Joint union response to legal guidance challenging aspects of the Joint Union Long Covid Protocol

We are aware that some employers may have received legal advice challenging aspects of the Joint Union Long Covid Protocol, published in April this year by all the education unions (NEU, ASCL, NAHT, NASUWT, Unite, Unison, GMB, Community and UCU). We are concerned that this legal advice may discourage employers from adoption of the protocol, which simply aims to provide reassurance and confidence that Long Covid is being managed in a fair and supportive way.

We would, therefore, like to take the opportunity to clarify certain points in respect of the protocol.

By way of introduction, we would point out the importance of employers and trade unions using the collective bargaining process to come to agreements which will help employers attract and retain staff. This of course means going beyond legal minimums, which is what good employers do regularly.

The joint unions are not asking employers to completely exclude Long Covid from the arrangements that an employer would normally use to manage long-term illness, nor are we asking employers to bestow more favourable treatment on one group of disabled workers to the detriment of other disabled workers. There is nothing in the protocol that would prevent an employer from applying the same terms to any other disabled employee.

To clarify our position in respect of Disability Leave, the Equality Act 2010 establishes a duty on employers to provide reasonable adjustments for disabled people who face disadvantage at work. Disability Leave is an example of a reasonable adjustment which is given in the EHRC statutory Code of Practice which accompanies the Equality Act. The right to Disability Leave as a reasonable adjustment has been given further weight through case law, which has also considered how refusals to consider disability-related leave can sometimes amount

to discrimination arising from disability or associative disability discrimination. Despite the advice of one legal firm, it is simply not true to say that 'the concept of disability leave does not exist in law' and the advice given may put employers at risk of a legal claim. Case law has established that disability leave can cover time off for treatment, rehabilitation and assessment and where the worker is waiting for other reasonable adjustments to be put in place.

We do not wish to see schools and colleges involved in time and resource-consuming arguments with unions as to whether an individual member is disabled or not – when this can only be definitively judged by a tribunal. However, having a policy in place may also potentially reduce the risks of litigation, showing they have acted reasonably and in line with the law, should it be established that the member is disabled.

The protocol does nothing more than summarise the steps we deem reasonable for an employer to take in respect of employees with Long Covid. Since Long Covid sufferers present with the same or similar symptoms and tend to have the same needs, it makes sense, in our view, to summarise their needs in a single document so that employers do not have to reinvent the wheel whenever an employee develops Long Covid.

Furthermore, it is worth restating that the Protocol is intended as a basis for negotiation, not a statement of the legal rights and entitlements of employees with Long Covid.

In summary, we are not suggesting that employers move away from a personalised approach to applying adjustments, rather we are seeking employers' agreement to the protocol through collective bargaining mechanisms. We see no reason why employers would reject the protocol when many of the 'asks' are already standard practice.