



COVID-19 VACCINES IN THE WORKPLACE: A SECOND JAB

Catherine Ramnarine

In my article in the 27th February 2021 issue of the Sunday Business Guardian, I provided my preliminary view on Covid-19 vaccination in the workplace. Since that time, the issue has become even more hotly debated, with many becoming increasingly vocal and entrenched in their positions. Vaccines are also more accessible now than they were in February, taking the discussion out of the realm of the academic and into the practical. This therefore seems like an appropriate time to take a second ‘jab’ at what has evolved into a somewhat controversial public issue.

At the outset, it is important to note that the validity and enforceability of mandatory workplace vaccination policies has not yet been tested before the Trinidad and Tobago Courts. Until it is, public discourse on the topic is still speculative. Unfortunately, it seems that many employers may need to make decisions about how to deal with Covid-19 vaccination in their workplaces without the benefit of absolute legal certainty. In these circumstances this Article will focus, not on whether mandatory vaccination policies are enforceable, but rather on providing context for some of the legal and industrial relations principles that employers should bear in mind when determining what decisions to make in their own businesses.

Changing the Terms and Conditions of Employment:

As a general rule, the unilateral imposition by an employer of a new term or condition of employment is not valid or enforceable unless and until agreed to by employees. Where an employer attempts to unilaterally vary the terms and conditions of employment, this may amount to what is known as a ‘repudiatory breach’ of the employment contract or conduct deemed to be harsh, oppressive or contrary to the principles of good industrial relations practice.

It is not every breach or the variation of every term that will be considered a repudiatory breach, but only those that are ‘essential’ or ‘material’. To date, the question of whether requiring employees to be vaccinated against Covid-19 would be considered ‘essential’ has not yet been tested before the local Courts.

An employee may respond to a repudiatory breach of the employment contract by resigning. In such a case he can claim constructive dismissal as in law the contract would be deemed to have been terminated by the employer’s initial breach, and not by the employee’s resignation. As a general rule, in order to claim constructive dismissal, an employee must first resign from employment. Alternatively, an employee may agree to the change in his terms and conditions of employment, either expressly or by continuing to work under the new terms. In such a case, the terms and conditions of employment will be considered to have been validly varied and the revised terms will have legal effect.

The question of changing the terms and conditions of employment does not arise in the case of new employees. As a general rule, an employer may include a mandatory vaccination requirement in the terms and conditions of employment offered to a new employee, and that employee would then be free to accept or reject employment on those terms. This is however subject to compliance with the discrimination regime set out in the Equal Opportunity Act, discussed in more detail below.

Health and Safety in the Workplace:

Under the Occupational Safety and Health (‘OSH’) Act,

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PROPERTY TAX: WHAT TO KNOW

Miguel Vasquez

At the 2022 Budget Presentation, the Honourable Minister of Finance, Mr. Colm Imbert, reiterated the Government of Trinidad and Tobago's intent to proceed with the collection of Property Tax in Trinidad and Tobago. At the presentation, Mr. Imbert advised that the revenue intended to be collected from Property Tax would provide a steady stream of income to help fund its development programme. With the continued progression of the Government's plans, there may be some uncertainty regarding what Property Tax is, how Property Tax will operate, what are the obligations of owners and occupiers, and what are the potential liabilities for non-compliance. This Article will briefly touch on these aspects to assist with gaining a better understanding of the Property Tax regime.

The **Property Tax Act, Chap. 76:04** (the 'PTA') creates a tax called Property Tax, which is levied on property that falls within the definition of "land" for the purposes of the legislation. The person who is determined to be the "owner" of the land, for the purposes of the PTA, is required to pay the tax to the Board of Inland Revenue. The tax is payable on what is defined as the "annual taxable value" ('ATV') of the land, at various rates of tax that is set out in Schedule 1 of the legislation as follows:

1. Residential land, which is taxed at 3% of the ATV;
2. Commercial land, which is taxed at 5% of the ATV;
3. Industrial land, which is divided into:
 - Plant and machinery housed in a building, which is taxed at 6% of the ATV; and
 - Plant and machinery not housed in a building, which is taxed at 3% of the ATV;
4. Agricultural land, which is taxed at 1% of the ATV.

There are two (2) pieces of legislation that are inextricably linked and upon which the Property Tax regime rests:

- (a) The PTA; and
- (b) The **Valuation of Land Act, Chap. 58:03** (the 'VLA').

As indicated above, the PTA creates the charge to tax on the value of land, such value being based on a valuation exercise which is conducted by the Commissioner of Valuations, in accordance with the VLA.

As Property Tax involves taxing an "owner" of "land" at a fixed rate of tax based on the "ATV" of the land, it is critical to know what these terms mean, particularly as they are specifically defined within the PTA.

The "owner" of land for the purposes of the PTA is relatively broad in scope and includes not only the legal or title owner and their receiver, attorney, agent, manager or guardian, but also any other person in charge or having the

control or possession of land in his own right, or in the right of the owner.

"Land" as defined in the PTA is also quite encompassing and includes all types of land, corporeal and incorporeal, of every kind and description, or any estate or interest in an estate, together with all paths and passages, land that is covered by water, and all buildings, structures, plant and machinery, pipelines, cables and fixtures that are erected on or affixed to the land. Despite the encompassing scope of land for the purposes of the PTA, certain properties, such as land used for places of worship of any religious denomination, certain school buildings, office and playgrounds, land owned, occupied or used exclusively by a charitable institution, and land belonging to or in occupation by the State of Trinidad and Tobago, a statutory authority, or a state enterprise controlled by the State, is exempt from the payment of Property Tax.

The last term, "ATV", is the figure on which the specific rate of tax will be applied on in order to compute what the likely Property Tax will be. This figure is arrived at after any applicable deductions and allowances (in respect of voids and loss of rent equivalent to 10%) are made to a figure referred to as the "annual rental value" ('ARV').

The ARV is arguably the most relevant term at this time since there is currently an obligation on all owners of residential, commercial and agricultural land to complete and submit a return pursuant to the VLA, to the Valuation Division or other specified offices on or before the 30th November, 2021. The Commissioner of Valuations will be required to value the property in accordance with the VLA (whose provisions are compatible with that of the PTA), to arrive at the ARV figure.

When the Commissioner of Valuations has valued land based on the return and in accordance with the factors that he is required to consider, a notice of valuation, which will contain the Commissioner's valuation, will be issued to the owner of the land. If an owner is dissatisfied with a valuation that is made by the Commissioner, he may object to the valuation, within thirty (30) days after service of receipt of a notice of valuation. The VLA outlines certain specific grounds upon which an objection can be made, and which the objection should be based on. The Commissioner of Valuations is required to consider the objection and to either allow it wholly or in part or disallow it. If an owner remains dissatisfied with the Commissioner's decision, he can appeal to a newly constituted body called the Valuation Tribunal.

When the collection of Property Tax formally resumes (which is likely to be preceded by legislative enactment specifically provision for the resumption), for each year in which the Property Tax will be collected, the BIR will be

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employers have a statutory duty to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all their employees. This duty also extends to persons who are not their employees, but who may be affected by their operations. Employees too have a duty to take reasonable care for their own safety and the safety of others.

Is Covid-19 vaccination reasonably required in order to ensure safety in the workplace? This has yet to be tested before the local Courts. However, it is a question that calls for a considered and careful assessment and may vary from workplace to workplace, and even between positions and worksites in the same business.

To date, the Ministry of Health and the Occupational Safety and Health Authority have not yet updated their existing Covid-19 workplace guidelines so as to take vaccination into account. While it is possible that they may do so in the future, for the time being this leaves employers to make their own assessments of what is reasonably required.

The OSH Act contains an existing framework that may assist employers in this regard. Section 13A of the Act requires an employer to make a suitable and sufficient annual assessment of the risks that its employees and others might be exposed to whilst at work, and to identify the measures that it should put in place to ensure workplace health and safety in the context of these risks. An employer also has an obligation to review and update its risk assessment where there is reason to believe that it is no longer valid or where there has been a significant change in the matters to which it relates. In the context of the Covid-19 pandemic, an employer arguably has a duty to update its workplace risk assessment to address the potential risks posed by Covid-19 and the protective measures that should be put in place in order to safeguard employees from those risks.

From a practical perspective, conducting a careful and thorough workplace risk assessment is an important and valuable first step towards developing a vaccination policy. Both the risk assessment itself, and the process leading up to it, are likely to tease out and provide clarity regarding (a) the general risks posed by Covid-19 in the workplace (b) any specific or heightened risks that are may arise in relation to certain positions, processes or work sites (c) the relative importance of those positions, processes or sites to the operations of the business (d) the range of preventative measures available (e) the efficacy and suitability of those measures across different positions, processes and sites (for example, not all positions or activities can facilitate alternative preventative measures such as remote working or physical distancing) and (f) the cost and practicability of

the different preventative measures.

This analysis is valuable as it provides employers with an underlying business justification for their vaccination policy, helps to align their policy with the particular needs and risks of their business (as opposed to a generic or 'one size fits all' approach) which in turn helps to ensure that the policy is proportionate to those risks and needs. From a practical perspective, it can be used as a tool to help the business to prioritize its efforts and streamline its messaging in cases where some employees are vaccine hesitant. By contrast, a generic policy that applies equally to all employees across the board is likely to be both a tougher 'sell' to employees, and to be more vulnerable to challenge at Court.

In theory, a workplace risk assessment may differentiate between the protective measures that vaccinated and non-vaccinated employees are required to follow. It would be important for such an assessment to address why such a differentiation is reasonably required in order to ensure workplace safety.

Discrimination Claims:

The Equal Opportunity Act ('EOA') prohibits discrimination in employment on the basis of, among other things, disability and religion. Notably, this applies to both existing and to new and prospective employees.

It is possible that an employee may have a medical reason for not taking the vaccine. In general, an employer is prohibited from terminating, refusing to employ or otherwise treating a disabled employee unfavorably due their disability. However, the duty owed by an employer to an employee with a disability is not an absolute one. Section 14 of the EOA provides that this duty (emphasis ours):

“...shall not apply to the employment of a person with a disability if ... the person because of disability — (i) would be unable to carry out the **inherent requirements** of the particular employment; or (ii) would, in order to carry out those requirements, require **services or facilities** that are not required by persons without a disability and the provision of which would impose an **unjustifiable hardship** on the employer; (b) because of the nature of the disability and the environment in which the person works or is to work or the nature of the work performed or to be performed, there is or likely to be — (i) a risk that the person will **injure others**, and it is not reasonable in all the circumstances to take that risk; or a substantial risk that the person will **injure himself**.”

Section 14 has not been tested before the Equal Opportunity Tribunal in the context of Covid-19 vaccination. However, in deciding how to apply its vaccination policy to

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employees with medical reasons for not being vaccinated, the employer can consider whether:

- Being vaccinated in an inherent requirement of the job;
- An unvaccinated employee would require additional services or facilities that vaccinated employees would not require, and the provision of same would impose an unjustifiable hardship on the employer; or
- An unvaccinated employee would pose a safety risk to himself or others.

The workplace risk assessment (discussed above) would be a valuable tool in this regard.

Unlike in disability cases, there is no objective third party 'proof' that can be requested as to the validity of a religious objection to vaccination. Pronouncements made by religious bodies are informative, but not necessarily conclusive to an individual's personal faith and beliefs. The employee's previous vaccination history (to the extent that this information is already available to the employer) may be a useful indicator as to the genuineness of a religious objection but is not in and of itself conclusive.

That said, the duty owed by an employer to an employee with a religious objection to vaccination is also not an absolute one and an employer should be able to take into account the same factors outlined above in deciding how to treat with them.

Conclusion:

Legally speaking, the question of whether mandatory vaccination policies are enforceable has not yet been conclusively determined. However, many employers are faced with deciding how to deal with Covid-19 vaccination in their workplaces without the benefit of absolute legal certainty. In this regard, securing employee agreement and buy in remains the ideal first step. Where this proves difficult or impossible, employers will need to make a judgment call balancing the different risks to their business and the considerations outlined above. As with many things Covid-19 related, it is all about weighing the risks and making an informed decision, in an external environment that continues to evolve.

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required to serve a Notice of Assessment on the owner of land personally, on the owner's agent, or by post, before the 31st March of the relevant year. The owner will thereafter be required to pay the Property Tax on or before the 30th September of the relevant year.

If an owner is dissatisfied with the BIR's assessment of the amount of Property Tax to be paid, which is contained in the Notice of Assessment, he can object to the assessment by notifying the BIR of the objection, in writing, within twenty one (21) days that the Property Tax will become due and payable. Similar to the objection process to the valuation exercise, there are certain specified grounds upon which an objection may be made, which are outlined in the PTA.

If the BIR is of the view that the Notice of Assessment was accurate and therefore disallows the objection, the owner may appeal the BIR's decision to the Tax Appeal Board.

An owner liable to pay Property Tax can request a deferral of payment of the tax on the grounds that he is in an impoverished condition and is unable to improve his financial position significantly due to his age, impaired health, or some other special circumstance, and that undue hardship would ensure to him. An owner requesting such a deferral is required to provide written evidence in support in order for the BIR to consider the deferral.

While Property Tax is required to be paid by the 30th September of the relevant year, if any amount of the Property Tax is outstanding by the 15th March of the following year, a penalty at the rate of 10% of the outstanding tax will be added, in addition to interest calculated at the rate of 15% per annum. The BIR will be required to issue a Notice to the owner notifying him of these liabilities and the risk that the land will be subject to distraint or forfeiture. The BIR has the power to waive any penalty and interest that may arise, if it is just and equitable to do so.

The powers of the BIR to exercise distraint or subsequently, forfeiture, will arise if the tax remains outstanding for a further extended period of time, and provided that further statutory notices are sent. The provisions of the PTA outline the requirements and safeguards that the BIR will be required to adhere to if it opts to exercise distraint or forfeiture, as well as the consequences of forfeiture.

While debates in certain quarters regarding the timing of the resumption of collection of Property Taxes continue to persist due to the prevailing economic downturn, it seems clear that the regime will proceed as planned within the near future. As such, it is in the interests of owners to understand how Property Tax operates, their obligations, and rights, in advance of the implementation of the regime.

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