



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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