



## **'No Jab No Job': A legal perspective on advice to employers**

As recovery from the pandemic gains ground, one of the most controversial topics relates to whether an employer can oblige an employee to be vaccinated as a condition of their employment. Or, perhaps more accurately, whether employees can refuse a vaccination and still expect to remain in employment.

The competing interests could not be more stark. The employer has an ordinary common law duty to take reasonable care for the safety of its staff and others who are foreseeably affected by its actions. Therefore, the argument runs, an employer will have to give some consideration to the issue of protecting those within the workforce and others who may come into prolonged contact with them during the course of their employment. Depending on the circumstances, an employee who has to work with someone who has not been vaccinated and may be exposed to a material risk by doing so, may argue that there is a breach of the duty to provide a safe system or work, whether as part of the implied duty to maintain trust and confidence or otherwise. That could lead to a claim for constructive dismissal. Finally, there are commercial reputational considerations; potential customers may be more inclined to treat with an employer if they know they are dealing with an organisation with a robust vaccination policy.

As far as the employee is concerned there is a duty to cooperate with the employer in maintaining any safe system of work but the right to refuse vaccination is part of an individual's right to refuse medical treatment for whatever reason. This has been clearly stated several times but, perhaps, most forcibly in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 where Lord Donaldson observed that:

*"An adult patient who...suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered... This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent."*

This principle is reflected in the existing public health legislation. The Public Health (Control of Diseases) Act 1984 specifically provides that the delegated powers of the Secretary of State to make secondary legislation to control the spread of an epidemic do not extend to compelling individuals to undergo medical treatment; and this expressly includes vaccination. Of course, no one is suggesting individuals are compelled to be vaccinated, and there are no known plans to amend this legislation, although there have been discussions about proposals relating to specific sectors. The issue is a more nuanced one; can the individual be subject to a disadvantage, namely losing a job or failing to be selected for one, if having been offered a vaccination, they refuse it?

It seems, as a matter of general principle, the answer to this question is a tentative 'yes'. A balance has to be struck between these competing interests which, depending on the circumstances, may justify such a step. This conclusion has some existing support to the extent that, consistent with this, there is European Court of Human Rights authority in the case of *Jehovah's witnesses of Moscow v*

*Russia* where it was acknowledged that, whilst the state should abstain from interfering with the individual's freedom of choice in the sphere of health care, it might potentially justify doing so where there was a need to protect third parties<sup>1</sup>. A useful analogy is also provided in the case of *Wretland v Sweden* which upheld the right of an employer to dismiss a cleaner at a nuclear power station who refused to undertake a drug test.<sup>2</sup> A decision relating to mandatory vaccination involving parents who refuse to vaccinate their children in the Czech republic is awaited<sup>3</sup>.

It may be that the important questions which will determine how any Employment Tribunal (or Court) would look at this issue, relate to 'who' is involved and 'how' the employer seeks to impose this requirement. Everything will depend on the facts in a given case.

Depending on 'who' is affected the issue of discrimination may arise. The clearest example relates to those who are pregnant or planning to become pregnant in the three months prior to any proposed vaccination. Clearly, any pregnant woman should not be vaccinated and any unfavourable treatment linked to this will amount to direct pregnancy discrimination. Further, it may be that inability to have the vaccine is linked to a disability. Again, the potential for discrimination arises. Race may also be a factor as there may be a perception by the BAME community that there is a lack of research on the effects of a vaccine for ethnic minorities consistent with perceived historical exclusion from health care generally.

Therefore, it is of crucial importance that employers take great care when considering 'how' to implement any such condition. Creating new express contractual terms for new recruits should be straightforward, although changing existing express contractual terms for present employees may be more difficult. The most appropriate way of dealing with the issue is by implementing a new policy on vaccination. The process for arriving at such a policy needs to be handled with care; there should be a degree of consultation which is commensurate with the sensitivity of the issue and the numbers and characteristics of the workforce involved. The content of the policy needs to be scrutinised with care; it needs to be sufficiently focused to meet the particular circumstances of the work involved, it needs to be sufficiently targeted that it avoids any discriminatory effect and it needs to be sufficiently flexible so as to be able to respond to unique situations. Importantly, it also needs to involve consideration of a potential 'fall back' position; what can be done to protect others if vaccination is not appropriate?

If an employer takes care when formulating such a policy then, if it comes to it, and there is no other realistic option other than dismissal, the employer should be in a strong position to contest any resulting unfair dismissal claim. The difficulty is that whilst there will be pressure on employers to implement such policies in the very near future, the prospect of having any domestic guidance from a superior court lies a long way off.

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<sup>1</sup> <https://voelkerrechtsblog.org/do-compulsory-vaccinations-against-covid-19-violate-human-rights/>

<sup>2</sup> *Wretland v Sweden* 46210/99 ECHR

<sup>3</sup> *Vavricka v Czech Republic* <https://www.echrcaselaw.com/en/echr-decisions/compulsory-vaccination-controversy-ecthr-and-fundamental-human-rights/>