



PUMP COURT
CHAMBERS

No Jab, No Job

Daniella Gilbert & Sian Beaven



No jab, no job

- Can employees be required to have the Covid-19 vaccine?
- What issues arise?
- Existing employees Vs new recruits?

Current legislation & consultation

- Currently no legislation that would require vaccination, but:
- Care home staff:
 - Government’s consultation response (16 June 2021)
 - Intends to legislate to require all CQC regulated service providers that provide accommodation for persons who require nursing or personal care in care homes in England to allow entry only to those who have completed the course of vaccines or are exempt.

Current legislation & consultation

- Applies indoors only.
- Will apply to any professionals visiting a care home, such as healthcare workers, tradespeople, hairdressers, beauticians and CQC inspectors.

Employer's duties

- Common law duty to take reasonable care for safety of staff and others foreseeably affected by employer's actions.
- Duty to provide safe system of work.
- Health and Safety Work etc Act 1974: sections 2 & 3.

Employer's duties

- In the context of Covid-19 this may mean:
 - social distancing
 - cleaning
 - face coverings
 - Regular testing

Employee's duties

- Duty to co-operate, including in maintaining safe system of work.
- Duty to comply with reasonable and lawful instructions
 - Reasonable: depends on nature of the job.
 - Lawful: depends on nature of the instruction.

Employee's rights

- To be provided with a safe system of work:
 - Corresponding contractual obligation - an employee who leaves because the system is unsafe in some serious respect may claim unfair dismissal (*British Aircraft Corpn v Austin* [1978] IRLR 332, EAT).

Employee's rights

- To refuse medical treatment including vaccines:
 - *“Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment... This is so notwithstanding the very strong public interest in preserving the life and health of all citizens.” (Re T (Adult: refusal of treatment) [1993] Fam 95)*

Employee's rights

- Article 8 ECHR
 - Though in *Vavříčka and Others v. the Czech Republic* – ECHR held mandatory pre-school vaccinations were a justifiable interference.
- Contrast Public Health (Control of Diseases) Act 1984:
 - Section 45C Health protection regulations: domestic – is subject to section 45E Medical treatment
 - Even where public health is as stake, no-one can be compelled to have the vaccination

Conclusion

- Employees cannot be forced to have the vaccine.
- BUT can they be disadvantaged by their choice not to have it?
- Can an employer impose a blanket vaccination policy?

What issues arise?

- Clear disparity in vaccine hesitancy:
 - 94% of adults reported positive sentiment
 - Greater hesitancy amongst some ethnic minority groups
 - 21% of Black or Black British adults reported hesitancy as compared with 6% of White adults and 7% of Asian or Asian British adults
 - Greater hesitancy amongst some religions
 - 11% of adults identifying as Muslim or Other reported hesitancy as compared with 5% of adults who identify as Christian and 2% who identify as Hindu

What issues arise?

- No significant disparity between men (7%) and women (6%) but of those women 31% cited fertility as their reason for refusal.

(Office of National Statistics report: Coronavirus and vaccine hesitancy, Great Britain: 28 April to 23 May 2021 (9 June 2021))

What issues arise?

- Clear potential for any blanket policy to be discriminatory – in particular section 19:
Indirect discrimination
 - Will need to be framed carefully with appropriate exceptions
 - Will need to be capable of objective justification

Objective justification

- Fact specific:
 - Nature of work
 - Need to protect colleagues and members of public
 - Future legislation
 - Other less onerous measures available

- Current guidance from PHE:
 - Pregnant women should be offered the vaccine at the same time as people of the same age or risk group
 - Vaccines can be received whilst breast feeding
- Section 18 Equality Act 2010: unfavourable treatment because of pregnancy or illness resulting from pregnancy during protected period
- Section 19 Equality Act 2010: indirect (sex)

Disability

- Allergies, Immune system disorders, Anxiety
- Section 15 Equality Act 2010: unfavourable treatment because of something arising as a result of disability
 - Objective justification?

Anti-Vaxxers – A belief ?

- Question the courts may have to grapple with is whether a vaccine sceptic could be considered to hold a belief under the Equality Act 2010?
- The definition of ‘belief’ has expanded beyond religion eg: ethical veganism in *Casamitjana v the League Against Cruel Sports* 3331129/2018.

Anti-Vaxxers – A belief ?

- Belief is defined if the following criteria met:

It must be genuinely held;

It must be a belief and not an opinion or viewpoint based on the present state of information available;

It must be a belief as to a weighty and substantial aspect of human life and behaviour;

It must attain a certain level of cogency, seriousness, cohesion and importance; and finally;

It must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

Return to the Office

- Requiring vaccination far more invasive than requiring use of PPE. (see: *Kubilius v Kent Foods Ltd ET/3201960/2020*)
- Unions have been critical of such proposals suggesting it leads to a worker-blaming culture and detracts from employer's obligations to ensure safe working environment.
- Potential for indirect age discrimination based on partial or full vaccination status.

Return to the Office

- Question of whether employers could require vaccination as a condition of return to the office/ workplace.
- As vaccine not government mandated, employers would require clear justification for such a policy.
- Likely legal challenges presented by whether the workplace is specified in the employment contract.

Vaccination as a term in the employment contract

- Existing employees:
 - will depend on the contract
 - Scope of any term relating to issuing instructions to employees
 - Scope of any terms relating to complying with employer's policies
 - Scope of any terms relating to complying with legislation (foreign and domestic)
 - Scope of any terms relating to availability for travel

Existing employees

- Attempts to unilaterally alter the terms of employment may amount to constructive dismissal
 - SOSR?
 - Vaccination reduces the chance of the vaccinated individual contracting COVID-19, but the extent to which vaccination reduces transmission is still under review
 - Recent ONS report suggests those who became infected post vaccination were less likely to have symptoms and less likely to have a high viral load compared with individuals who tested positive but have not been vaccinated

Existing employees

- Refusal as a basis for disciplining or dismissing an employee?
 - Conduct?
 - ACAS guidance: could result in disciplinary procedure
 - Is it covered by contract or workplace policy?
 - Is it really necessary?
 - Is the reason related to a protected characteristic?

Existing employees

— SOSR?

- Fact specific – is it really necessary?
- If the employer has a genuine belief in a fair reason for dismissal that may make the reason substantial (*Harper v National Coal Board* [1980] IRLR 260).

New employees

- Freedom to contract
- Section 39 Equality Act 2010: must not discriminate
 - In deciding to whom to offer employment
 - The terms upon which to offer employment

Conclusion

- Vaccine requirement may be permissible but each case will depend on its own facts
- Different considerations apply to existing employees and new recruits
- Potential for discrimination is the common element
- Careful consideration must be given to any policy, which must be capable of objective justification