

Work and legislation: when work, health and the law collide

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Council for Work and Health

- Created in 2009 as a common voice for all the professions involved with health and work, including safety professionals, hygienists, occupational physicians, nurses, physiotherapists, occupational therapists, psychologists and also representatives from the trades unions, employer organisations, human resources, charities and civil service departments.
- I was the founding Chair and recently handed over to Dr Steve Boorman after 7 years. I was elected Hon President at the meeting in February.

Disability in the workplace: good work is good for you

- **Improving Lives: the Work, Health and Disability Green Paper 2016**
- Government response to consultation:
- **Cm 9526, November 2017**
- Aim to increase the numbers of disabled people in work from 3.5 million to 4.5 million
- See also: **Thriving at Work, the Stevenson/Farmer Review of mental health and employers**
- Aim to “dramatically” reduce the numbers of people with long term mental health conditions who leave employment every year (300,000)

Health and safety?

- Does the need to protect employees against work-related accident and injury preclude the employment of those with a disability?
- What are the legal barriers, if any, to the employment of someone with a disability?

Relationship between the criminal law, the civil law and employment law

- **Criminal law**
- Health and Safety at Work Act 1974 and Regulations, eg Management, COSHH, Vibration, Noise mostly based on EU directives
- Enforced by the HSE and local authorities
- **Common law duty of reasonable care (tort)**
- Enforced by civil action in the civil courts
- Action for breach of statutory duty abolished Enterprise and Regulatory Reform Act 2013
- **Employment law**
- Enforced by civil action in an employment tribunal
- Equality Act 2010 (England, Wales and Scotland), Disability Discrimination Act 1995 (as amended) (Northern Ireland)

Does an employee have a legal duty to disclose a health condition to an employer?

- Compare Road Traffic Act
- Section 7 HSWA?
- It shall be the duty of every employee **while at work**
- (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts and omissions at work.
- No prosecution for failure to disclose. Right to privacy?
- HSE website says that employees do not have a duty to disclose a disability.

Statutory health surveillance

- Eg Control of Vibration at Work Regulations 2005
- Employee has a legal duty to present himself for health surveillance:
- Reg 7(6)
- Can the doctor or nurse report without consent? The regulations do not place a legal duty on the health professional, only on employer and employee.
- HSE guidance suggests that a bald statement of fit/unfit does not need consent, but clinical details should be kept confidential.
- See however Working Time Regulations, Reg 7
- Consent is needed to report that a worker is unfit to work nights.
- NB GMC guidance (2017) is that breach of confidence is unethical if only to protect the patient against themselves, even if the risk is of death or serious injury. However public interest justifies disclosure where others are at risk. Does the existence of statutory regulation justify breach of confidence to protect the worker?
- No duty on the doctor under RIDDOR 2013, only on the employer.

Health and safety and disability discrimination

- If there is a specific statutory duty that duty takes precedence over the DDA.
- Lane Group plc v Farmiloe (2004)
- But if no specific duty and the worker discloses a disability the employer must consider whether rejection is a proportionate means of achieving a legitimate aim. Question of balancing of risk.
- Practical examples on HSE website.

Seeking further medical information

- Should the manager/OH ask for a report from a general practitioner?
- Access to Medical Reports Act 1988
- (does not extend to Northern Ireland).
- Should the manager/OH ask for disclosure of the full GP record?
- Is this asking for excessive information contrary to the Data Protection Act?
- See Data Protection Bill due to come into force with the GDPR on 25 May 2018

General Data Protection Regulation

- In force 25 May 2018
- OH professionals are advised not to rely on consent when dealing with health data (though it is still needed at common law and under the Human Rights Act) but on Article 9(2)(h):
- Processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems on the basis of Union or Member State law or pursuant to a contract with a health professional **and subject to paragraph 3**
- (3) para (h) can only be used when data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy or by another person also subject to an obligation of secrecy, ie **health professionals still need consent as before.**

GDPR

- Employers are advised to use Article 9(2)(b) not consent when dealing with special category (sensitive) data:
- Processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or the data subject in the field of employment and social security and social protection law in so far as it is authorised by law or collective agreement.....

Employer liability where the worker does not disclose

- The employer has a duty to take reasonable care if he either knows or ought to know of a worker's special vulnerability but if he is not made aware of the problem he cannot be expected to take extra precautions.
- Sutherland v Hatton (2002) employer liability for stress-related illness
- However, an employer must perform risk assessments under the Management Regulations 1999 and the HSE Management Standards are a tried and tested method of assessing for mental health problems.
- Failure to use the standards is not in itself a breach of the criminal law but a failure to risk assess is. When is the HSE going to prosecute an employer for failure to assess risks to mental health?