



GDPR – how to fend off the fines

When the Information Commissioner's Office (ICO) announced its intention to fine Marriott International approximately £99m for breaches of the General Data Protection Regulation (EU) 2016/679 (GDPR), we took a look at the case to see what lessons could be learned.

Implement appropriate security processes

It's impossible to guarantee 'security perfection' but all businesses need to have robust security procedures that follow best industry practices in place, especially if they process a high level of sensitive personal data including credit card numbers, names and addresses.

Regularly review and test your security processes

Businesses are obliged to continually monitor and test their security structures and processes in response to new threats. One of the aggravating factors in the Marriott case is that the security weaknesses in their systems had been allowed to remain for a number of years.

Keep records

If your business is hacked, being able to provide evidence of all the steps you've taken to prevent it, and to protect the personal data you hold, will assist in defending any potential legal claims.

Buy cyber insurance

We always advise our clients to buy a cyber insurance policy to protect themselves from the financial consequences of data breach.

Take extra care when acquiring new businesses that come with databases containing personal data.

Appropriate due diligence on the security structures and procedures of the potential acquisition should be carried out before completing the purchase. After the sale is complete, audit the security processes and structures of the business you have acquired

to validate any assurances given by the sellers and to ensure everything's up to standard.

It could have been worse for Marriott. Under GDPR the ICO can raise fines of 4% of annual turnover, or £20m if higher. With revenues in the order of £20bn, the fine for Marriott could have been up to £800m.

Don't get caught out. Data protection and security of personal data must be taken extremely seriously.



Talk to Steve Thomas
Partner, Commercial

Direct Dial: +44 1242 246 489
Mobile: +44 7765 238 895
Email: sjthomas@hcrlaw.com

GDPR - DID YOU KNOW?

67% of businesses we spoke to said it's been harder to comply with the GDPR than they were expecting

39% of SME owners don't know who GDPR affects

67% of businesses we spoke to said they'd had a data breach

¹ GDPR still a mystery to SMEs: the risks of non-compliance, January 2019, www.hiscox.co.uk

harrison clark
rickerbys
SOLICITORS

PASSION FOR BUSINESS

South West

2019
Issue 3

TALK TO US

If you would like to know more about our services or how we could support you, please call us for an informal, no-obligation chat on 01242 224 422.

Birmingham 63 Church Street Birmingham B3 2DP	Cambridge Compass House Chivers Way Histon Cambridge CB24 9AD	Cheltenham Ellenborough House Wellington Street Cheltenham GL50 1YD	Hereford Thorpe House 29 Broad Street Hereford HR4 9AR	London 3 St Helen's Place London EC3A 6AB	Thames Valley 100 Longwater Avenue Green Park Reading Berkshire RG2 6GP	Worcester 5 Deansway Worcester WR1 2JG	Wye Valley Overross House Ross Park Ross-On-Wye HR9 7US
---	---	--	---	--	--	--	--

www.hcrlaw.com | @HCRLaw



INSIDE

GDPR – how to fend off the fines
Social media: a curse or a tool?
Social media and divorce
Case study: Insolvency isn't always 'the end of the world'

harrison clark
rickerbys
SOLICITORS



Social media: a curse or a tool?

Social media has become a staple of our collective sub-conscious - from breakfast choices to a weekend selfie, these things were made for sharing.

But, as we know all too well, some people over-share. And while this can create workplace headaches, it may also provide employers with valuable insight, for example in discovering misconduct, exposing absenteeism or addressing reputational damage caused by employees. So how can you deal with these situations and avoid the potential pitfalls?

Addressing misconduct

Social media provides fertile ground for offensive comments or discriminatory remarks, yet the line between the workplace and an employee's private life is not easily drawn.

This point was recognised in *Forbes v LHR Airport Limited*. An employee shared a racially offensive image on her personal Facebook page with the line "Let's see how far he can travel before Facebook takes him off." This was shared with the employee's friends, including a work colleague. The Employment Appeal Tribunal (EAT) concluded this had not been done in the course of employment and, therefore, the employer was not liable for the employee's actions. However, it made clear that it could not lay down any hard and fast guidance; each case depends on its own facts.

Conversely, in *Laws v Game Retail Ltd*, an employee used Twitter to broadcast abusive and offensive tweets outside work hours and was consequently dismissed by Game on the grounds of gross misconduct. The EAT found that the dismissal was potentially fair and held that the correct test was whether the employer was entitled to conclude that the tweets might offend customers or other staff.

Whilst employers do not want to be liable for what their employees do in their spare time, they also need to be able to act over misconduct, so they have to balance these competing interests carefully.

Exposing absenteeism

Suppose your employee is absent due to sickness, but an image on Facebook shows they were happily enjoying a music festival. What then?

Do you have an accurate picture of your employee's health? Just because they're absent, they are not obliged to be at home under their duvet – recovery from a period of stress could be helped by social activities. So you need to consider all the evidence; for example, what the photographs show, when they were taken and whether the behaviour is out of character for the employee.

Employers must consider what the behaviour demonstrates; does it show dishonesty (and therefore misconduct) or does it show poor decision making by the employee about their health (and thus, perhaps a capability process is more appropriate)? Ultimately, the employer should scrutinise the evidence and determine its value.

Addressing reputational concerns

Suppose an employee expresses an unsavoury opinion on Facebook. How does their right to free speech interact with the employment relationship? What if the post does not, of itself, constitute misconduct but nevertheless reflects poorly on the employer? In such cases, an employer may want to consider taking action for "some other substantial reason" (a fair reason for dismissal under the Employment Rights Act 1996).

This issue arose in *Gibbins v British Council*, a case involving a senior employee who posted a derogatory comment about Prince George, believing that only her 150 Facebook contacts would see the post. But it attracted media attention, and Ms Gibbins was dismissed. A tribunal concluded her dismissal was fair because her actions were a "distasteful and personal attack" and that this brought the reputation of her employer into disrepute.

Having a robust policy helped in *Preece v JD Wetherspoons plc*. An employee posted rude comments about customers on her personal Facebook page. Wetherspoons had included derogatory comments on Facebook as an example of gross misconduct in their disciplinary policy, which aided them in justifying the dismissal.

Ultimately, the law recognises the difficulties for employers and enables businesses to protect themselves from the misuse of social media. What is important is to understand the complexities and adopt an approach which can withstand any challenge.

Talk to Rachel Roberts
Partner, Employment and Immigration

Direct Dial: +44 1242 246 455
Mobile: +44 7725 242 980
Email: rroberts@hcrlaw.com

Read more of our views and advice on social media and your business on our website: www.hcrlaw.com



Rachel Roberts
Partner, Employment and Immigration

Top social media tips for employers

Tips for employers dealing with the challenges of social media:

- recognise that employees, generally, have the right to express themselves, providing it does not infringe on the employment relationship
- ensure policies adequately address and highlight acceptable use of social media (including outside work use)
- consider issues concerning GDPR and human rights
- preserve evidence in case posts are deleted
- conduct a thorough investigation if you suspect foul play
- follow a fair disciplinary process, and ensure it is fully documented
- consider training for those employees running social media accounts for the business.

When dealing with evidence of behaviour during sick leave, also:

- consider the full picture - an employee with a fracture would not usually check into a ski resort, but an employee with depression may benefit from a camping trip
- discuss the findings with the employee
- request further details about the alleged illness or seek evidence from a GP if you suspect malingering
- have clear sickness absence and disciplinary policies in place.



Social media and divorce

When divorcing, social media may be the last thing on your mind, but we're seeing it feature in more and more of our clients' cases. Here are some key points to consider:

Change your passwords

You may have shared various passwords with your spouse. If your marriage is coming to an end, change your passwords to avoid sensitive information or confidential legal advice falling into the wrong hands. Failing to do so could give your spouse an unfair advantage.

Don't access your spouse's personal emails without their permission

As tempting as it may be to browse through your spouse's emails, if you obtain access by unlawful means, you may not be able to rely on this information within court proceedings, and at worst could find yourself involved in criminal proceedings. Return any information that could be considered private and delete any soft copies, to avoid accusations of unlawful self-discovery.

If you do obtain relevant information outside the normal disclosure process, if approached correctly, there are ways of ensuring the information can be relied upon within proceedings legitimately, and this is something we can help you with.

Check whether your devices are synced

Consider that your personal text messages or emails from a mobile phone may be synced to a family computer or tablet and therefore can be easily read by other people. Devices may even share your location, and having separated, you may not want your ex-partner to be able to track your whereabouts. Make sure you keep private messages or photos private.



Talk to Andrew Morris
Partner, Family Law

Direct Dial: +44 1242 246 456
Mobile: +44 7872 870 661
Email: amorris@hcrlaw.com

Case Study: Insolvency isn't always 'the end of the world'

Businesses fail for many reasons, most often as a result of factors beyond the control of management, such as market forces, changes in demand, cost fluctuations and failings in the supply chain. With Brexit looming, these factors are even more 'front and centre' for many businesses.

"On a day to day basis, 'failing' businesses factor heavily in my work," says Robin Koolhoven, a partner in the restructuring and insolvency team at HCR. "I think it's a shame that the words 'turnaround' and 'reorganisation' have such negative associations.

"True, there are errant directors out there who are surprised at the breadth of powers available to liquidators to make them accountable, as well as directors who seek to beat the system. But those represent the minority, not the majority – most directors are owner managers seeking to do the best for their company, suppliers, creditors and employees. These are the honest hardworking people who deserve the opportunity to find a solution in troubled times."

Robin is currently supporting several organisations. Here he shares their stories:

"One of my current clients is a large company with loyal management and staff. The core business is good, but it is laden with historic debt, and it is suffering from changes in market demand. Attempts to secure a sale of shares and new working capital proved fruitless. It is fair to say the vultures were circling and HMRC, understandably,

wanted a conclusion to the historic position.

"Initially there was interest from parties but the proposed solution would have resulted in a break up. We finally found, with the help of a corporate agent and a national accountancy practice, a willing purchaser who had the ability not only to take the business and employees on, but deliver the money necessary to make it work longer term.

"The result is a sale through administration. The people who helped put this together, the directors, will not be employed by the business going forward, but that was not their aim; they kept the business - one with real potential - alive, and maintained employment for their loyal staff. The return to creditors will be demonstrably better too. This is a commendable effort from the directors, putting themselves last on the list of priorities.

"One of my other current clients is a small family business. After a failed attempt at a voluntary arrangement with creditors we managed to find a solution so this business can continue to operate with its current staff, through a sale via liquidation.

"In my view failure should not be about blame (with some exceptions) but about the opportunity to find a solution. If your business or finances fall into troubled waters, we can offer a lifeline."

Whatever financial problems you're experiencing, we'll help you to find the best way forward, giving you a fresh start and safeguarding jobs where possible.

Talk to Robin Koolhoven
Partner, Restructuring and Insolvency

Direct Dial: +44 1242 211 658
Mobile: +44 7384 813 923
Email: rkoolhoven@hcrlaw.com



Robin Koolhoven
Partner, Restructuring and Insolvency

“ I think it's a shame that the words 'turnaround' and 'reorganisation' have such negative associations. Most company directors are seeking to do the best for their company, suppliers, creditors and employees. ”