

FAB Conference: 20 October 2017

Legal Update 2017: What Awarding Organisations need to know

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Agenda

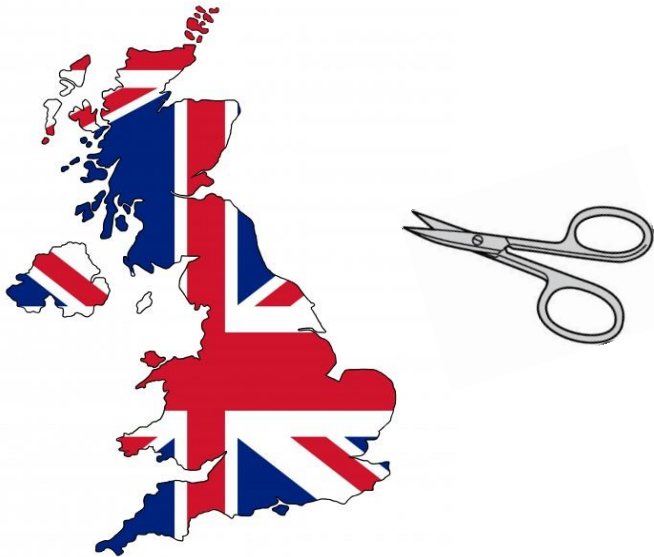
- Brexit
 - European Union (Withdrawal) Bill
 - Immigration
- General Data Protection Regulation and Data Protection Bill 2017
- Ofqual Sanctions
- Case law update on *CitySprint*, *Uber* and *Pimlico Plumbers*
- Taylor Review of Modern Working Practices
- Watch this space...

Brexit

European Union (Withdrawal) Bill

European Union (Withdrawal) Bill

- Repeal of European Communities Act 1972
- Retain existing EU law
- Creates powers of amendment



EU law in the UK

- Employment
- Immigration
- Competition
- Agriculture
- Health and safety



- Clause 7** Deficiencies arising from withdrawal
- Clause 8** International obligations
- Clause 9** Implementing withdrawal agreement
- Clause 17** Consequential and transitional



Immigration

- Article 50 Triggered on 29 March 2017
 - No immediate ‘legal’ immigration consequences of actual triggering
- EEA/Swiss nationals have the right to live in the UK if they are exercising treaty rights as a “qualified person”:
 - Employed (including jobseekers)
 - Self-employed
 - Students
 - Self-sufficient persons
- Non-EEA nationals who are family members of EEA/Swiss nationals benefit as well
- NB: Be aware of requirements under each category to validly exercise treaty rights --- will impact whether one is “**lawfully**” in the UK
 - Consider: Self-sufficient individuals, including spouses; students, including children of EU nationals currently working in the UK

Recent government “Offer”

- Caution – not yet law; likely to remain dependant on what is agreed for UK nationals in the rest of the EU
- General plan: new “Settled Status” for EU nationals (and Swiss/EEA nationals? – unclear)
 - EU citizens with permanent residence before Specified Date (SD) – will need to re-apply for documentation (streamlined);
 - EU citizens who have been lawfully in the UK for five years by SD – will be able to apply for new settled status;
 - EU citizens lawfully in the UK for less than five years but before the SD: will be able to remain in the UK until they are able to obtain settled status.

Remain cautious

- Government proposals not yet law

Collect evidence to prove status

- this will facilitate any future applications and allow you to determine what you are eligible for and when

Apply for permanent residence if eligible

- even if will need to reapply post-Brexit

Ensure that you are at all times *lawfully* in the UK

- until Brexit this means complying with the requirements under EU law, including comprehensive sickness insurance if you are self-sufficient or a student (and encouraging family members to have this if they are self-sufficient or students)

General Data Protection Regulation

Data protection timeline

Data Protection Act 1998

- Current regime (see also PECR)

Data Protection Bill 2017

- Will repeal DPA 1998 and fill in gaps in GDPR

General Data Protection Regulation (GDPR)

- Enters into force 25 May 2018

BREXIT

- March 2019?

What happens post-Brexit?

- EU Withdrawal Bill
 - Aims to convert EU law (including GDPR) into UK law
- Data Protection “partnership paper”
 - Aims include that DP law will be aligned on exit and to work with EU to promote data protection standards and ensure ease of data transfers
- Data Protection Bill
 - Read with GDPR to fill in gaps
 - Brexit-proof UK data protection law and mirror the GDPR
- GDPR obligations for AOs unlikely to change
 - Important for economy that data can be transferred to EU
 - If standards lowered, less likely to obtain “adequacy finding”
 - AOs offering services to individuals in EU may be caught by GDPR

Key points

- GDPR **will** enter into force and apply to AOs from 25 May 2018
- AOs need to prepare to ensure they comply with GDPR



Practical steps

Review current compliance position

- Are you complying with DPA/PECR (direct marketing)?

Good opportunity for data protection review/audit:

- What personal data do you hold? How is it being processed? Are you complying with the data protection principles (eg what is your basis for processing? Do you still need to hold the data?)
- Identify areas of risk, eg security, sharing, international transfers etc.

Review policies and procedures

- Does your privacy policy contain all the required information?
- Are you ready to deal with subject access requests and new rights, eg requests to be forgotten?

Consider governance and accountability

- Who is responsible for data protection compliance?
- Have staff had appropriate training?
- Appropriate record keeping

Ofqual Sanctions

Ofqual's statutory objectives



Taking Regulatory Action policy

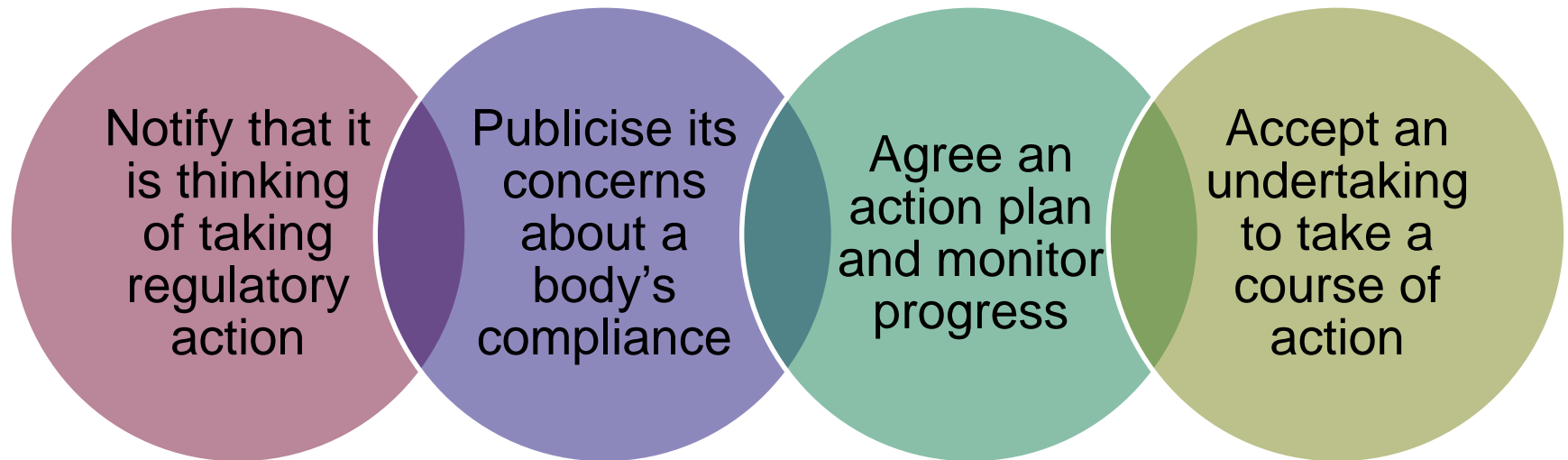


Taking Regulatory Action policy



Consideration of all the circumstances of the case

Extra-statutory measures



Regulatory action (May 2013 – present)

14

Undertaking

4

Special conditions

3

Notice of intention to fine

2

Notice of costs recovery

2

Notice of monetary penalty

2

Withdrawal of recognition

1

Direction

Practical Advice

Appropriate deference:
recognise Ofqual's
status as regulator
granted by Parliament

Research on similar
cases can be a helpful
barometer

Agree on
facts/breaches that
can be agreed on as
early as possible

Narrow the issues to
save costs and
demonstrate suitability
for recognition

Pick your battles: do
not deny everything
out of principle

Demonstrate
willingness to comply,
learn and
change

Ofqual should be
assured the AO will be
candid and inform it
promptly to assist it in
fulfilling its objectives

Notify the Charity
Commission via SIR
(where appropriate)

Provide appropriate
details in annual report
and accounts

Proportionate approach to enforcement

The Deregulation Act 2015

- The new *Economic Growth* duty: Section 108 of the Deregulation Act 2015:
 - applies to Ofqual;
 - must have regard to desirability of promoting economic growth (the “growth duty”);
 - must consider the importance for the promotion of economic growth to ensure that regulatory action is taken only when it is needed and is proportionate;
 - involves considering business environment, their business community, individual businesses to deliver a risk-based, proportionate approach in their day-to-day activities.
- When imposing fines, an identified factor in Ofqual’s consideration: likely impact of the fine on the awarding organisation’s provision of regulated qualifications (see *Taking Regulatory Action*, page 31)

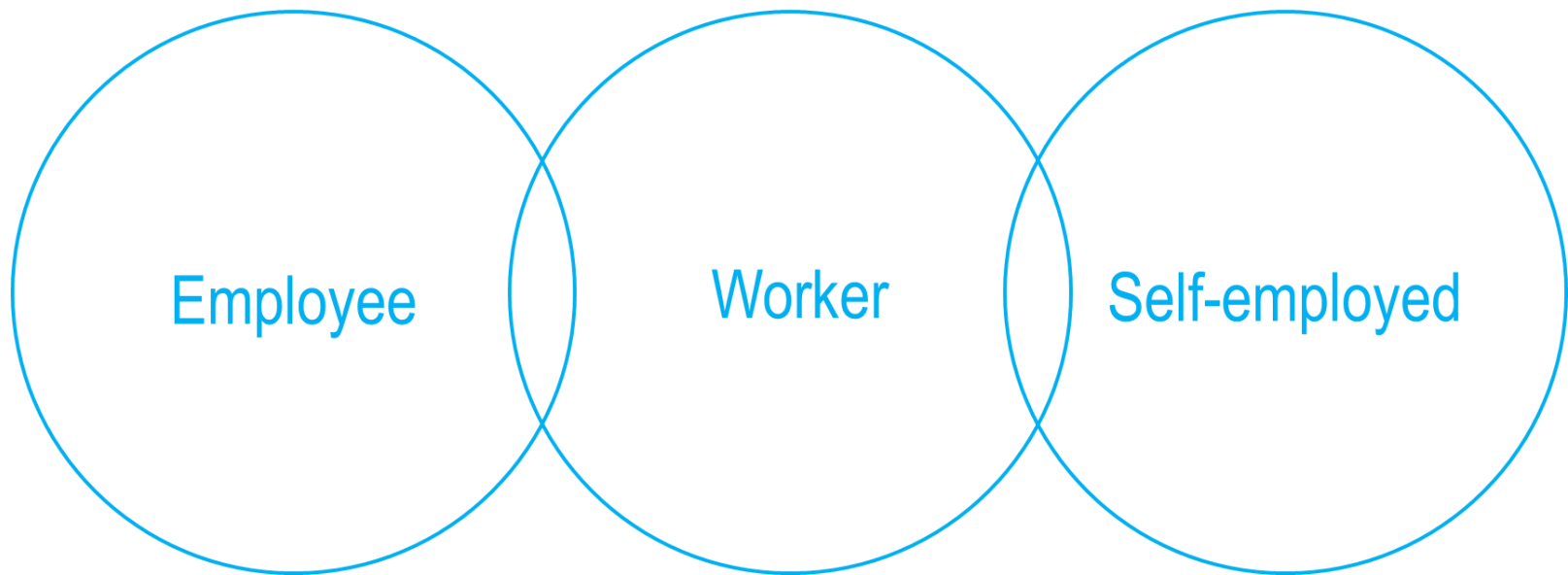


Growth Duty: Statutory Guidance

- Paragraph 4 of the Statutory Guidance highlights that over-zealous regulatory action damages public confidence
- Regulators to consider factors such as
 - Risks associated with non-compliance
 - Steps taken to achieve compliance and clear reasons for failure
 - Impact of proposed intervention on wider business community
- Regulators should try to minimise unnecessary costs by:
 - Prioritising advice and guidance
 - Explaining clearly the consequences of non-compliance
 - Setting out clear expected timescales for remedying non-compliance.

Case law developments on employment status

Employment status categories



***Dewhurst v CitySprint* – Employment Tribunal**

- Tribunal ruled that the agreement did not reflect the true relationship between the parties and therefore Ms Dewhurst, a cycle courier, was a worker.

***(1) Aslam (2) Farrar and others v Uber BV and others* – Employment Tribunal**

- Tribunal rejected Uber's argument that it was simply a technological platform and found that drivers personally performed work for Uber.

***Pimlico Plumbers Ltd v Smith* – Court of Appeal**

- Although the contract stated that Mr Smith was an independent contractor, the Court found that he was a worker.

The Taylor Review of Modern Working Practices

- Commissioned to consider how employment practices need to change to keep pace with modern practices. Seven steps:
 - National strategy on providing good work for all
 - Worker status should be renamed ‘Dependent Contractor’ and better distinguished from self-employment
 - Dependent contractors (workers falling outside the definition of employee) should be entitled to additional protections and there should be stronger incentives for companies to treat them more fairly
 - Good management and strong employment relations within the organisation
 - There need to be new ways for people to strengthen their future work prospects and enhance their skills
 - More proactive approach to workplace health
 - NLW should be accompanied by strategies to avoid the low-pay trap.

Impact on AOs

- Important to keep this report in perspective
- Increase in claims following Supreme Court ruling against employment tribunal fees.
- Scope of recommendations go beyond 'gig economy' issues – focus on status
- Critical analysis of contractual documentation and focus on true nature of the arrangements
- Case law – future Supreme Court judgment

Watch this space...

- Implementation of Post -16 Skills Plan
- Technical and Further Education Act 2017 – commencement?
- Ofqual Handbook
- Ofqual consultation on reforming functional skills qualifications

Questions



Thank you



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