



DLS

Directorate
of Legal
Services

Employment Law Up-date Training for HPMA

25th January 2018

Presented by June Turkington
Assistant Chief Legal Adviser, DLS

www.hscbusiness.hscni.net

EU General Data Protection Regulation (GDPR)

- Will come into force in the UK



- Has “**direct effect**” in UK law
- Will be **fully implemented** despite Brexit
- Member States have **some discretion in employment field**
- **UK Data Protection Bill** going through House of Lords

GDPR – Penalty Regime



For non-compliance

- **Fines of up to EUR 20 Million or 4% of total turnover** (whichever is higher)
- Implications for HSC bodies as (large) employers
 - Huge amounts of data held and processed on employees
 - Lot of unstructured data – e.g. emails
 - Disputes and grievances – often personalised and intense – personal data involved

DLS

Directorate
of Legal
Services

GDPR – General Approach

Similar overall to DPA

- Core definitions
 - Personal Data
 - Data Controller (DC)
 - Processing
 - Data Processor (DP)
- Set of principles
- Gateway conditions provide **legal basis for processing**
- Rights of data subject – including **subject access rights (SAR)**

GDPR - Compliance

Will require →

- More granularity/detail
- Greater focus on legal basis for processing
- More information and policies
- Additional rights for data subjects

GDPR – New Requirement of Transparency

In addition to “lawfully and fairly”

Meaning → openness AND explanation

e.g. when responding to SAR, must explain the approach which has been taken

GDPR - Consent

Gateway → legal basis

Stricter conditions for consent

Must be

- Freely given – genuine choice
- Specific
- Informed
- Unambiguous
- Employer must show consent
- Consent must “stand out” → separate signature box?
- Right to withdraw consent at any time

ICO guidance on consent

DLS

Directorate
of Legal
Services

Privacy/Fair processing notices

- Previously had to include purposes of processing and other fair processing information
- GDPR – now information **must also be**
 - **Concise**
 - **Transparent**
 - **Easily accessible**
 - **Plain language**
 - + **legal basis** – must include additional condition for processing sensitive data

GDPR Legitimate Interests

“**legitimate interests**” – condition for processing

- i.e. processing is necessary for the legitimate interests of the employer or a third party – complainant?
- Except where those interests are overridden by the interests, rights and freedoms of the employee
- Employee must be told what those interests are
- AND employees must be given further information about **how** and **why** the data is to be used AND their rights
- Privacy notices → quite lengthy! – but also have to be concise?!

Data Subject Rights

“Delete it, freeze it, correct it”

- Right to erasure aka **“right to be forgotten”**
- **Right to rectification**
- **Right to restrict processing**
- **Right to object to processing**

Potential to be (ab)used in employment disputes?

GDPR – Subject Access Requests (SARs)

- Broadly similar to existing regime

Plus

- Must also provide
 - Anticipated period of storage
 - Details of “*delete it*” etc rights
 - Timeframe for response – “**without undue delay**” **AND within 1 month** (possible extension of up to 2 months for complex requests)
 - £10 fee abolished – but where request is “manifestly excessive”, can charge a reasonable “admin” fee OR
 - refuse to provide

GDPR – Requirement to show compliance

- Need for **policies** in order to **demonstrate compliance**
- Data protection by **design and default** – must be inherent/built in to systems, procedures and rules
 - E.g. to minimise data collected and ensure it is all relevant to the specific purpose for which it is collected

GDPR Data Processors

e.g. Shared Services

- Payroll - Recruitment
- Accounts Receivable – e.g. recovery of overpayments
- Leadership Centre/Training providers/NIMDTA
- DLS
- Requirement for **formal contractual arrangements** between DC and DP
- Must be **documented instructions** for processing from DC to DP
- DP may be **directly liable** for non-compliance

DLS

Directorate
of Legal
Services

GDPR New Role of DP Officer

Mandatory for public bodies

Role is to

- Advise DC or DP
- Monitor compliance with DP policies and training
- Act as point of contact for ICO
- **Act independently** – similar to an auditor

Protection from dismissal/detriment for performance of functions

DLS

Directorate
of Legal
Services

GDPR Data Breaches

- Any breach must be reported to ICO **within 72 hours** where possible
- If not, must provide “reasoned justification” for delay
- Except if breach is unlikely to result in risk to data subjects
- Must keep **records of all breaches**, even those where employer decides not to report as no risk

GDPR Key Steps for Employers

- **Implementation team** within HR
- **Information audit** – size and scope of the issue
- Conduct ICO **self-assessments** – implement recommended actions
- Consider and **record legal basis** for each category of data
- **Beware of relying on consent!**

GDPR Key Steps for Employers

- Prepare **privacy notices** – tiered approach
- Review **security measures** – hard copy and manual data
- **Procedures for new rights** – “*delete it*” etc
- **Train all staff** – proportionate approach
- Liaise closely with your DPO
- **Don't leave it until May!**

Agency Workers

Coles v MOD 2015 EAT

Effect of Reg 13 of the Agency Workers Regulations

“13. – (1) An agency worker has...the right to be informed... of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.”

Coles v MOD 2015 EAT



- C engaged through an agency to cover post on temp basis during re-structuring
- C told post was to be filled, but that “at risk” permanent employees would have preference
- His engagement was terminated
- Permanent employee was re-deployed into the post
- Mr C argued this was in breach of Reg 13

Coles v MOD 2015 EAT

EAT held

- Right is **limited to being informed of vacancy**
- This is a meaningful right of itself
- The permanent “at risk” employee was not an appropriate comparator
- No basis for protecting the job of the temp agency worker in preference to the permanent employee requiring to be re-deployed

DLS

Directorate
of Legal
Services

The Gig Economy

Developing caselaw.....

OED definition of “gig economy” = *a labour market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs*

Staff purportedly self-employed/freelance

“casual worker” includes many different types of working arrangements e.g. bank staff, seasonal workers and zero hours, guaranteed minimum or short-hours contracts

DLS

Directorate
of Legal
Services

Tests for employment status

- Different – albeit similar – tests for employment status for
 - **Tax purposes** – determination made HMRC – also impact of IR 35
 - **Employment rights purposes** – determination made by employment tribunal

Worker Status

“Workers” have the right to

- The NMW
- Paid holiday
- Rest periods and other WTR rights
- The right to seek compulsory TU recognition
- The right not to suffer detriment on grounds of whistleblowing
- Etc

Worker Status

King v Sash Window Workshop 2016 ECJ

- ECJ held that workers who
- Have not taken their full holiday entitlement under the WTD
- Because employer had misclassified as self-employed
- Should have the right to carry that untaken holiday over indefinitely; **and**
- Be paid in lieu on termination

Cases where staff found to be workers

- *Uber BV v Aslam EAT 2017* – taxi drivers engaged on “self-employed” basis – right to NMW and WTR rights – to be appealed to CA
- *Dewhurst v Citysprint UK Ltd ET 2016* – cycle couriers engaged on “self-employed” basis – not under appeal
- *Pimlico Plumbers Ltd v Smith EWCA 2017* – plumbers engaged on “self-employed” basis – entitled to holiday, protection from unlawful deductions from wages and DDA – under appeal to Supreme Court
- *Boxer v Excel Group Services Ltd ET 2016* – cycle couriers engaged on “self-employed” basis – workers for WTR purposes
.....And many others

Zero Hours Contract

**ZERO HOUR
CONTRACT**

As yet – no regulation in NI of zero hours contracts

- Including no regulation of exclusivity clauses – can't be used in GB

DLS

Directorate
of Legal
Services

Whistleblowing – up-date

Amendments in 2016 Employment Act **in force on 1st October 2017** – NI law on WB now substantially in line with GB

Protected disclosures

Section 12 – worker must have a reasonable belief that the disclosure is made **“in the public interest”** and tends to show [commission of a criminal offence etc]

DLS

Directorate
of Legal
Services

Whistleblowing – up-date

Requirement of **good faith** for a disclosure to be a qualifying disclosure is now **removed**

Lack of good faith → **reduction in compensation** of up to 25%

DLS

Directorate
of Legal
Services

Whistleblowing – up-date

Section 15 – Worker has the right not to be subjected to a detriment by

- A **co-worker** in the **course of his employment**; or
- An agent with the authority of the employer

On the ground that he has made a protected disclosure

- **Co-worker** may be **directly liable** for his own actions
- **Employer** may be **vicariously liable** for those actions
- **Knowledge** or approval **of the employer** (or lack of it) is **immaterial**
- Statutory “**reasonable steps**” defence is applicable

Whistleblowing – up-date

- Specific extension to the definition of “worker” to include →
 - Work experience provided pursuant to a course of education or training approved by the NMC

Suspension

Agoreyo v London Borough of Lambeth

A cautionary tale of a precautionary suspension!

High Court in London held suspension was in breach of contract

- Suspension was “default position” and “knee jerk”
- Decision maker had not made preliminary enquiries or sought claimant’s initial response

Suspension

Agoreyo v London Borough of Lambeth

- No evidence any alternative considered
- In the circumstances, the suspension was a breach of trust and confidence
- Court applied previous cases
 1. Mezey 2010 – suspension is not a neutral act
 2. Gogay 2000 – suspension should not be a routine response to need for investigation

Recent HSC tribunal decisions

Ruth Lynch v Northern Trust 2017

UD claim – dismissed in full (no DDA claim)

BUT see tribunal’s comments re

- Managing Attendance Protocol and Procedure (MAP)
- Short term absence
- Long term absence
- Mixture – *“at time of absence, manager should take action in accordance with short or long term absence section”*
- Confusion over meanings of *“unacceptable”* and *“unsustainable”* absence

Recent HSC tribunal decisions

Ruth Lynch v Northern Trust 2017

- Criticism for not having used full text of template letters
- *“scope for respondent to improve on the knowledge and training of its managers in respect of MAP”*
- Error in cross reference in relevant FAQ
- Same senior manager had been at one of the absence meetings and then took decision on termination – claimant did not focus on this, but could have become an issue

Recent HSC tribunal decisions

Eamon McGrath v Southern Trust 2017

Claim of unfair dismissal – successful

- Claimant was subject to disciplinary procedure for allegedly being under the influence of alcohol at work
- Claimant was support worker in supported living facility
- Following disciplinary hearing, formal warning issued and claimant downgraded from Band 5 to Band 3 and required to take part in alcohol programme

DLS

Directorate
of Legal
Services

Recent HSC tribunal decisions

Eamon McGrath v Southern Trust 2017

- Shortly after the disciplinary hearing, claimant sought postponement of OH appointment → 2nd disciplinary
- 2nd disciplinary process led to dismissal
- Tribunal critical of
 - Drafting of charges
 - Failure to record or keep detailed notes of hearings
 - Lack of clarity over what was required of claimant – total abstinence?
 - Same managers conducted both investigations and both disciplinary hearings

Recent HSC tribunal decisions

Mandy Campbell v Belfast Trust 2017

Issue → Does associative disability discrimination extend to the duty to make RA?

Answer → NO – the duty to make RA extends only to a disabled employee

BUT beware of other relevant legal issues – eg indirect (sex) discrimination and/or the right to request flexible working etc

Recent Court of Appeal decision

Caroline Connolly v Western Trust 2017 (No.2)

Claimant was a nurse who was dismissed after taking an inhaler from ward supplies

- Dismissal held to be fair by 2 separate and subsequent tribunals which heard evidence from members of the relevant internal panels
- Dismissal held to be unfair by Court of Appeal – 2 to 1
- Particular focus in the leading judgment on the phrase in the ERO “*in accordance with equity and the substantial merits of the case*”

DLS

Directorate
of Legal
Services

Recent Court of Appeal decision

Caroline Connolly v Western Trust 2017 (No.2)

3 main areas of criticism

- Inclusion of unredacted complaints in disciplinary panel papers
- Appeal panel member had concluded that claimant intended to replace the inhaler without telling anyone – no evidence for that conclusion
- Failure to investigate and establish if there was a culture of staff using Trust drugs for personal use

DLS

Directorate
of Legal
Services

Disability Discrimination

Identifying Disability

- Persons with progressive conditions such as cancer, multiple-sclerosis and HIV regarded as disabled persons from diagnosis
- Otherwise legal question to be determined by court or tribunal
- Autism Act extends the definition to include those with social or communication disabilities

Disability Discrimination

Identifying Disability

- Be alive to the issue – employee does not have to alert the employer to the fact they are disabled for employer to be liable under the Act
- Medical guidance should be sought from Occupational Health and experts if appropriate
- Ensure you consult and liaise with the employee

Disability Discrimination Act 1995

The Act makes unlawful the following forms of disability discrimination

- less favourable treatment (LFT) on grounds of a person's disability – including associative and perception
- LFT on grounds related to a person's disability which cannot be justified
- **Failure to make reasonable adjustments for a disabled person**
- Harassment on grounds of disability
- Victimisation

The Duty to Make Reasonable Adjustments

When does the duty arise?

Where the employer knows (*or ought reasonably to know*) that

- A provision, criterion or practice (PCP) applied by it, or
- any physical feature of premises occupied by it, places a disabled person at a substantial disadvantage compared with people who are not disabled.

The Duty to Make Reasonable Adjustments

Where the duty has arisen, the employer **must**

take such steps as it is **reasonable** for it to have to take in all the circumstances to prevent that disadvantage

Note - duty isn't limited to adjustments to current role

A failure to make a reasonable adjustment

- constitutes **unlawful discrimination**; and
- **can never be justified**

The Duty to Make Reasonable Adjustments

What are PCPs?

These include arrangements

- for determining to whom employment should be offered
- relating to terms and conditions of employment
- regarding employment, promotion, transfer, training or any other benefit

Examples of Reasonable Adjustments

- making **adjustments to premises**
- **allocating** some of the disabled person's **duties** to another person
- **transferring** the disabled person **to fill an existing vacancy**
- **altering** the disabled person's **hours of working**
- **assigning** the disabled person **to a different place of work**

Examples of Reasonable Adjustments Cont.

- **allowing** the disabled person **to be absent** during working hours for rehabilitation, assessment or treatment
- **acquiring or modifying equipment**
- **modifying** procedures for **testing or assessment**
- **providing a reader or interpreter**
- **providing supervision or other support**
- **Modifying the application of any policy or procedure to the disabled employee**

Question of Reasonableness

Considerations for the Employer:

- **Effectiveness** of step in questions
- **Practicability** of the step
- **Financial and other costs** of the step (include disruption to activities)
- Extent of **resources available**
- Duty may be to treat disabled person **more favourably** in recognition of their special needs (*Archibald v Fife Council*) [2004]

Failure to comply with the RA duty **cannot** be justified

DLS

Directorate
of Legal
Services

Key Policies impacted by the duty to make reasonable adjustments

- Sickness Absence policy
- Capability policy
- Recruitment policy
- Redeployment policy
- Disciplinary policy
- Conduct of all internal procedures

Disability Case Law



Downie v DSD IT 2015

- Admin Officer with Chron's disease
- Employer aware and adjustments made
- Included not issuing a written warning when warranted under its Sickness policy in 2011
- Further 80 day sickness absence 2014
- Written warning issued despite manager's disapproval

Disability Case Law

Downie

- No up date OH report or consideration of whether further adjustments necessary
- Decision maker reasoning - the absence policy did not permit the trigger points to be overlooked as an adjustment
- Appeal of decision unsuccessful
- IT held this amounted to RA failure awarded £10,000 injury to feelings

Disability Case Law

McCracken v Northern HSC Trust IT 2013

- Duty to make reasonable adjustments includes the duty to act expeditiously. Endorsed in recent IT case (*McLaughlin v Charles Hurst 2017*)

McErlean v Northern HSC Trust IT 20134

- Employee summarily dismissed for domestic violence incident he attributed to stress and ill health

Disability Case Law

McErlean v Northern Trust contd

- Initial nurse assessment – no mental illness
- First OH report mentioned the DDA – advised not disabled – next 5 made no mention
- Seen by 2 Consultant Psychiatrists throughout
- Expert evidence in disciplinary was that the employee had a mental health condition
- Held employer ought to have known of disability and applied capability policy = RA failure
- IT awarded reinstatement and £12,000 injury to feelings

Disability Case Law

Jo-Anne Peters v South Eastern Trust 2017

A good news story!

- Claims of disability discrimination re
 - Decision to implement Capability Procedure
 - Demotion
 - Process leading up to demotion
 - Alleged mishandling of grievance
 - Alleged failure to take account of OH advice and recommendations

Disability Case Law

Jo-Anne Peters v South Eastern Trust 2017

- Tribunal accepted that claimant met the statutory definition of disability
 - Cluster headaches/migraines – since 2009
 - Adjustment disorder – dispute re onset of this – tribunal found October 2015

Following Galo and in light of the adjustment disorder, tribunal took great care in how it managed the conduct of the hearing

Disability Case Law

Jo-Anne Peters v South Eastern Trust 2017

Findings of fact

- Very proactive and careful management by line manager
- Additional support and supervision
- Action plans
- Regular meetings
- Excellent record keeping by manager
- Claimant and her husband/rep had not mentioned impact of migraines during the internal process

Disability Case Law

Jo-Anne Peters v South Eastern Trust 2017

Tribunal rejected the claims in their entirety

- No evidence that migraines had caused the performance difficulties or were the source of any differential treatment
- Capability issues were unrelated to disability
- Claimant's case re impact of migraines not supported by the medical evidence

Key Challenges for Managers

Recognition & Research

- Identifying disability at an early stage of process e.g. sickness absence, capability.
- Be alert to the possibility of disability throughout entire process.
- Understand extent and nature of the duty
- Liaising with employee, HR and OH
- Use all available expertise
- Act on OH recommendations in a timely fashion

Key Challenges for Managers

- Proactively manage case and clarify any misunderstandings immediately
- Adjustments could include permitting not being prescriptive in application of policies.
- Duty is onerous, particularly for large employers
- **Record** -Document the process including considerations applied when determining reasonableness of all potential adjustments.
- Be **Reasonable** and imaginative!

Key Challenges for Managers

- **Redeploy** - if RA to current job not possible, consideration must be given to whether any suitable alternative posts are available
- This could be a post at a higher grade (*Archibald v Fife Council*) [2004]
- Or swapping posts with an able bodied colleague (*Chief Constable of South Yorkshire Police v Jelic*) [2010]
- Enduring aim should be to **Recruit or Retain**

The Duty to Make Reasonable Adjustments

Record process – Paper trail is essential

Review regularly especially for those with fluctuating or progressive conditions

What if the duty is not complied with?

The disabled employee may bring

- a grievance and/or
- a claim to a tribunal

Termination on the grounds of ill health

- Where employee too ill to return to work - **last resort**
- Not conduct issue –different process
- Need audit trail of attempts made to return and application of reasonable adjustments
- Disability considered and seen to be considered
- IHR considered?
- Panel should have no previous involvement in managing absence
- Must comply with statutory dismissal procedures

The Duty to Make Reasonable Adjustments

Sources of Information & Guidance for line managers

- www.equalityni.org.uk
- www.lra.org.uk
- www.nidirect.gov.uk
- Relevant voluntary organisations
- Human Resources
- Occupational Health
- DLS if legal advice is required

The Duty to Make Reasonable Adjustments

Any Questions?



DLS

Directorate
of Legal
Services