

# Vaccination: to what extent are you opening yourself up to a discrimination claim by asking for proof of vaccination?

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# Agenda

- What legal issues might arise by asking for proof?
- What risks could arise when an employee/visitor refuses to provide proof of vaccination?
- What claims might employees/visitors bring?
- What could be fair reasons for asking for proof?
- What practical issues might arise when asking for proof?

## Context: vaccinations in the UK



Historically not mandatory



Health workers are not generally required to demonstrate proof of vaccination



Gvt consultation on adult care workers requiring vaccination and “covid certificates”

# Key legal risks



Discrimination



Unfair dismissal



Data protection



Express and implied contractual obligations

## Unfair dismissal risk - assessing reasonableness



Covid-19 risk assessment



Type of job and sector



Interaction with others



Requirement for international travel?



Effectiveness of other covid secure measures



Length of service and reason for refusal

# Discrimination risks: workers

Potentially relevant  
protected characteristics  
under the Equality  
Act 2010:



Disability



Pregnancy / maternity



Race



Age

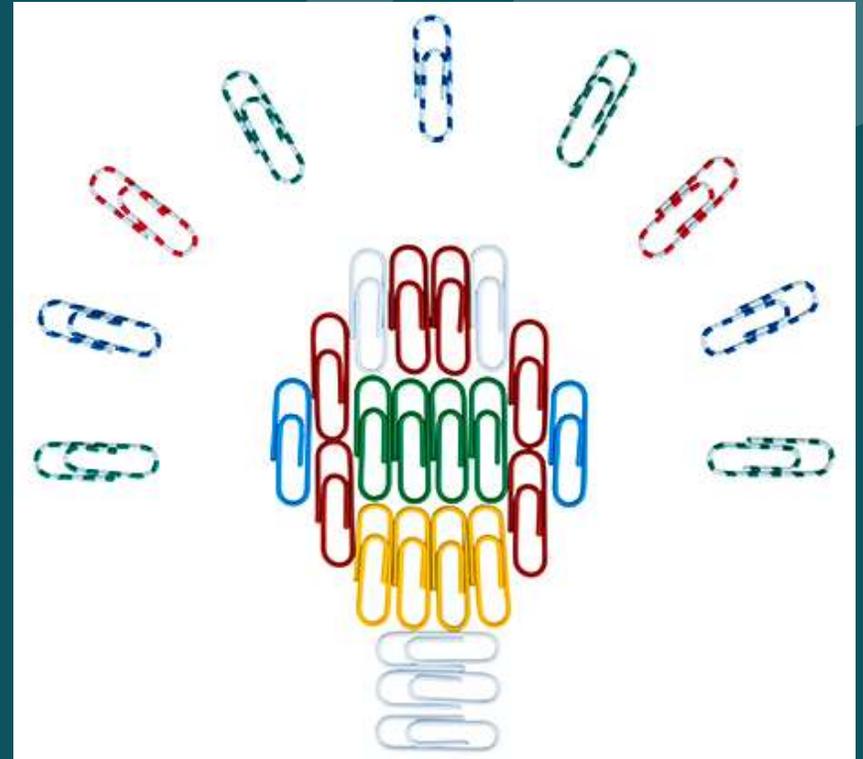


Religion / philosophical belief

# Standard required to meet a philosophical belief

## The Grainger criteria:

- The belief must be genuinely held
- The belief must not simply be an opinion or viewpoint based on the present state of information available
- The belief must concern a weighty and substantial aspect of human life and behaviour
- The belief must attain a certain level of cogency, seriousness, cohesion and importance
- The belief must be worthy of respect in a democratic society, not be incompatible with human dignity and not be in conflict with the fundamental rights of others.



# Relevant types of discrimination claim



indirect discrimination



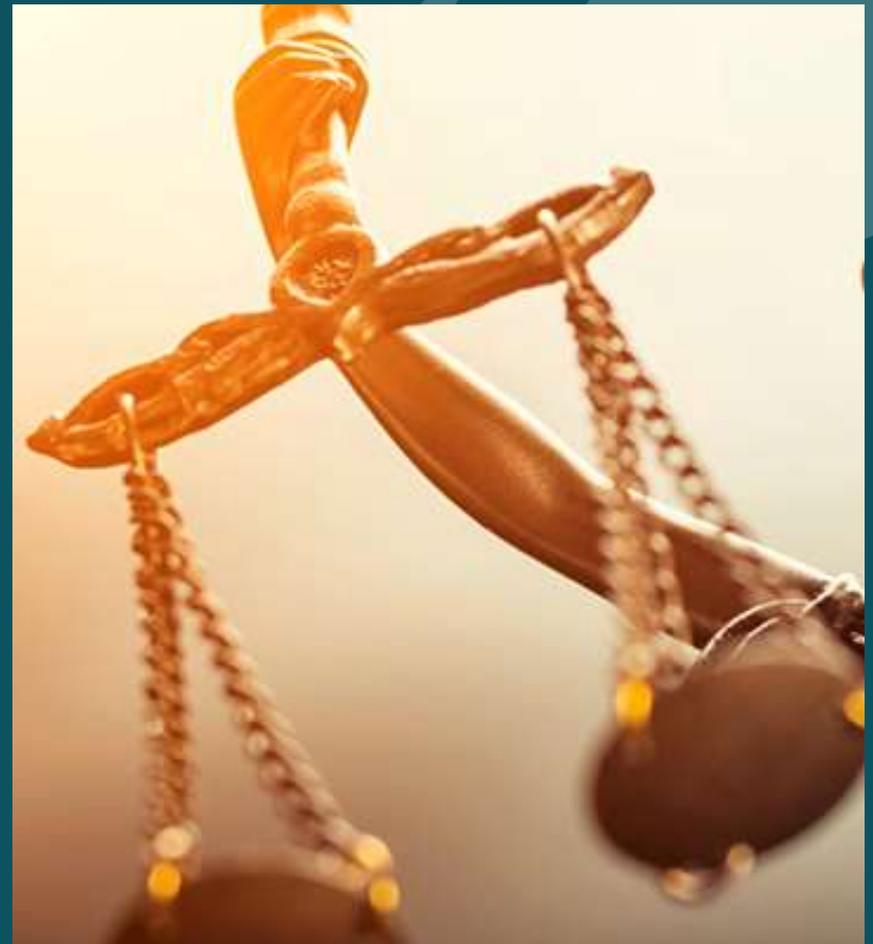
discrimination arising from a disability

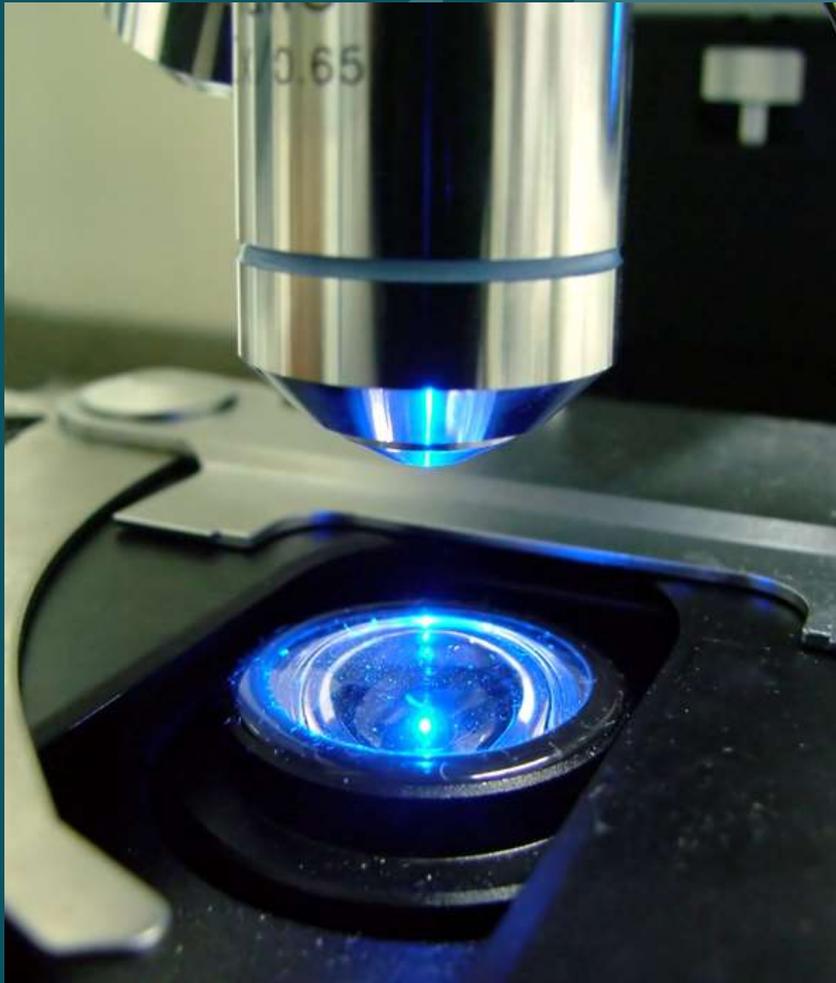


reasonable adjustments for disability

## Discrimination risks: visitors

- Duty to make reasonable adjustments
- Claims in this area tend to have a low financial exposure but significant reputational damage
- Civil claim in the county/sheriff courts within six months
- EHRC also has the power to investigate





## Case law: Goods & Services

- Lee v Ashers Baking 2018
- First Group Ltd v Paulley 2017
- Travellers Movement and Others v JD Weatherspoon 2015

# Fair & objective reasons?

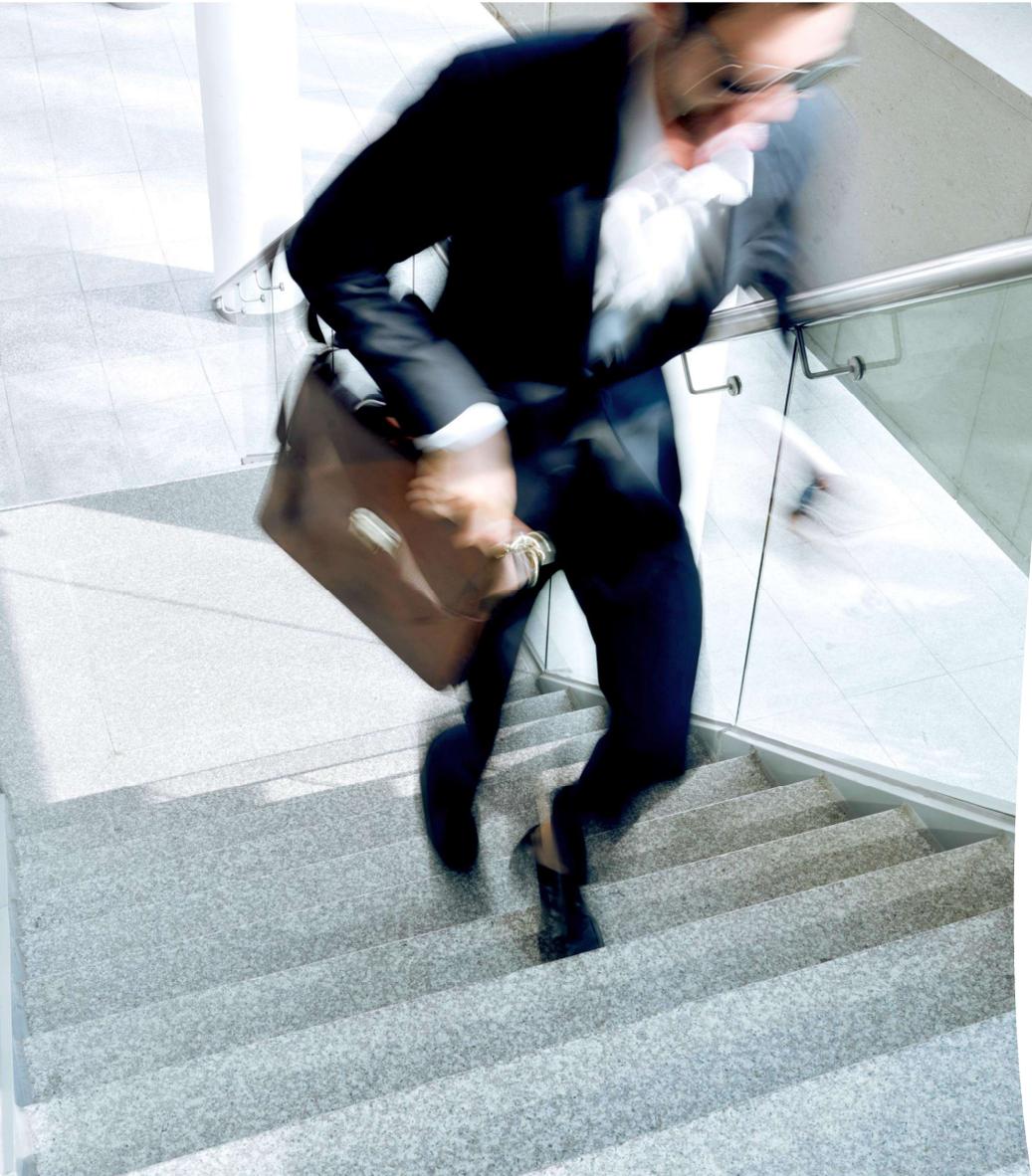
Justifying indirect discrimination involves identifying that the policy is a **proportionate means of achieving legitimate aim**

- A legitimate aim must be real and not in itself discriminatory
- health and safety and the desire to prevent the virus infecting staff or customers?

Proportionality test requires a **balancing exercise**:

- does the benefit outweigh the discriminatory effects of the unfavourable treatment?
- is there a less discriminatory way of achieving the same aim?





## Practical issues around vaccinations

Evidence - what is valid proof of vaccination?

Timing – everyone vaccinated?

Actual benefits vs risks

Communication

Benchmarking

Review

## To recap: the question



## To what extent are you opening yourself up to discrimination claims by asking employees and visitors to provide proof of vaccination? What are fair and objective reasons?

- Employers are undoubtedly exposing themselves to risk by adopting this approach....
- Highly unlikely this is going to be justified or reasonable in an office based environment...
- But if the employer does wish to proceed because of special factors then the risks from both a discrimination and unfair dismissal perspective could be mitigated by employers....

# Steps to mitigate risk

- ✓ Review and update Covid-19 risk assessment
- ✓ Consult with staff/advise visitors in advance
- ✓ Introduce exemptions to policy
- ✓ Consider alternatives
- ✓ Identify a legitimate aim – health and safety, AND
- ✓ Explain why the policy is proportionate and cannot be achieved in other ways, i.e. the special factors which are relevant to this workplace
- ✓ Consider individual circumstances

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