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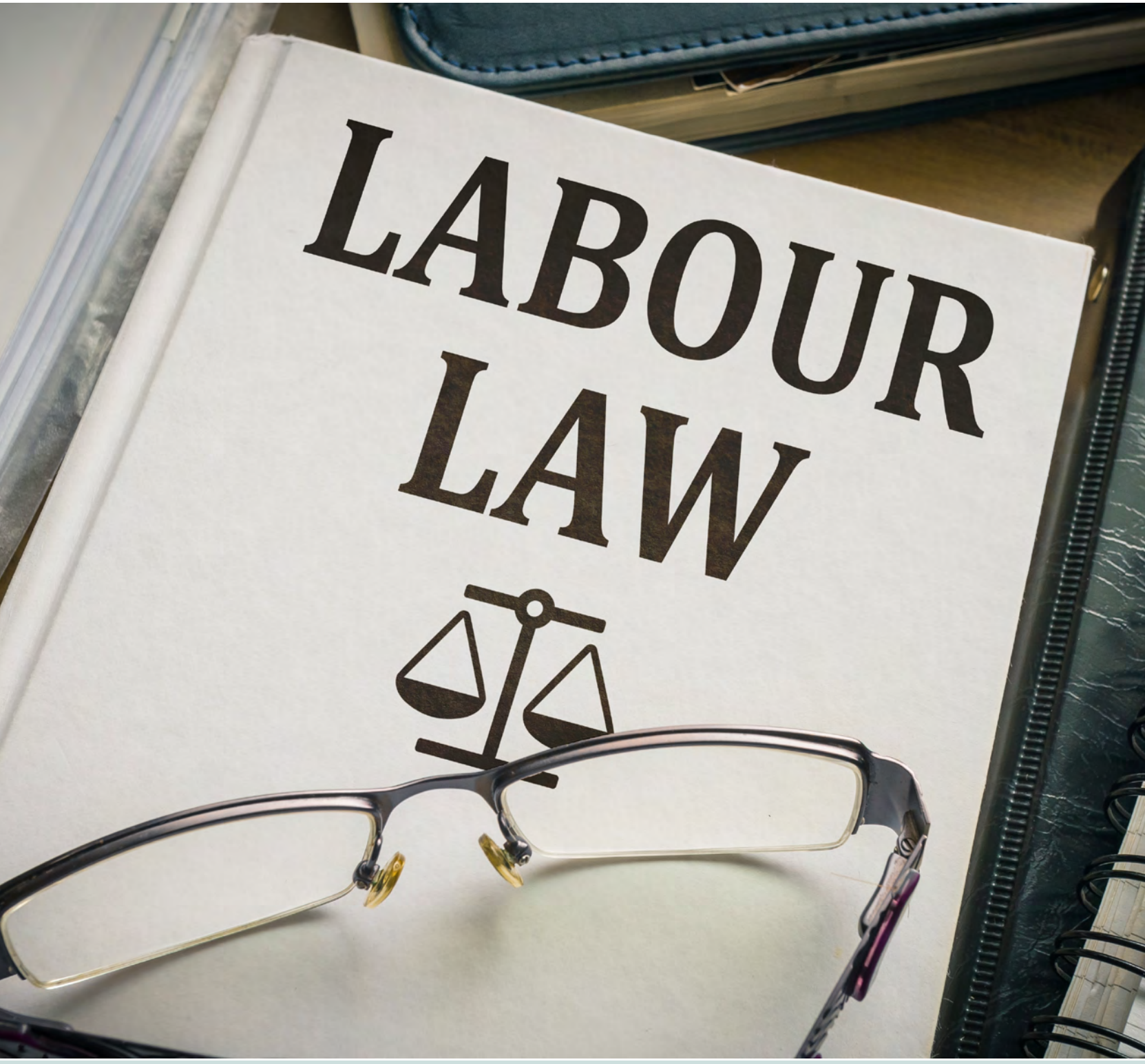

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A Date With Data Protection ©

By Linda Goldman

https://ico.org.uk/media/for-organisations/documents.1624219), an essential tool for all employers, highlighting the fact that the ambit of the Regulations extends beyond the EU: "*non-EU controllers that do business in the EU with EU data subjects' personal data may need to comply with the Regulations*". Further, individuals will have the right to erasure of personal data and/or to have "*data portability*", allowing for electronic transfer of data to another organisation. Swingeing financial penalties will result from infringements and data subjects will have wider privileges in relation to consent to the use of their data. The key themes are greater control for the data subject including enhanced protection of the right to private life and protection from the inroads of commercialism. In a big plus for personal privacy, direct marketing automated decision-making and profiling are to be banned.

The IC website gives interesting records of the fines and enforcement notices for data protection breaches. Under "*Action we've taken*", 13 charities have been fined for "*breaking the law when handling donors' personal information.*" The "*Enforcement*" heading shows 4,847 complaints were upheld out of a total of 10,316 matters investigated. Having to deal with an investigation is time-consuming and expensive and creates an especially strong imperative to get things right, even if no financial penalty is imposed. Compliance helps avoid all that trouble. But wrong is wrong. TalkTalk was fined a record £400,000 in 2016 after customer data was accessed by hacking. This was not an excuse for the abdication of security obligations: TalkTalk had not done enough to safeguard its customer information.

The "how" of processing personal data can only be achieved by explicit (the key-word in the GDPR) consent. Now is the time to carry out a detailed review of how information is stored and how used because of the impending punitive system of fines for lack of compliance, regardless of whether any damage has been suffered.

On the cloud

Do these unauthorised access issues come about by the way that information is stored? The finger of complaint often points at the cloud as the villain of the piece. In simple terms, cloud storage is a system of storing encrypted data on a remote server rather than leaving it all alone on the hard-drive of a computer, as in the days that were. The data can be released or accessed when required by the authorised, or in the hacking cases, unauthorised user of the system. Many companies have their own clouds. After all, the cloud – or should it be "clouds"? – is nothing more than a fancy storage system which may not be within the European parameters envisaged by the Act or the GDPR. A technical expert should assist on whether there is an EU-compliant data storage system but what is of greater relevance is the ability to explain to data subjects, in the consent process, what are the safeguards where there is storage outside the EU or on a cloud-based system. Cloud storage is only as secure as the barricades it contains to prevent access to hackers. Clearly, that is an international issue, not contained by the borders of the EU. The misuse of access which breaks the security barriers should be encompassed in employment situations by the role of

the Data Protection Officer, supported by stringent HR procedures prohibiting unauthorised data usage by any means or, in particular, through social media. There is plenty to do in the data days to come.

Data in court

A thumbnail sketch of some interesting data protection cases serves more to warn that to comfort. For example, the law has recognised a "right to be forgotten", which implies that data can be removed from an accessible source (such as a public record) if the public's right to know supersedes the impact on an individual's right to privacy. In *Camera di Commercio di Lecce v Manni (2017)*, M, who had been the director of an insolvent company some years ago, sought to have his details removed from or anonymised in a public registry on the grounds that the record was adversely affecting sales of a property development in which he was currently involved. The court held that there is no unfettered "right to be forgotten". Reference to a person holding a specific office in an insolvent company does not itself create a derogatory inference since many other issues could have been involved in the insolvency, including external market factors.

In *Barbalescu v Romania (2016)*, it was affirmed that there is no infringement of human rights where an employer has the right to access the emails of staff sent on company equipment if it has good reason to do so and acts proportionately. B's employer monitored its business email account when it suspected that B was using it for personal communications in breach of a strict company rule prohibiting such use. B complained that evidence of the email use should have been excluded because it had been obtained in breach of his Article 8 right to privacy and personal communications. It was relevant that, by strictly enforced terms, the employment contract prohibited personal use of company computers, another employee was dismissed before B on the same grounds and the fact of the personal use was sufficient.

> *"In these highly fact-sensitive cases, the level of information to be disclosed amounted to "an unnecessary and disproportionate interference with the right to a private life."*

The law can be interpreted flexibly as in *R v Secretary of State (T and B) (2014)* T was rejected for a post at a football club because of a conviction for theft at the age of 11. B's caution for a minor shop-lifting offence led to the refusal of a job as a care assistant eight years later. Although an organisation is entitled ask if a job candidate has any "unspent" convictions, the regulated professions such as medicine or those concerning care of children or vulnerable adults, a conviction can never be deemed to be spent. In the T and B cases, it was held that a request for a declaration of any past conviction may violate the right to private life under Article 8 of the ECHR. In these highly fact-sensitive cases, the level of information to be disclosed amounted to "an unnecessary and disproportionate interference with the right to a private life." The Court invited a "common-sense approach".

Further down the legal scale, in *McWilliams v Citibank (2016)* an employment tribunal case, M's dismissal was unfair because C failed to respond "properly or at all" to M's lawful subject access request (SAR) for data, made because she was unable to amass evidence otherwise during suspension prior to her disciplinary hearing which prohibited her from contacting work colleagues or obtaining documents to defend the allegations made against her. C's lack of compliance affected the fairness of the dismissal.

Richard v British Broadcasting Corporation and another was heard on 26 May 2017. It dealt with an application by Sir Cliff Richard for disclosure of the source of information on which reliance had been placed before the police mounted a raid on his home in the course of an investigation into child abuse. The case was based on privacy rights and rights under the Data Protection Act to enable the Claimant to enjoy his right to a fair trial. The application succeeded and an order was made to "provide a proper answer to the question posed."

And last but not least, the Irish case of *Nolan v Sunday Newspapers Limited t/a The Sunday World (2017)* concerned a claim for damages for various matters including infringement of the right to privacy, and breach of confidence arising from a historic matter. The court would "… *not be thwarted by the vacuous plea that there is a public interest in publishing salacious material without regard to the truth … Lest there be any doubt, the intrusion into the plaintiff's private life did not have any overriding consideration of the public interest*."

Linda Goldman has degrees in dentistry and law. Her Honorary Doctorate is from West London University. She practises in employment law, acting for claimants and respondents. She is standing counsel to a premier league football club. She writes articles and contributes chapters to occupational health text-books. She is the author of "Wigs and Wherefores," the biography of Michael Sherrard CBE QC.