

A Day in the Life – Data Protection and Employee Information

15 May 2018

Workshop 2 Questions And Answers

The questions in this series of workshops are based on events taking place in a fictional company called 'Preston Produce Limited' ("PPL").

PPL is an agricultural and manufacturing company. They produce meat and vegetable produce on site and also have a farm shop with a cafe. The meat and vegetables they produce on site is sold in the farm shop, used in the cafe and distributed to other retailers for sale.

PPL has been steadily growing and with the number of orders building they are now looking to recruit their first large intake of employees with a view to continuing the expansion of the business. Up until this point they have had a core group of employees who have been with the business from the beginning and who all work well together. Along with family members who work on the farm, the current employees are as follows:

- Victoria Olsen is the Managing Director
- Percy Summers is the Finance Director who also has HR responsibilities
- Billy Wilson is the Operations Director
- Veronica Jones is the PA to the Directors
- Sally Brown is the Operations Manager
- There are 8 full-time and 2 part-time employees working in the production area and Jack Atkin is the Line Manager for the employees working in the production area
- There are 5 full-time and 3 part-time employees working in the farm shop and cafe. Frank Smith is the Farm Shop & Cafe Manager.

Please work through the questions below in your groups. Feedback will be provided by our Employment Solicitors.

Case Study 1 – GDPR and Recruitment

Percy and Billy are leading the recruitment process. They are looking to take on 15 employees over the course of the next couple of months. They have advertised the vacancies widely on job sites and newspapers and have received a large number of applications. Candidates have been asked to complete an application form and also an equal opportunities form.

1. Do Percy and Billy need consent from candidates to enable them to process the information they submit with the application form?

No express consent would be required for any personal data submitted by candidates on the application form as PPL will be able to rely on the lawful condition that processing is necessary for the performance of a contract with the data subject, or to take steps to enter into a contract. Do Percy and Billy need consent from candidates to enable them to process the information they submit with the equal opportunities form? Yes PPL will need evidence they have candidates' express consent to process special categories of data (including information about race, sexual orientation, religious belief, health data, or information on T U membership). A statement on the equal opportunities form should explain the information will be processed in order to monitor diversity statistics.

2. If yes to 1 or 2 above how can Percy and Billy show they have obtained consent?

You should have a declaration at the bottom of their application form/equal opportunities form saying they consent to the processing of special categories of data – What about a privacy notice? PPL should also have a privacy notice explaining what personal data they will hold about candidates, how it will be collected, used and shared during the process.

3. Do Percy and Billy have the right to view and to take into account publicly available information they find on candidates during the recruitment process? Individuals have the right to privacy even over publicly available information. If PPL intend to view such information they should inform candidates in a privacy notice or on the application form that they might review available information. Applicants have a right to object to PPL processing such data – if they do object then PPL cannot take such data into account, make copies of it or include it in their web browser's store/cache. If there is no objection then PPL can likely rely on legitimate interest as the ground for processing this data although this comes with a note of caution because there is guidance suggesting that recruiters should only view social media info if there is a specific risk arising from a specific role.

4. Percy and Billy receive a subject access request from one candidate who was not shortlisted for interview and one who was, but who was not successful in being appointed. In what time scale do they need to respond to the requests and what information do they need provide in each case? No longer a fee payable accept a "reasonable fee" based on the admin cost of providing the info when the request is "manifestly unfounded or excessive" which is likely to be in situations where it is repetitive, or when complying with requests for further copies of the same info. Employers will have less time to comply with requests (previously 40 days from

receipt of £10.00 fee) – info must be provided without delay and at the latest within 1 month of receipt (employers will be able to extend this timeframe by up to a further 2 months when the request is complex or numerous; if this is the case the employer has to inform the individual within 1 month of receipt of the request and explain why the extension is necessary. The employer will need to verify the identity of the person making the request and if the request is made electronically should provide the information in a commonly used electronic format, unless the individual requests that it is made available in an alternate format. The GDPR introduces a new best practice recommendation that, where possible, organisations should be able to provide remote access to a secure self service system which gives the individual direct access eg through an employee HR intranet. Info they will need to provide would be copies of notes or scoring sheets along with any other documentation generated. Beware off of the cuff notes scribbled down or commentary in emails etc!

5. Do they have any rights to refuse to provide information when it is made via a subject access request? Only where the request being made is manifestly excessive eg all docs on file covering whole history of employment when dispute about which employee is concerned happened in the recent employment history – unlikely to be right to refuse a request made at the recruitment stage and employers should expect to receive more requests under the GDPR.
6. How long should Percy and Billy keep information about unsuccessful candidates for once they have completed the recruitment process? Not for longer than “reasonably necessary” but 2 factors to consider; 1) legit interest in keeping records about runners up, in case another recruitment round is required. Also legit interest to keep data to protect against discrim claims. Conduct a risk assessment with each recruitment round or for recruitment generally and review it every 2 years. Unlikely to go wrong with a general rule of keeping the data for 6 months but include this in your privacy statement or on the application form. If you then delete the data in accordance with what you have told candidates, it should be much easier to object to any request to extend time in a discrimination claim. Don’t forget the right to be forgotten! Candidates unlikely to invoke the right but if they do you should comply.

