



Twitter ye not: Data Protection breaches in the workplace

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Case Study: Pitfalls of handling medical data in the workplace & Employment References: Just how exempt are referees?

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Case Study: Basic Facts

- Employee of a local authority hospital.
- Allegations of bullying and harassment by line manager.
- Claim out of time to pursue.
- Returned to the workplace after absence with stress-related condition.
- Psychiatric treatment: Medical Report sought by and provided to employer.
- Returned to work before resignation.
- Employer asked by potential new employer for a reference.
- Reference provided by line manager!

Case Study: Basic Facts (2)

- Reference included a number of adverse statements about C's performance.
- And, critically, outside of the tick-box questions asked by the new employer the line manager stated as follows:
- *“[C] finds relationships difficult, leading to problems with boundaries. She has an insecurity that makes this work too difficult for her. It also causes her to have problems with management. However, she was increasingly unwell while here and has since had professional help.”*

Access to Medical Records Act, 1988

- Individuals have certain rights in respect of medical reports sought by employer.
- Provided that the medical practitioner is or has been responsible for clinical care of individual.
- “Care” has wide definition. Includes examination, investigation or diagnosis for purposes of medical treatment.
- Critically, not Occupational Health or other medical professional engaged by the employer. Only clinical care providers.

Access to Medical Records Act (2)

- Common misconception which can lead to unnecessary complications.
- Clinical care providers cannot be contacted by employer without consent of employee (s.3)
- Employee must be informed of rights under the Act.
- Right to be shown the Report before it is sent to the employer (s.6).
- If employee exercises that right the medical practitioner may not supply it to the employer without employee's consent (s.5(1)).
- The employee can ask medical practitioner to make amendments to the Report. If he/she is not prepared to do so then employee entitled to have views attached to Report (s.5(2)).

Access to Medical Records Act (3).

- Employee can be refused access:
 - If, in the opinion of the medical practitioner [Note: Not the employer], it is likely to cause serious harm to the physical or mental health of employee or others (s.7(1)).
 - Example ***Open University*** case.
 - Where it would be likely to reveal information about a third party or the identity of a third party (s.7(2)).
- Employee entitled to be informed that access denied [Note: Change from the predecessor Act].
- Decision can be challenged in the County Court, which can order disclosure.

Return to the Case Study (1)

- Simple question in the Instructions: Is the Reference actionable?
- Negligent misstatement action for aspects that are false (***Spring v. Guardian Assurance***).
- Would not help with the references to a medical condition or fact received treatment – both true.
- It is the revealing of that information to a potential employer that had the profound impact on C (as both C's and D's Psychiatrist accepted).

Recourse to the DPA, 1998.

- Starting point – that both the reference to C’s medical condition and the medical treatment received was “sensitive personal data” (see s.2).
- Definition: “Personal data consisting of information as to his physical or mental health or condition.”
- Claim can be brought pursuant to s.13 by “an individual who suffers damage by reason of any contravention by a data controller.”
- Actionable in CC or HC.
- First defence – s.13(3) – taken all care reasonably required to comply with requirements of Act.

- Schedule 1, Part 1: Personal data shall be processed “fairly and lawfully.”
- Shall not be processed unless at least one of the Schedule 2 conditions is met; and
- For sensitive personal data: At least one of the Schedule 3 conditions is met.
- Schedule 2: Possible runners for employer:
 - Data subject has given consent to the processing (para 1).

- Necessary for the performance of C's contract.
- Necessary for compliance with a legal obligation to which the data controller is subject.
- Necessary to protect the interests of the data subject.
- Necessary for the purposes of legitimate interests of the data controller or a third party except where the processing is unwarranted by reason of the prejudice to the rights and freedoms of the data subject.

- Schedule 3 runners and riders:
 - Explicit consent of C.
 - Necessary to perform any right or obligation conferred or imposed by law in connection with employment.
 - Necessary to protect the interests of a third party where consent has been unreasonably withheld by the data subject.
 - Necessary for medical purposes but only if processing is by a health professional

- Employer on the run by this stage ... But, “ah, ha” they say (or plead): we have the exemption under Schedule 7.
- Personal data exempt from section 7 if they consist of a reference given by the data controller for the purposes of employment.
- Looks encouraging so far...
- But, section 7 is the provision that gives employee the right of access: References are exempt.
- Section 7 has nothing to do with obligations re: processing.

DPA, 1998 (6)

- Employer left with expensive breach.
- C not able to work as a result of psych injury:
Psychiatrists attributed to DPA breach.
- Chris dealing with damages and what can be claimed.

Wider context of medical data in the workplace (1)

- Unnecessary or ill-advised dissemination could give rise to disability discrimination claim.
- Examples of sensitive personal data in medical arena in ICO Code of Practice is very wide, i.e. E-mails from employee to manager about medical condition.
- Retention = processing.
- Employee can obtain access pursuant to an SAR: care in what is obtained and retained.
- Advice of ICO to keep absence and sickness records separate. Restrict access to records with reasons for absence.

Wider context (2)

- Inform those with access why they have it and restricted use that can be made.
- Only give access to those who require it.
- One of example of the reasons for access is to ensure compliance with health and safety and to prevent discrimination. May be the only way out for an employer.
- Note: Require explicit consent or employee under Schedule 3. General Clause in contract unlikely to be sufficient.



- (1) Valuing privacy and reputational damage
- (2) Handling a Subject Access Request

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- Principles of data processing: Part I, Schd 1 DPA, incl.:
 - Data must be processed “fairly and lawfully” and not unless one of conditions in Schd 2 (personal data) or Schd 3 (Sensitive personal data) is met (para 1)
 - Data not to be processed in a manner incompatible with the specified and lawful purpose (para 2)
 - Accurate and, if necessary, kept up to date (para 4)
 - Not kept longer than necessary for the purpose (para 5)
 - Processed in accordance with rights of data subjects (para 6)
 - Measures should be taken against unauthorised or unlawful processing of personal data and accidental loss or destruction (para 7)

- Right to compensation for damage suffered by reason of a contravention of any requirement of the DPA (s 13(1))
- Right to compensation for distress (13(2)) if:
 - (a) C also suffered damage; or
 - (b) the contravention relates to the processing of personal data for the special purposes
- Defence for data controller if took reasonable care to comply with the requirement (s 13(3))
- Art 23: Member states shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

Evolution of recoverable damages

- *Douglas v Hello (No. 6)*, 2003: s 13 not a separate route to recovery for damage and distress
- *Johnson v Medical Defence Union*, 2007: “damage” in 13(1) and 13(2)(a) was pecuniary damage
- *Halliday v Creation Consumer Finance*, 2013: distress damages could be recovered if nominal “damage”
- *Vidal Hall v Google*, 2015: s 13 was incompatible with Art 23 of Directive 95/46/EC; “damage” meant both material and non-material damage; s 13(2) disapplied.
 - Google withdrew appeal to SC – but what about Brexit?

Injury to reputation recoverable?

- Damages for injury to reputation are *ordinarily* restricted to claims in defamation
- *Hannon v NGN*, 2014: Application rejected to strike out breach of confidence and misuse of private information claims on basis they should have been brought in defamation
- *Prince Moulay v Elaph Publishing*, 2015 (HC) and 2017 (CoA): Application granted to amend defamation claim to include claim for breach of DPA

- *Gulati v MGN*, 2015: Guidance on damages for misuse of private information; invasion of “fundamental right” of privacy separate from distress. PI damages were little more than a reality check
- *TLT v SoS Home Dept*, 2016: damages for distress should take account of awards for psychiatric or psychological injury
 - De minimis threshold below which damages won't be awarded
 - Damages took account of loss of control of personal information rather than separate head of damage
- *Andrea Brown v Commissioner of Police for the Metropolis and Chief Constable of Greater Manchester Police*, 2016

Advantages of DPA claim

- No need to show “serious harm” under s 1 Defamation Act 2013
- DPA claims unlikely to be subject to *Jameel* abuse of process arguments
- Claim can be brought whether information true or false
- No need to establish inherently private nature of data

- Representing the Claimant:
 - Scope of the right – section 7 DPA
 - Ensure client is aware of risk of DSAR producing something damaging
 - Supply details of search parameters, or a list of key words to be used by employer in DSAR search
 - Send DSAR fee with DSAR request and list of key words

- Representing the Respondent:
 - 40 day time limit (from payment of fee if requested)
 - Mere difficulty is not an excuse (unlike an FOI request), though section 8(2) DPA does provide an escape clause in cases involving “disproportionate effort”
 - Exemptions include privilege, and confidential references given by the Respondent (but not received by them)
 - A reasonable interval must pass between requests
 - Don’t supply confidential information relating to others
 - Relevant to fairness of a dismissal *McWilliams v CitiBank NA*, ET 3200384/15

General Data Protection Regulation – 25 May 2018

- Rights of data subjects to access data – article 15
- If request is manifestly unfounded or excessive the data controller can (article 12(5))
 - Charge a reasonable fee
 - Refuse to act
- Burden of demonstrating this on data controller
- One month to comply, can be extended to two months depending on complexity (article 12(3))
- If data controller does not act within one month must inform subject of reason for delay and possibility of complaint and judicial remedy (article 12(4))



Thank you

Any questions?

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