanying claims for harassment.

Another delegate's experience was different from that of the speaker's, in that his clients were taking a relaxed approach to the non-wearing of masks, primarily to avoid staff coming into conflict with customers. Another dynamic was that some individuals challenged for suspicious activity were responding with a 'mask' claim.

### **Ingrid McGhee – Weightmans**

Before beginning her presentation, the speaker commented that much of what had been discussed earlier, came back to the policies implemented and staff training. Staff need to deal with situations appropriately and consistently and are not seen to be picking on certain individuals.

## **Vaccinations and mask wearing from an employment prospect**

Vaccination is not mandated and a business cannot force an employee to have the jab. However, it has been reported that the government is expected to announce later this week that coronavirus vaccinations will be made compulsory within the care sector. It is suggested that care home employees given 16 weeks to get the vaccine or face being redeployed away from frontline care.

As discussed, whether or not an employer could introduce such a policy will depend on what sector they are in and their ability to rely on health and safety law and regulation to support such a measure to make the workplace safe. No delegate was aware of such a policy having been brought in in the retail sector.

Masks are mandatory in the retail sector. Problems have arisen particularly in the hospitality sector, with some staff refusing to wear masks. There must be a clear policy which addresses all stakeholders: management, staff and the end user. Staff should be engaged in this process, so that everyone can understand the issues, why any given steps are needed and that all aspects of the policy are aligned. If a problem arises, everyone should be aware of what the policy is. Expectations also need to be addressed, as things will not necessarily return to 'normal' at the end of the pandemic.

Once the policy has been designed and everyone understands it, how it is to be implemented must then be considered. At any time, but certainly at the moment, it is necessary to think through what will happen if the policy is not followed: what happens if an employee does not comply? Businesses need to be very clear as to what they will do, which may range from a verbal warning to treating non-compliance as gross misconduct (ultimately resulting in dismissal with no notice). This may be influenced by which sector the business is in, the reason for any non-compliance, the importance to it of mask wearing and whether any other measure could be implemented to achieve the health and safety concern identified.

All of these steps must be understood by management and clearly communicated to staff. Into all of this must be factored measures to avoid any discrimination under the 2010 Act. Claimants are more than ever aware of their rights, but many claims relate back to poor communication at the outset.

## **Covid as a disease and causation**

### **Jonathan Mitchell – DAC Beachcroft**

#### **Legal Causation**

Two tests may be considered. First, 'but for' the workplace exposure, would the claimant have developed symptoms? If 'yes' the defendant is not liable, if 'no' the defendant is liable. Secondly the 'material contribution' test: did the workplace exposure make a material contribution to the claimant contracting the disease? The speaker was of the view that the first but not the second of these tests will currently apply to Covid claims.

#### **Factual Causation**

Coronavirus will be spread by an individual inhaling or ingesting infected droplets from the atmosphere, generally caused by an infected person coughing or sneezing. This could be a customer in a retail outlet, who is not wearing a mask, sneezing next to a member of staff. The virus will also spread via contaminated surfaces.

It must be borne in mind that the situation is very different in mid-2021 from what it was in March 2020. Different rules and regulations were brought in at different times, which will determine how defendants respond to different claims. Also, other sources of exposure must be considered. For

example, in February 2021, lockdown reduced possible sources of transmission, whereas in August 2020, people were being encouraged to eat out to help out.

Other considerations include any travel the claimant may have undertaken and/or whether they have been seeing family/living and working in the same household. Enquiries into a claimant's social life may be worthwhile, including checking social media. Is this an isolated case or one of a cluster? If a cluster arises in relation to a workplace, that suggests that control measures were ineffective, whereas an isolated case would suggest otherwise.

It is often what an employer did not do that becomes more relevant than what they did do. What precautionary steps were taken by a retailer before masks become mandatory for customers in July 2020? Was social distancing in force and if not why not? Consider, from the records, why certain decisions were made at the relevant time.

### **Medical Causation**

It is unlikely that any medical evidence will be sent with the letter of claim. It will be necessary to look at the medical records and the absence of any reference to Covid 19 symptoms or a formal diagnosis could raise potential fraud issues. Alternatively, the claimant may have had symptoms of some other condition (such as flu) and believed that they had Covid when they did not. This may be more of an issue for the period before testing became available.

In the absence of medical evidence, the claimant must prove, on the balance of probability, that they had Covid and that it was contracted in the workplace.

The comment was made that claimants will have an uphill struggle on causation, given the incubation period for Covid and other sources of exposure they might have come into contact with during that period. Even if a breach of duty is established, it is arguable that the claimant could have contracted the virus from children coming home from school or from meeting with others outside of the workplace.

The speaker agreed and returned to the example of a cluster outbreak in a workplace as providing a claimant with the best case. Other claimants may be able to show that they only attended work and otherwise were isolating, reducing the defendant's arguments that there may have been other sources.

**Bob Still** is responsible for some 3,500 betting shops in the UK. To date, he had experienced no claims but anticipates that some will arise, particularly in certain parts of the British Isles.

Very strong measures were introduced to protect staff, including protective kit. Screens have been erected; machines have been separated; and staff are not encouraged to go out onto the floor. One quite frequent issue is customers spitting on staff.

A robust health and safety system was introduced at a very early stage, including for testing staff and requiring infected members to self-isolate. The speaker thought it was this system that had resulted in no claims to date from staff or customers. It was also relevant that some shops had been limited in what they could do (e.g., not showing live tv.), reducing the numbers and length of visits.

Looking to the future, the fixed screens will probably remain but otherwise it seems likely that there will be a gradual return to visits to the shops by more people for most of the activities available before.

The comment was made that in some sectors, staff had been reluctant to be tested because of the need to remain away from work if the test was positive. Other employees were now reluctant to return to the workplace, having worked remotely for so long. Where an employer is encouraging a return to work, the appropriate health and safety measures must be in place.

## **Jim Byard – Weightmans**

### **What long Covid means**

There is a very loose definition to cover anyone who has tested positive for Covid 19 and has continuing symptoms. A tighter definition is where a person still has symptoms more than four-weeks after a positive test. But that preferred by NICE is where there are symptoms more than 12 weeks after a positive Covid test.

The National Institute of Health Research looked at this more forensically and published a paper on 16 March 2021. They produced four categories: patients with post intensive care unit syndrome; patients with long-term organ damage; post viral syndrome patients; and those with long Covid. The research suggested that true long-Covid is an active disease with a number of symptoms. The probability is that as we move through the pandemic, this definition will become tighter and more specific.

### **How prevalent is long Covid?**

The current view is that one in 10 patients who test positive for Covid 19 will go on to develop long Covid. It had been reported in the news that in February there were one million sufferers in the UK population. The statistics suggest that females and younger people are more likely to develop it.

### **The principal symptoms**

It causes major organ failure; respiratory problems; fatigue; joint pain; rashes; depression and anxiety; and even tinnitus and hearing loss. Patients who had been hospitalised with Covid are more likely to develop long Covid, including some who will be diagnosed with PTSD.

The government is now addressing the issue by setting up a number of long Covid clinics and NICE has issued a clinical treatment framework in January 2021.

### **Implications for compensators**

While claimants will have problems with causation, those suffering long Covid often have serious symptoms: kidney or liver failure; or anxiety and depression, with all of the problems of subjective reporting. Claims may therefore be sizeable.

A delegate observed that with claims coming in late, it could be very difficult for an employer to prove what happened. For example, it is difficult to disprove an allegation that someone who was not wearing a mask coughed in the face of the claimant: proving a negative.

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