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UK Employment Tribunal finds that dismissal of employee who refused to be vaccinated was justified

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As far as we are aware, this is the first Employment Tribunal judgment which considers the issue of mandatory vaccination. We consider the implications of this judgment for local employers and responds to some other FAQs regarding vaccination and workplace rights.

Allette v Scarsdale Grange Nursing Home Ltd

Ms Allette worked as a care assistant in a residential home for dementia patients. She was dismissed in February 2021 for refusing to get vaccinated.

At the time of Ms Allette's dismissal, there was no legal requirement for UK care home workers to be vaccinated. However, her employer decided that it needed to implement a mandatory vaccination policy in order to protect its vulnerable residents. There had been an outbreak of COVID at the care home in December 2020, which had resulted in a number of deaths. The employer was also concerned about incurring liability if an unvaccinated member of staff were to pass on COVID to a resident or visitor, since such risks were no longer covered by their insurers.

Ms Allette brought claims for unfair dismissal and wrongful dismissal, but she was unsuccessful at Tribunal. The Tribunal found that the instruction to be vaccinated was reasonable considering that she worked with vulnerable people and taking into account the progress of the pandemic at that point in time.

Ms Allette's main reason for refusing to be vaccinated was that she did not consider the vaccine safe. The Tribunal held that this stance was not reasonable considering the medical evidence and advice that was available and the impact that her refusal could have on the care home's vulnerable residents. It said that whilst Ms Allette had a right to privacy (which was impacted by the mandatory vaccination policy), this right had to be balanced against the rights of the care home residents, staff and visitors.

Does this judgment help local employers who want to impose a mandatory vaccination policy?

However, it is important to remember that this case turned on its specific facts, in particular the nature of the work undertaken by the employee and the COVID situation at the relevant time. Employers operating in other sectors, where workers do not come into frequent contact with vulnerable persons, are likely to find it more difficult to justify a mandatory vaccination policy. The case for implementing such a policy would need to be

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carefully explored, and the employer would need to think in particular about why other measures taken to control the spread of the virus are not sufficient.

Even if an employer can justify a mandatory vaccination policy, it does not necessarily follow that they can lawfully dismiss anyone who refuses to comply. They must first consider the employee's reasons for refusal. For example, a refusal on genuine medical or religious grounds may not be deemed unreasonable. They should also consider alternatives, such as redeployment, regular lateral flow tests or allowing the employee to work from home instead.

Many employers are not currently planning to implement a mandatory vaccination policy but do have other questions about workplace rights and vaccination. We have addressed some of the frequently asked questions below.

Can we ask employees if they are vaccinated?

This will depend on why you are asking, and what you plan to do with the information collected.

Vaccination data constitutes “special category data” in Guernsey and Jersey’s data protection legislation, which means that you can only collect it for certain purposes; for example, to comply with your legal obligations (such as your health and safety obligations), or where there are other public health reasons for collecting it. The type of work carried out and the health and safety risks present in the particular workplace will be key to this analysis, and it is likely to be appropriate to carry out a data protection impact assessment before proceeding.

If you decide to collect vaccination data, you would also need to comply with your data protection obligations more broadly; for example, by limiting access to the data to those who need it, being transparent with employees about why you are collecting the data, using it only for that purpose and keeping it stored securely.

What should we do if an employee's role requires overseas travel, and they are unable to travel without being vaccinated?

If an employee’s role requires travel to other countries, vaccination is a requirement for entry into those countries and the employee is unwilling or unable to be vaccinated, this could provide justification for terminating the employee’s employment. However, a fair termination process would still need to be followed, and you would need to explore alternatives to dismissal, such as whether the individual could be redeployed to another role.

Can we state in job adverts that new recruits must be vaccinated?

In some ways this is less problematic than terminating existing employees, as you do not need to worry about the unfair dismissal risks. However, it could still give rise to discrimination risks, for example if the refusal to get vaccinated is due to pregnancy or a medical condition (the latter being an issue only in Jersey for the time

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being, until the new Guernsey discrimination law comes into force). It's therefore still important to have a good reason for imposing the requirement, and to consider exceptions where appropriate.

Can we require employees work from home if they are not vaccinated?

If your health and safety risk assessment suggests that having unvaccinated employees in the workplace poses too high a risk, then you could ask them to work from home. However, if an employee does not want to work from home, you should think carefully about your next steps. If you were to terminate the employee's employment or force them to work from home without full consideration of alternative solutions then this could lead to claims for unfair dismissal and/or discrimination.

If you do end up with some employees working remotely, you should ensure that you treat them equally – for example, in terms of learning and promotion opportunities – regardless of where they are based. Read our remote working tips for more advice.

What should you do if an employee refuses to work with an unvaccinated colleague?

Such situations will require careful handling, as the individuals involved will often have competing legal rights, which need to be carefully balanced. Ideally the situation would be resolved by listening to everyone involved and finding a mutually agreeable solution. If this is not possible, then we would advise you to take legal advice.

Can we withhold sick pay from unvaccinated employees who are required to isolate due to close contact with a positive case?

This is a topic which has hit the headlines in the UK recently, with IKEA, Ocado and Next all cutting contractual sick pay for unvaccinated employees. Employees who are isolating due to contact with a positive case often won't be covered by the company's sick pay policy. However, the terms of the sick pay policy – and any related communications to employees – should obviously be checked, to ensure that the decision to remove sick pay would not amount to a breach of contract. Employers will also need to consider whether removing company sick pay in these circumstances could amount to indirect discrimination. As things stand, such arguments are more likely to arise in Jersey than in Guernsey, but this will change next year when Guernsey's new discrimination law comes into force.

It is worth remembering that the legal risks in relation to workplace vaccination rights may change as the COVID situation develops, public health guidance changes and we get more case law on the topic.

We would always recommend taking legal advice before making any decision to collect vaccination data and/or treat unvaccinated employees differently, due to the numerous legal issues that need to be considered and the fact specific nature of every situation.

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