



COVID-19: CAN EMPLOYERS IN THE CAYMAN ISLANDS COMPEL ITS EMPLOYEES TO BE VACCINATED?

By: Kerrie Cox, Partner

In December 2020, the Premier announced that a mass vaccination campaign to prevent the spread of COVID-19 will be rolled out across the territory in January. In unveiling the plan, he stressed that inoculation will be voluntary but encouraged the public "to do due diligence, and to keep their minds open to the benefits that participation will offer".

As the roll-out of the Covid-19 vaccination builds momentum in the Cayman Islands, employers will be considering the implications for their staff and workplace.

Many employers are likely to opt to *encourage* employees to take up the vaccine, without mandating it. However, there will be some who in taking account of the needs of the business, may be contemplating whether to impose compulsory vaccination. Requiring employees to be vaccinated raises a number of issues which will need to be thought through before implementation.

Can employers mandate vaccination?

A direction to take the vaccine could be regarded as a 'reasonable instruction' on the part of the employer, depending on the individual circumstances of the business. For example, employers in the social care sector may be able to issue a reasonable instruction to employees to take the vaccine because refusal could put vulnerable people at risk. Conversely, employers in other business sectors will not have the same strong rationale for mandating staff inoculation.

Clear communications and engagement with the workforce would assist an employer who does wish to pursue the mandatory route.

Can employers dismiss for failure to follow a reasonable instruction to vaccinate?

Failure to follow a reasonable instruction can lead to a fair dismissal, most likely 'dismissal for some other substantial reason' (SOSR). Again, using the social care example, a care home employer could well be able to rely on a refusal to seek vaccination to dismiss an employee - based on the instruction itself being reasonable.

Nonetheless, even where the instruction is reasonable, the dismissal process also has to be fair, with each case considered on its own facts. Only an employee who unreasonably refuses to be vaccinated could be fairly dismissed. There must be an opportunity for the employee to set out the basis for their refusal, and the employer will need to consider those reasons in the context of its business.

One of the challenges for employers will be in justifying why accommodation can be made for those employees who are, for example, pregnant or because of a health condition cannot take the vaccine. This is likely to go to the proportionality of the approach and will be relevant should there be any legal challenge to a dismissal.

An employer seriously considering dismissing an employee as a result of a refusal to be vaccinated will need to give careful thought to whether there are any alternatives to dismissal - for example,

reallocating the employee to another role where this does not amount to a detriment to the business in the particular circumstances.

Could an employee in the Cayman Islands bring a discrimination claim against his/her employer if dismissed?

Any inconsistency in the treatment of employees who have or haven't been vaccinated may amount to indirect discrimination. The most likely protected characteristics which will be asserted are those of age, disability, sex and pregnancy, and potentially religion or belief.

Potential scenarios in which a claim for indirect discrimination may be advanced include where an employee cannot return to site without vaccination or a decision is taken not to pay sick pay to an employee who has refused the vaccine and then subsequently becomes ill with COVID-19.

In the Cayman Islands, there are constitutional prohibitions against discrimination as contained within the Bill of Rights, Freedoms and Responsibilities which apply essential human rights and freedoms to all individuals. These rights, however, are enforced against Government only and not against private individuals (which includes private businesses).

As concerns the private sector, there are three pieces of discrete legislation which are applicable:-

(a) Section 80(1) of the Labour Act (2011 Revision) states that:

“No person (whether an employer or an employee) shall discriminate with respect to any person’s hire, promotion, dismissal, tenure, wages, hours or other conditions of employment, by reason of race, colour, creed, sex, pregnancy or any reason connected with pregnancy, age, mental or physical disability (provided their ability to perform the job is not impaired), political belief or the exercise of any rights under this or any other Law.”

Whilst this resonates towards discrimination claims being brought by employees, in truth, section 80(1) is nothing more than basic homage to the principle that employers should not discriminate against a certain class of its employees. The provision is placed within Part IX of the Labour Act under ‘General Penalties and Miscellaneous’ and the prescribed penalty for statutory breach by an employer is liability on summary conviction to a fine of five thousand dollars and to imprisonment for twelve months.

The legislation is silent as to whether a breach of the section creates a right of civil action against an employer by an employee. The general rule is that *‘where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner’*.¹

Against the general rule, Lord Diplock in Lonrho Ltd v Shell Petroleum Co² considered that whether or not a private cause of action is granted is a question of statutory construction. He recognised two exceptions to the general rule, the first being *where the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals*. However, the fact that a statute was unquestionably passed for the protection of a specific class of individuals is not conclusive.³

There are no reported decisions in which an employee has sought to exercise a private cause of action under section 80(1). If such were to be the case, the court would attempt to ‘discover’ the intention of Parliament using the rules of statutory interpretation as balanced against the presumption that the Labour Act prescribes its own remedy. Nonetheless, it raises an interesting question of law due to the

¹ Lord Tenterden CJ in Doe d Bishop of Rochester v Bridges (1831) 1 B&Ad 847, 859

² [1982] AC 173

³ X (minors) v Bedfordshire CC [1995] 3 WLR 152 (per Lord Browne-Wilkinson at pp. 180-1)

number of contradictory judicial statements in the UK which makes it impossible to forecast how the courts would deal with a stand-alone discrimination claim under the Labour Act.

(b) The Gender Equality Act 2011 (“GEL”)

The legislation seeks to eliminate discrimination in employment, training and recruitment on the basis of sex, marital status, pregnancy or gender and to promote the payment of equal remuneration to male and female employees who perform work of equal value.

As the vaccine is not recommended for those who are pregnant, breastfeeding or even planning conception, an employee who is dismissed because she has not been vaccinated may be able to assert discrimination under the GEL if she has been subjected to unfavourable treatment. Maximum compensation is limited to CI\$20,000 although unlike complaints to the Labour Tribunal, the Gender Equality Tribunal has a discretionary power to make an award for costs.

(c) The Disabilities (Soloman Webster) Act 2016 (“DSWA”)

Upon its passage through the then Legislative Assembly, the Premier’s office announced the purpose of the legislation as being *“to protect persons with disabilities from having their civil and political rights infringed by any person (including individuals and non-governmental entities) in specified instances where the Constitution and other laws do not adequately address particular vulnerabilities.”*

The general purpose of the DSWA is set out in the pre-ambule to the legislation:

“A Law to promote, protect and ensure the full enjoyment of human rights and fundamental freedoms, by persons with disabilities, on an equal basis with other persons; to promote respect for the dignity of persons with disabilities; to establish the National Council for Persons with Disabilities; and for incidental and connected purposes.”

‘Discrimination’ is defined as *any distinction, exclusion or restriction, on the basis of disability, which*

- (a) has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all rights and freedoms in the political, economic, social, cultural, civil, or any other field; and,*
- (b) cannot be shown to be a proportionate means of achieving a legitimate aim.*

The broad scope of *any other field* combined with the general purpose of the DSWA, infers that the prevention and remedy for disability discrimination within employment would be a remit of the legislation. However, the National Council for Persons with Disabilities (the body established to promote and reinforce the principles under the DSWA) is not empowered to perform any quasi-tribunal/judicial tasks and as similar to section 81(1) of the Labour Act, there is no express right of civil action which could be brought under the legislation.

Furthermore, despite being hailed as a ‘milestone for our islands’ by some quarters as the Bill was steered through the Legislative Assembly in 2016, the key provisions to the DSWA contained in Part 4 (Access to Rights) which entitles a disabled person to the enjoyment of *rights, privileges, interests, benefits and treatment (whether directly, or through contractual, licensing or other arrangements)* is **not in force**.

Taking the three pieces of ‘discrimination’ legislation together, this potential area of claim is uncertain although specific proceedings brought under the GEL is likely to have a far more meritorious course in the right circumstances. As seen above, a more general claim under section 80(1) of the Labour Act will require a court to declare (most likely by way of a preliminary point) that a breach of the section gives rise to a civil cause of action.

Are there health and safety issues around mandating vaccination?

Under Part VIII of the Labour Act and under common law, employers also have obligations to *ensure, so far as reasonably practicable, the health, safety and welfare at work of his employees*;⁴ in other words, to reduce health risks to employees and others to a level which is as low as reasonably practicable.

The vaccine should be considered as part of COVID-19 risk assessments, as a potential additional measure to control the risks associated with contracting the virus at work. However, health and safety considerations also need to take account of any health risks associated with the vaccine itself for certain groups or even for individual employees. Mandating the vaccine could give rise to claims from employees who suffer an adverse reaction to the vaccine if a link can be established, so medical advice for employees may be required.

What about data protection issues?

Requiring evidence of vaccination gives rise to significant data protection issues. Employers would have to carefully consider why they need evidence of vaccination and whether it is appropriate for their business. The employer must consider not only the reasons for requiring the data but also issues like how it will be held securely, who will have access and whether it is appropriate to hold more than a simple 'yes' or 'no'.

Conclusion

There is no doubt that this topic will gain traction throughout the course of this year and not only in the employment context. Media reports indicate that international air travellers, for example, will in future need to prove they have been vaccinated against COVID-19 in order to board Qantas flights. How then, would that policy impact on customer facing employees of the airline who for all practical purposes, must be compelled to vaccinate?

As previously explained, an employer seeking to impose compulsory vaccination is likely to raise a number of legal issues. The most practical approach would be for employers to engage with staff and encourage, perhaps writing a non-contractual policy outlining the benefits of taking the vaccine and assisting in any arrangements for staff to be immunised. Any employees who refuse the vaccine could be met privately to explain the benefits again, but employers should be cautioned about forcing or disciplining staff who refuse.

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