

EMPLOYMENT CONTRACTS & VACCINATIONS

1. What are we talking about?

How businesses operate & exercise power over employees.

2. Contracts of Employment.

Contracts establish and regulate relationships between employer and employee.

Terms are.

expressed - written & or verbal.

Implied – suggested not specifically agreed but intended to be part of e.g. necessity – follow rules / pay wages / mutual trust / toilet breaks.

Incorporated – collective agreements, workplace policies i.e., a staff handbook and disciplinary codes.

Cannot be VAGUE & must be REASONABLE.

The work relationship is therefore two-way for employers and employees.

Responsibilities (behaviour) & duties (performance).

Examples.

Health and safety in the workplace and for staff, visitors and by employees.

Disciplinary processes in policy documents.

CONTRACT CHANGES

EMPLOYMENT RIGHTS NI ORDER 1996

- Employer can change Article 33.
- Written statement containing changes.
- 1 Month after the change in question.
- By employee consent.
- Impose by express term.
- Employer can terminate current contract & offer a new contract of employment which includes the variation.

Employee Options

- agree & work under the varied terms.
- can resign and claim constructive dismissal.
- can simply refuse to work under the new terms but risk dismissal.
- stand and sue i.e., work 'under protest'.
- work under the new contract and claim unfair dismissal from the old one.

Automatic unfairness.

Employer to show dismissal for non-acceptance was for a potentially fair reason and that the decision to dismiss was reasonable in all the circumstances.

Potentially fair Dismissal reasons.

1. Redundancy.
2. Disciplinary – Conduct.
3. Lack of capability (or qualifications) to do the job.
4. A statutory requirement prevents the employer from continuing to employ the individual (Drink driving & Licence).
5. **Some other substantial reason** – work safety, refusal to disclose vaccination status or refusal to get vaccinated.

3. No job /. No job

It is a contract change.

Employer may insist on this under their belief they have a responsibility to make workplace safe.

<http://www.legislation.gov.uk/nisi/1978/1039>

WHY DO THIS?

Employer must ensure employees health and safety.

<https://www.nidirect.gov.uk/articles/employees-health-and-safety-responsibilities>

- to have any risks to your health and safety properly controlled
- to be provided with any personal protective and safety equipment free of charge
- to stop work and leave your work area, without being disciplined if you have reasonable concerns about your safety
- to tell your employer about any health and safety concerns you have
- not to be disciplined if you contact the Health and Safety Executive for Northern Ireland (HSENI), or your local authority, if your employer won't listen to your concerns
- to have rest breaks during the working day
- to have time off from work during the working week
- to have annual paid holiday

- You can refuse to do something that isn't safe without being threatened with disciplinary action. If you think your employer isn't meeting their responsibilities, talk to them first. Your safety representative or a trade union official may be able to help you with this.

Employer steps to take before insisting on this contract change to employee.

<https://www.nidirect.gov.uk/articles/employers-health-and-safety-responsibilities>

4. Risk assessment to spot possible health and safety hazards.
5. They must appoint a 'competent person' with health and safety responsibilities usually one of the owners in smaller firms, or a member of staff trained in health and safety.

Employee responsibilities before or after employer insists on either vaccination status disclosure or vaccinated.

- to take reasonable care of your own health and safety
- if possible to avoid wearing jewellery or loose clothing if operating machinery
- if you have long hair, or wear a headscarf, make sure it's tucked out of the way as it could get caught in machinery
- to take reasonable care not to put other people - fellow employees and members of the public - at risk by what you do or don't do in the course of your work
- to co-operate with your employer, making sure you get proper training, and you understand and follow the company's health and safety policies
- not to interfere with or misuse anything that's been provided for your health, safety or welfare
- to report any injuries, strains or illnesses you suffer as a result of doing your job, your employer may need to change the way you work
- to tell your employer if something happens that might affect your ability to work, like becoming pregnant or suffering an injury - because your employer has a legal responsibility for your health and safety, they may need to suspend you while they find a solution to the issue or problem, but you will normally be paid if this happens
- if you drive or operate machinery, you have a responsibility to tell your employer if you take medication that makes you drowsy - if you have, they should temporarily move you to another job if they have one for you to do

Can employer lawfully insist on No Job / No Job or. Vaccination status disclosure Or Lawfully dismiss employee for refusal for either.

The public health act (NI) 1967 expressly provides that individuals should not be compelled to undergo mandatory medical treatments, which include vaccinations.

If you were dismissed for refusal your employer would be dismissing you for **some other substantial reason.**

But it is not a refusal of a reasonable instruction, because it's not a reasonable instruction to get vaccinated and put stuff in your body.

Dismissal would be because the employer has concerns about the employee who isn't vaccinated and the risk that that might pose to others.

The employer would then have to prove in an industrial tribunal that he undertook the correct and appropriate risk assessments and properly discharged his responsibilities.

Employer duties on covid vaccination issue ensuring workplace safety.

Need to go through procedures;

- discuss things, look at alternatives and different options and things that are more proportionate and less severe than termination that's too extreme which doesn't fit with the statutory procedures. Does the dismissal fall within the band of reasonable responses; Iceland Frozen Foods Ltd v Jones 1983
- Why? The refusal to be vaccinated was related to a disability or a religious reason, the employee could bring a discrimination claim with uncapped loss of earnings and a sum of injury to feelings.
- pregnant employees are another protected group who may be concerned about a vaccination.

Present rules are clear –

consent and voluntary participation are required, the law provides the government with powers to prevent, control or mitigate the spread of an infection. The legislation specifically provides that individuals must not be required to undergo any mandatory “medical treatment”, which includes vaccination. The coronavirus act 2020 recently extended this prohibition Northern Ireland.

No one can be compelled to have a vaccination in the uk, so an employer's requirement for staff to be vaccinated would likely not be considered a 'reasonable instruction' or a lawful basis for withholding pay or dismissing an employee.

Imposing such a requirement would potentially be a breach of the implied term of trust and confidence, enabling an employee to resign and claim constructive dismissal.

A policy which allowed voluntarily vaccinated employees back into the workplace while others remained at home (on full pay) could potentially be justifiable in some circumstances but would not be risk free. Although employees may be happy to remain working remotely for the time being, they could challenge the policy if they felt it caused them a disadvantage, such as being overlooked for opportunities or being detrimental to their mental health.

An employee could also challenge this under human rights laws as being in breach of the “absolute right” to choose whether to consent to medical treatment.

Any requirement to be vaccinated could also be in breach of article 8 of the European Convention of Human Rights (ECHR) (the right to respect for one’s privacy and family life and article 9 (the right to freedom of thought, conscience and religion).

Asking about vaccination status.

Confidentiality of personal medical information.

There may be some employment sectors where vaccination status could be considered necessary to collect, such as those providing **frontline healthcare services**.

The guidance outlined that information about a person’s vaccination status is ‘special category personal data’ for the purposes of GDPR (General Data Protection Regulation).

The decision to get a Covid-19 vaccine is made voluntarily, which the DPC said “further suggests” that vaccination status shouldn’t be generally considered a necessary **workplace safety measure** and that the processing of a worker’s vaccine status is unlikely to be necessary. Employers are being reported to the information commissioner’s office regarding an unreasonable and unnecessary infringement on their privacy regarding their sensitive medical information.

The creation of a safe workplace, alternatively, can be satisfied by seeking the employee to confirm that they will not put the employer of breaching their workplace safety measures, i.e. not put other people at risk from pathogens, virus, and the employee can know this in respect of Covid by e.g. antibodies, vaccinated, negative test and retaining their privacy to medical information.

This is a point that can be made and should be taken to be raised with employers as a proactive measure.

The data protection commission (DPC) has said there is currently “no clear legal basis” for the processing of vaccine data by employers about employees as it relates to the issue of whether employers can legally collect and process information about the vaccination status of their workers

4. Navigating through this process.

Employees, especially those seeking clarifications on work safety procedures, policy and potential contract changes are protected on how they are treated in work Fair Employment Treatment Order (NI) 1998.

Protections exist.

If an employer insists that an employee engage in the process of either disclosing or acquiescing to vaccination and this has a negative emotional / mental feeling and reaction in that employee some help may be found in;

disability discrimination act 1995 & 2006

why disability?

- S.1. - Disabled = physical / mental impairment – Substantial & long-term adverse effect.
- S. 3a – Discrimination - less favourable / harassment
- S.4. - P.C.P & Reasonable Adjustments

Depression & stress are recognised within disability that incorporates issues of fear, psychological harm / PTSD, as a mental...hidden disability.

Complex Issue –

Most people have multiples stressors / fears / hidden disabilities, they do not exist in isolation.

- I. Constellation of Vulnerabilities. Autism, Downs Syndrome with Learning Disability / Personality Disorders with complex PTSD...Dr E.Vizzard. Criminal Bar Association. Inner Temple. London. Dec 2014.
- II. Under identification of people who need Reasonable Adjustments / Special Measures (RA/SM) - Burton Evans 2006 CLR [criminal law review]
- III. Hidden [full extent and impact unknown by people] – (ATG) Advocates Gateway - Toolkit 5 - & Law Society Practice Note – 02/07/15 – People often hide their vulnerabilities - Galo v Bombardier [2016] NI Case law is evidence of research that many spectrum disorders remain hidden & not diagnosed until adult hood

The employee feels they are or may be suffering the above and feel it is because of the ER has engaged or likely to engage in the following ;

DDA – 16; unlawful act. – instructions to pressure and discriminate; putting pressure on / coercion in essence to disclose vaccine status or get vaccine.

Or @ 3B engage in harassment [F2]

(1) unwanted conduct which has the purpose or effect of—

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him / her.

The law recognises inherent unfairness of this situation and that the employee is entitled to help as there are many examples where there is an imbalance of power and tries to level the playing field both in courts and employment situations;

Magill v Ulster IND Clinic 2010 NI Court of Appeal – 33; (Binding on all lower courts who must follow this law as a precedent)

Girvan LJ - Need for balance / RA & SM but rules applied, i.e. satisfy qualifying criteria not just because difficulties.

Archibald v Fife. 2004 UKHL 442 - Hale Lady; 'ER obliged to treat a disabled person more favourably'

Leading English QC - 'it is a very unfair contest as a complainant, already unnerved by the courtroom, were often no match for a skilled and experienced counsel' TEMPKIN 2000 Krahe & Tempkin 229 – 36. SA & JG pg 129 Professional Role.

Why we need to ensure balance in situations where one person has all the power; a courtroom is akin to an employment meeting asking / seeking / instructing / coercing a person to get a vaccine at risk to health and work / finances / family stability... which are protected under Human Rights Act which is still in use due to Article 2 of the Northern Ireland Protocol.

Reasonable Adjustments / Special Measures – they are simple and practical things, e.g. if you are being asked questions to have those questions before the meeting so you can prepare your answers as some people have issues with dyslexia and are embarrassed to make this known / or get embarrassed and find it difficult to answer questions on the spot because of stress or feel they are not very communicatively adept (tongue tied) or to record the meeting as again they may have issues taking notes due to literacy issues and would be embarrassed to own up to this so recording the meeting allows them to listen back and have time to correct things = the aim is to make sure people are giving their best evidence or the best of themselves in situations where they feel they have less power than their employer or a barrister in court asking them questions.

INCEPTION

Criminal Justice system - as legal protections Criminal Evidence (NI) Order 1999 - vulnerable witnesses. – The legal process and procedures adjust to the needs (psychological / physical / emotional) of the complainant and witnesses. See Also; Victims Charter 2015.

Case example.

R v MOSES [2014] EWCA CRIM 1730 ;
child witness refused answer QC questions, judge got QC to write down and he asked, and witness answered to judge

Practical Help in the work place;

1. Get questions written out first and take home to consider answers; if this can happen in a criminal case it can happen in an employment meeting also (see Moses case above)
2. UTI V ROYAL MAIN GROUP LTD & OTHERS - UKEAT/0061/17/RN - ET have power to appoint litigation friends.
3. Galo v Bombardier [2016] NICA – case authority.

This is about having help for a person to effectively communicate, and you can have a union rep, friend or who you want ...employers often try to restrict this to stop lawyers attending and generally it would not be appropriate for a lawyer to be attending in a professional capacity at this stage as that would unbalance in favour of lawyer but no reason why lawyer could simply be a friend.

Employers duty RA/SM.

DDA 4 & 6. & 18 b – The employee should not therefore have to go through this process on their own and can seek assistance in many forms to maintain their power so they can effectively communicate with their employer seeking to arrive at a mutually acceptable solution in order to ensure resilience on the part of both employer and employee so as to avoid any unnecessary litigation.

Helpful article to read.

<https://www.pinsentmasons.com/out-law/news/ni-employers-should-consider-covid-vaccination-policy>