



## Employment Law Brief

*with*

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**The COVID-19 pandemic presents challenges to employers unlike any that they have faced in modern times. No area of work has been left unaffected by the precautions that must be taken to prevent the spread of the virus. In local authorities some of the challenges have been particularly acute because much of the work cannot be done at home. Key services must still be provided to the community and that means employees coming in to work to deliver them.**

As vaccination is rolled out, we can expect the risk of COVID-19 to fade as we slowly return to something like normal. Meanwhile the availability of testing is an important tool in making sure that employees can come to work safely without either contracting or spreading the virus. But there will inevitably be problems. Some employees may object to vaccination and refuse to undergo the rather uncomfortable process of being tested. When that happens, what can the employer do?

From an employment law perspective, many of the issues boil down to a single question: what is a reasonable instruction?

A contract of employment is a contract of service. The employee is in the service of the employer and central to that is a duty to obey reasonable instructions. Failure to do so can amount to gross misconduct and result in dismissal. Obviously, there are some instructions – ‘do your work’ that are clearly reasonable and which the employee must obey or face disciplinary action. The question is whether instructions such as ‘have a COVID test’ or ‘tell us whether or not you have been vaccinated’ or even ‘have a vaccination’ fall into this category. After all, the employer has not given these instructions in the past and the requirement to take a COVID test or inform the employer about vaccination status are not likely to be set out in the contract of employment.

When you are asking whether or not an instruction falls within the scope of the contract of employment the key point to establish is the link between the instruction and the employer’s legitimate interests. Why is the employer asking the employee to do

this? If it is a whim or a matter of personal preference - and nothing to do with the effective performance of the job - then that is unlikely to be a reasonable instruction. But where the employer can show that the instruction relates directly to the safety of other employees or members of the public then that is a different matter entirely.

My expectation is that in general a public sector employer will be entitled to ask employees to undergo a test before interacting with colleagues or members of the public – even if social distancing is practised. It also makes sense as the vaccination programme is rolled out to key workers that an employer delivering public services should know who among their workforce has been vaccinated or even insist that employees agree to the vaccination when it is offered to them. The argument against this is that testing and vaccination should make no difference since the employer will still take precautions to prevent the spread of the virus. On balance however I don’t think this stands up. This is a risk management process and the COVID-secure measures that employers have been taking so far do not eliminate the risk altogether. Information about testing and vaccination status can make an important contribution to the employer delivering services in a safer way.

But just because an employer is entitled to ask, that doesn’t mean that any employee who does not cooperate can be dismissed for gross misconduct. A blanket approach will not do. The first step on encountering an objection is to ask why the employee objects.



There may be a valid reason or at least a legitimate concern that the employer can address. All cases must be approached on an individual basis and a genuine attempt made to address concerns before the policy is enforced.

An employment lawyer's natural instinct when facing novel issues like this is to ask whether there is a discrimination angle. Is there some reason for refusal that might apply more to employees with a particular protected characteristic? It is frankly hard to think of one. Perhaps there is evidence that some communities are more resistant to public health messaging than others, but it seems unlikely that this will amount to enough of a 'particular disadvantage' to support an indirect discrimination claim. Besides, if the employer's policy is based on a proper assessment of the health risk to employees and members of the public, its requirements in relation to testing and vaccination should amount to a proportionate means of achieving a legitimate aim and any indirect discrimination claim would fail.

There is a separate issue with pregnancy and maternity. The current Government guidance is that pregnant people should not be vaccinated unless they are at high risk, although this advice may change as more information becomes available. But that certainly means that an employer would be on very thin ice if it subjected a pregnant woman to any disadvantage because she refused the vaccine. If the employer really does think that it is too risky to allow such an employee to come into work, then it should either make arrangements for her to work at home or under more COVID-secure conditions. Alternatively the employer might have to just accept that she should be placed on special paid leave until her maternity leave begins.

Finally there is a human rights issue. Obviously issues around health and vaccination concern aspects of an employee's private life and the right of an individual to have their private life respected is enshrined in Article 8 of the European Convention on Human Rights. But as with indirect discrimination there is a proportionality test. Interference with the right may be justified if

it is necessary to protect public safety or the 'rights and freedoms of others'.

Essentially then it comes down to this. Provided the employer has carefully assessed the need to impose requirements in relation to testing and vaccination and can explain why that approach is a proportionate one given the need to protect other employees and members of the public, then it should be in a position to enforce its policy. If that means sending employees home without pay or even – faced with persistent refusal – taking disciplinary action up to and including dismissal, then a Tribunal should accept that as a fair and proportionate response. But if the policy is explained carefully and employers engage sympathetically with employees who have concerns, there should rarely be a need for matters to get that far.

**Don't forget to check more about Darren Newman on his blog at [A Range of Reasonable Responses](#) or on twitter at [@DazNewman](#)**