

Webinar

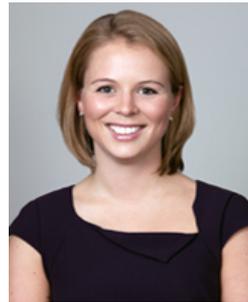
UK Employment Law Update – May 2016

Trade secrets and data protection: the latest developments

Meet the team



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Agenda

1. In case you missed it...
2. The General Data Protection Regulation – an employer's perspective
 - *Andrew Gilchrist, Senior Associate*
3. Trade Secrets Directive
 - *Briony Pollard, Associate*
4. Q&A

In case you missed it...

- Effectiveness of variation clauses – *Motors Inc v TRW Lucas Variety Electric Steering Ltd (CoA)*
 - Clause in commercial contract provided that any variations had to be made in writing to be effective
 - Two previous Court of Appeal cases conflicted on question of effectiveness of such clauses
 - Court of Appeal's view (*obiter*) here was that such clauses are not effective and variation can be effected orally and by conduct – principle of party autonomy prevails
 - Clause still worth including to encourage parties to agree variations in writing and thereby avoid disputes BUT can't be relied upon to exclude other variations

In case you missed it...(cont)

- Discrimination arising from disability – *Risby v London Borough of Waltham Forest* (EAT)
 - S15(1) EqA 2010: unfavourable treatment because of “something arising in consequence” of disability where such treatment is not a proportionate means of achieving a legitimate aim
 - EHRC Code: employee loses temper due to pain caused by cancer. Disciplining that employee would be unfavourable treatment as connection between the “something” (loss of temper) that led to the treatment and the disability.
 - R – paraplegic with 23 years’ service. R due to attend a workshop – venue changed to basement of LBWF building with no wheelchair access.
 - R lost temper – shouted at junior colleague and used racist language, reducing colleague to tears

In case you missed it...(cont)

- R dismissed for gross misconduct and claimed unfair dismissal and discrimination arising from disability.
- Tribunal dismissed claims: no link between his disability and his short temper was not related to disability. R appealed
- EAT upheld appeal:
 - Loose causation test: all that is needed is that R's conduct arose "in consequence" of disability. If R not disabled, would not have been angered by venue change. Short temper and disability were both causes of conduct leading to dismissal, which is enough.
 - Case remitted to Tribunal to determine whether dismissal was "proportionate means of achieving legitimate aim" of upholding equal opps policy.

In case you missed it...(cont)

- In brief
 - Religious discrimination: dismissed teacher who stood by convicted sex offender husband able to claim religious discrimination as refusal to divorce husband based on religious grounds (*Pendleton v Derbyshire County Council*, EAT)
 - High Court orders destruction of claimant's confidential information held on defendants' computers (for possibly the first time)(*Arthur J Gallagher v Skriptchenko and others*).
 - Dress codes back in the news!

The GDPR – an employer's perspective



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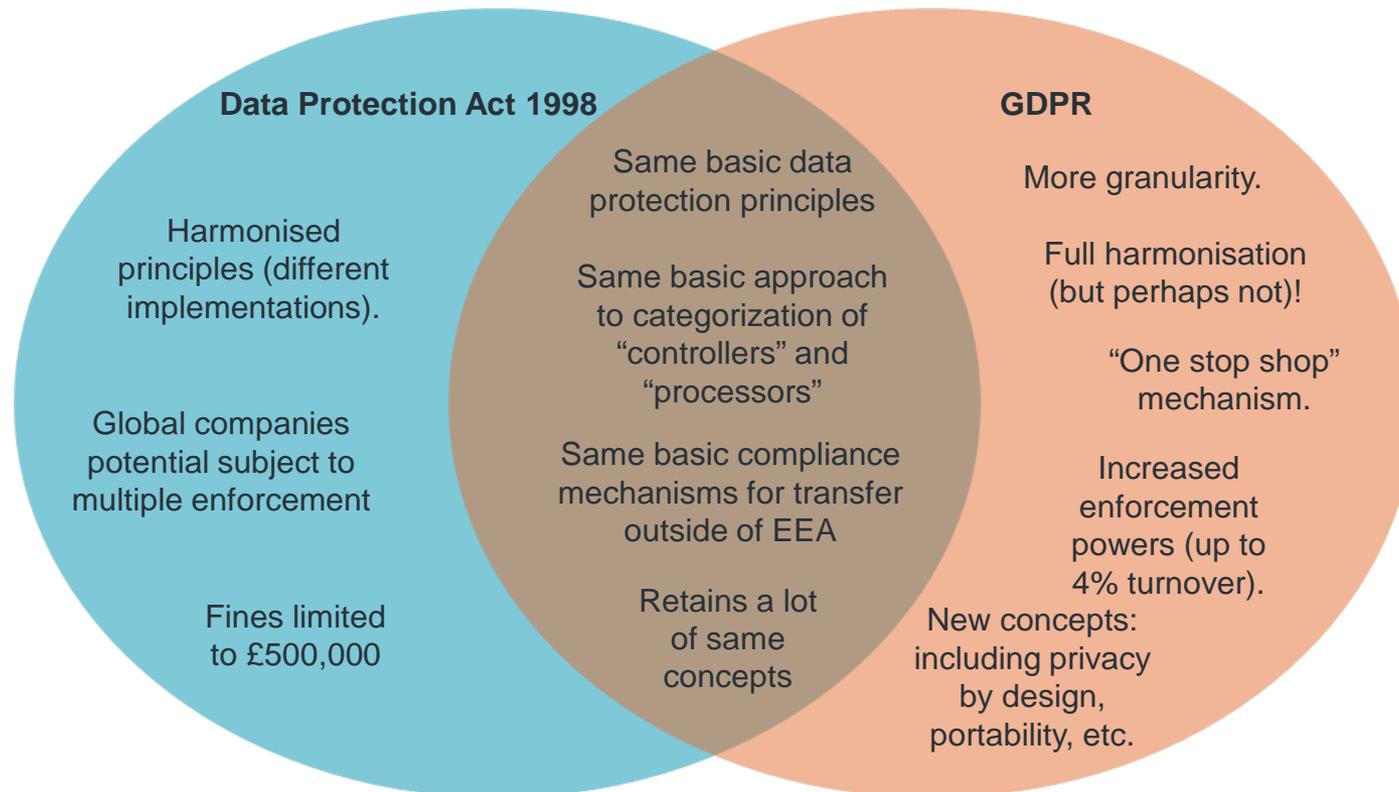
DATA PROTECTION – A CHANGING ENVIRONMENT

Background to reform

Key Dates:	
Directive 95/46/EC issued:	October 1995
Reform proposed by European Commission:	January 2012
Legislative hell:	January 2012 – December 2015
Text of GDPR Agreed:	15 December 2015
Text of GDPR Adopted:	14 April 2016
Text of GDPR Published:	4 May 2016
GDPR Enters into force:	24 May 2018
GDPR Applies from:	25 May 2018

Effect of reform

- Extensive reform but “doesn’t re-invent wheel”



- Important: Article 88 – Member States can set additional (more specific) rules for processing of employee data**

Where are we today?

- Data Protection Act 1998 – implements Directive 95/45/EC

	Key requirement	Key areas of impact
1.	Implement appropriate organisational measures to protect personal data	IT Security Policies / Breaches (not formal notification requirements)
2.	Conditions on appointing data processors	Written contracts with payroll providers.
3.	Restriction on processing outside of EEA	Must put in place a “compliance measure” (i.e. prescribed form of contract with a payroll provider based in the US).
4.	Data subject have right to access personal data held about them.	Data subject access requests / strategic tool in disputes.
5.	Regulated by local regulator with enforcement powers	Potential investigations, potential penalties, global companies face multiplicity of regulation.

Key changes – your contract with processors

	Position Now	Position under Regulation
1.	“Processors” should be appointed under a written contract, with certain minimum terms.	Article 28 extends minimum contract requirements – instructions must be documented, personal data must be deleted / returned at end of services, allow audits, etc.
2.	Only “controllers” are directly liable to comply.	Article 32 - Data “processors” shall be directly liable for first time for data security. May lead to more involved contract negotiation.
3.	No requirement for data processors to appoint data protection officers	Articles 37 – 39. Processors / controllers may need to appoint data protection officers (including where core activities involve large-scale processing).
4	No mandatory requirement to notify data breaches	Article 33 - Mandatory notification – 72 hours after becoming aware, unless unlikely to result in risk to data subjects. Dependant on information provided by data processor.

Key changes – transfers outside of EEA

	Position now	Position under Regulation
1	Only permitted when certain compliance mechanisms put in place.	Same basic rules.
2	Mechanisms include consent, but must be “freely given”.	No greater clarity – but Article 88 – could be opportunity for UK to clarify issue. (But less harmonisation?).
3	“Community finding of adequacy” needed.	Chapter V - Same basic requirements. Ongoing issues with Safe Harbour / Privacy Shield, following Schrems decision. Will not be resolved by GDPR. <u>What if we Brexit?</u>
4	Model form data transfer agreements.	Same basic requirements, but under review following Schrems.
5	BCRs.	Could become a preferred option?

Key changes - SARS

	Position Now	Position under Regulation
1	Data subjects have right to access personal data held about them.	Article 15 – generally the same, but further information requirements (period of storage, transfer out of EEA – what safeguards are in place).
2	40 days to comply.	Without “undue delay” and within one month but with a possibility of a 2 month extension if necessary.
3	£10 fee.	No default fee, but where request is “manifestly unfounded or excessive” may charge “reasonable fee” or refuse request.

Key changes - enforcement

	Position Now	Position under Regulation
1	£500,000 fine maximum	Article 83 – up to 2% of global turnover (or 10,000,000 Euros) / 4% of global turnover (or 20,000,000 Euros).
2	Local enforcement. Multiple regulators. Inconsistent enforcement.	Article 56 - One stop shop principle – “lead supervisory authority” of “main establishment” – i.e. HQ. More harmonised enforcement? But other supervisory authorities can object to decision – built in consistency mechanism.

What can employers do now?

- More granularity required. Investigate data flows now / undertake risk assessment.
- Consider whether you need to appoint a DPO.
- Review existing policies and procedures (including SARs policy).
- Establish policy for handling data breaches.
- Review your data processing agreements.
- Watch out for impact of Brexit.
- Watch for ICO guidance.

Can you keep a secret? The new Trade Secrets Directive



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Questions

- What is the new law?
- How is it different to the current law?
- Why does this matter to me?
- What are the implications for employment law?
- Practical steps and things to consider now.

What is the new law?

- Directive on the protection of trade secrets against their unlawful acquisition, use and disclosure.
- Purpose – minimum standard of harmonization across the EU.
- Introduces standard definition for “trade secret”.
- Timeframe – expected to come into force next month. MS will have two years to implement.

Trade secrets definition

- SECRET - not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- VALUE - commercial value because it is secret; &
- PROTECTED - subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Reasonable steps to keep secret

- Unclear and undefined.
- Similar requirement in US – low threshold preventing somebody taking no measures from claiming protection.
- US position - “highly contextual and subjective”.
- Clarification – case law.

Comparison with current UK law (1)

- No definition of a trade secret in the UK.
- Information is eligible for protection if it has the ‘necessary quality of confidence about it’ – *Coco v AN Clark*
- Confidential information a wider concept than trade secrets under the Directive. No requirement for confidential information to have commercial value - *Douglas v Hello!*

Comparison with current UK law (2)

- Article 1(2a) - nothing in the Directive will limit employees' use of information that is "experience and skills honestly acquired in the normal course of their employment".
- *Faccenda Chicken Ltd v Fowler* - prevents former employees from using or disclosing information which is of a sufficiently high degree of confidentiality so as to amount to a trade secret.
- CJEU references - meaning of "experience and skills honestly required".

Consequences

- Unclear whether the UK will implement provisions of the Directive.
- The UK Parliament's European Scrutiny Committee has said that they are already given effect in national law.
- Unlikely to see much change in the UK law as a result of the definition in the Directive.

Why does this matter to me?

- Prohibitions against acquisition, use and disclosure of trade secrets.
- Exemptions.
- Remedies.
- Recital 27(a) - Directive is not "intended to affect the possibility of concluding non-competition agreements between employers and employees, in accordance with the applicable law".

Acquisition

- Lawful where obtained by:
 - Independent discovery or creation;
 - Observation, study, disassembly or testing;
 - Exercise of the right of workers or workers' representatives to information and consultation; or
 - Where conform with “honest commercial practices”.
- Unlawful where acquired without consent of the trade secret holder:
 - whenever carried out by unauthorised access, appropriation, copying; or
 - where contrary to “honest commercial practices”.
- Unlawful where at the time of the acquisition, the person knew or ought to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing it unlawfully.

Use or disclosure

- Use or disclosure is unlawful:
 - whenever carried out without consent of the trade secret holder and the:
 - secret was acquired unlawfully; or
 - person is in breach of duty not to disclose; or
 - person is in breach of any duty to limit use of the trade secret.
 - where the person knew or ought to have known that the trade secret had been obtained from another person who was using or disclosing it unlawfully.
- Producing, offering or placing on the market “infringing goods” unlawful where the person knew, or ought under the circumstances to have known, that the trade secret was used unlawfully.

Exceptions

- Freedom of expression/information in ECHR.
- Revealing misconduct/wrongdoing/illegal activity to protect general “public interest”.
- “Necessary” disclosure by workers to their representatives as part of legitimate exercise of representatives’ functions.
- Protecting a legitimate interest recognised by law.

Remedies

- Injunctions; corrective measures; damages.
- Proportionate.
- Avoid creating barriers to legitimate trade in the internal market.
- Provide safeguards against their abuse.

Practical steps and considerations

- Clearly identify what is/is not trade secrets and valuable information.
- Evaluate whether they do take "reasonable steps" to keep their valuable information secret.
- Handling of confidential information.
- Dealing with employees etc. Contracts; firm-wide policies.
- Document measures; retain evidence of them.

Q & A

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