

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY J.M. MAÇON OF ST. SAVIOUR
QUESTION SUBMITTED ON MONDAY 11th OCTOBER 2021
ANSWER TO BE TABLED ON MONDAY 18th OCTOBER 2021**

Question

Will H.M. Attorney General advise whether –

- (a) finance companies have the right pursuant to company policy to require an employee to wear a mask in an office environment for Covid reasons;
- (b) it would legally be a disciplinary matter, or grounds for dismissal, should that employee choose not to comply with that aspect of company policy; and
- (c) the answer to paragraph (b) would differ dependent upon the employee's reason for refusal, for example on the basis of religious beliefs?

Answer

The response below is expressed in general terms. It is not, and should not be taken as, legal advice. Any finance company seeking to require employees to wear masks should obtain specific legal advice, tailored to its circumstances.

(a) The relationship between employer and employee is governed by Jersey employment law and the contract of employment entered into between those parties. The terms of employment contained in the contract must be agreed by both parties. A contract may include clauses which require an employee to comply with company policy. Even so, employees are only required to follow reasonable management instructions of their employer. An employee is not obliged to carry out orders which are unlawful, beyond the scope of their contract, or which can be said to be clearly unreasonable. It is not unlawful in general terms to request an employee, as part of their terms of employment, to wear personal protective equipment. Whether it would be clearly unreasonable to do so or within the scope of a contract is a question of fact to be determined on a case-by-case basis.

(b) If a requirement is contained in an employee's contract, which has been agreed to by both parties, or if it is a reasonable requirement, then there may be grounds for the employer to initiate disciplinary procedures for an employee's failure to comply with such a requirement. Reasonableness is a question of fact but, in general terms, under Jersey health and safety legislation employers have a duty to protect the health of employees, anyone on their premises and anyone else affected by the business. A requirement or instruction for an employee to wear a mask in the course of their employment in pursuit of these purposes may then be a reasonable requirement, but it will dependant on the specific circumstances in question. However, in the case of non-public facing roles, and in the absence of a contractual requirement, an instruction to wear a mask may be an unreasonable management instruction, particularly if other measures are available to employers, such as social distancing or working remotely.

An employer may dismiss an employee if the employer has a fair reason for so doing but must consider the employee's circumstances and any reasonable grounds for non-compliance. Fair reasons which are set out at Article 64(2) of the Employment (Jersey) Law include, for example an employee's conduct, or because the employment would contravene a duty, or a restriction, imposed by enactment. Balanced against this is the employee's right not to be unfairly dismissed. Whether dismissal was fair or not depends on whether the employer acted reasonably or not and is to be assessed on a case-by-case basis.

(c) An employer must consider the individual employee's circumstances and grounds for refusal. However, an employer may not directly or indirectly discriminate against an employee on the basis of a protected characteristic in way that would be unlawful under the Discrimination (Jersey) Law 2013. If an employee can show that their treatment by the employer was discriminatory on the basis of their protected characteristic then the employer's conduct in undertaking the disciplinary exercise may be unlawful. Protected characteristics under the 2013 Law include characteristics such as sex, age and disability amongst others, but do not include religion. Furthermore, an act of discrimination will not be unlawful under the 2013 Law if it is done necessarily for the purpose of complying with a statutory requirement or any condition or requirement lawfully imposed pursuant to legislation.

If the employer in question is a public authority or is a private entity acting pursuant to a statutory requirement, it may be that the employee could bring a claim that either the act of the public authority or the statutory requirements amounts to an infringement of rights guaranteed to them under the European Convention on Human Rights (ECHR), which is incorporated into Jersey law by the Human Rights (Jersey) Law 2000. The right to private life (Article 8 ECHR), which includes a right to personal autonomy within its scope, and the right to freedom of thought conscience and religion (Article 9 ECHR) are, however, qualified rights meaning that interference by the state with these rights can be justified if it is in accordance with the law and proportionate to achieving a legitimate aim. A mandatory requirement to wear as mask would likely engage Article 8 ECHR and, if it conflicted with a religious or some other conscientious objection, Article 9 ECHR. However, it may be that the mandatory requirement to wear a mask could be justified if it can be shown to be proportionate to the protection of health.

Finally, Article 14 ECHR guarantees the right to non-discrimination in the enjoyment of rights guaranteed under the ECHR. If an employee is able to show that a right guaranteed to them under the ECHR, for instance the right to private life or the right to religious freedom, is engaged by the requirement to wear a mask, and can show that they have been treated differently on the grounds of a status protected under Article 14 ECHR (which includes religion and disability), it may be that the employee can establish a discrimination claim under the ECHR. Discriminatory treatment would not be unlawful under the ECHR if the discriminatory measure is capable of being justified. That is a question of fact to be determined on a case-by-case basis.